Fasken Martineau DuMoulin LLP *
Barristers and Solicitors
Patent and Trade-mark Agents

2900 – 550 Burrard Street
Vancouver, British Columbia, Canada V6C 0A3

604 631 3131 Telephone
604 631 3232 Facsimile
1 866 635 3131 Toll free

www.fasken.com

David Curtis
Direct +1 604 631 4827
Facsimile +1 604 632 4827
dcurtis@fasken.com

December 4, 2014
File No.: 240148.00715/15951

BY ELECTRONIC FILING

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street
Vancouver, BC V6Z 2N3

Dear Sirs/Mesdames

Re: FortisBC Energy Utilities ("FEU") - Remove Data Location Restriction

In accordance with the Regulatory Timetable set for this proceeding, we enclose for filing:

1. the electronic version of the FEU's Final Argument; and

2. five legal authorities that have been cited in the Final Argument.

Hardcopies of the enclosed will follow by courier.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by David Curtis]

David Curtis

/DC

FORTISBC ENERGY UTILITIES
APPLICATION FOR REMOVAL OF THE RESTRICTION ON THE LOCATION OF DATA SERVERS PROVIDING SERVICE TO THE FEU, CURRENTLY RESTRICTED TO CANADA

Submissions of FortisBC Energy Utilities

December 4, 2014

TABLE OF CONTENTS

A. INTRODUCTION

1. In Orders G-116-05, G-75-06, and G-49-07, and Letter L-30-06, the Commission established a restriction that requires the FortisBC Energy Utilities (FEU)[1] to store all of their data on servers located within Canada (the Data Restriction).

2. On August 1, 2014, the FEU applied to the Commission for an order removing the Data Restriction (Exhibit B-1, the Application).

3. The FEU submit that the Data Restriction should be removed for the following reasons:

(a) British Columbia's private sector privacy regulation has evolved considerably since 2005, when the Data Restriction was first put in place, and the BC Information and Privacy Commissioner (the BC Privacy Commissioner) is the more appropriate tribunal to consider privacy concerns (if and when they are raised);

(b) the original basis for the Data Restriction, which was largely due to the fact that the then Terasen companies were being bought up by a U.S. company (Kinder Morgan Inc., hereafter Kinder Morgan or KMI), no longer exists, as the FEU are Canadian owned utilities;

(c) technology has advanced since 2005 and customers should benefit; and

(d) the Data Restriction creates inconsistencies between the FEU and other private sector organizations in British Columbia, and between the FEU and FortisBC Inc. (FBC) (together FBCU), which limit the ability of the FEU and FBC to integrate systems, which could bring benefits to the customers of both companies.

4. In this proceeding, the FEU have responded to a number of information requests regarding issues around data security, vendor due diligence and risk assessment. The FEU submit that it has addressed the concerns expressed through these information requests, and demonstrated that they take privacy concerns seriously and follow privacy best practices to help ensure that customer data is protected. In particular:

---

[1] Comprised of FortisBC Energy Inc., FortisBC Energy (Vancouver Island) Inc., and FortisBC Energy (Whistler) Inc.

(a) the FEU perform a privacy impact assessment as part of the assessment process for proposals/projects that have a significant involvement with the collection, use or disclosure of personal information, and will continue to do so;

(b) the FEU have robust network security; and

(c) the FEU conduct robust due diligence before engaging any third party vendors who store FEU data, and will continue to do so.

5. For these reasons, which are described in further detail below, the FEU submit that the Data Restriction should be removed.

6. These submissions are organized as follows:

(a) **Part B** provides an overview of the purpose of the Application;

(b) **Part C** provides further submissions regarding the four reasons described in the Application that support removal of the Data Restriction;

(c) **Part D** addresses the issues raised in the proceeding through information requests, and in particular, the questions regarding how the FEU will protect customer data if the Data Restriction is removed; and

(d) **Part E** is the conclusion to these submissions.

B. THE PURPOSE OF THE APPLICATION

7. The FEU do not currently have any plans to host servers outside Canada, but wish to have the Data Restriction removed so that they can meaningfully explore such opportunities that could benefit customers, safe in the knowledge that they will be able to pursue and implement them.[2]

8. As discussed in the response to BCUC IR 1.1.1, the restriction imposed by the Commission has several disadvantages, including the inability of the FEU to consider all available technology platforms and solutions efficiently and cost-effectively. The FEU have requested the removal of the restriction in order to enable the Companies to consider available

[2] Ex. B-2, BCUC IR 1.2.2.

options and to achieve the most cost-effective solutions when the opportunities arise.[3] It is impractical and inefficient from a regulatory perspective for the FEU to have to apply for specific exemptions each time it wishes to engage a third party data service that could provide benefits to customers.[4]

9. Removal of the data location restriction will enable the FEU to operate their information systems requirements in the most efficient and cost effective manner. For instance, the FEU can consider and possibly select information systems, service providers and software which provide the greatest value and benefits for customers, without limiting the selection based on data location. Additionally, as service providers continue to be multi-national, the number of vendors able to serve the FEU under this restriction will continue to diminish, which may also have an impact on costs.[5] Further, the economies of scale that third party providers may have for specific systems should have cost benefits, as compared to building out systems internally.

10. The FEU submit that it is in the interests of its customers that the Data Restriction be removed so that they can explore these potential benefits.

C. REASONS FOR REMOVAL OF THE DATA RESTRICTION

11. In this section, the FEU provide further submissions on each of the four reasons described in the Application that support removal of the Data Restriction.

(a) The Privacy Regime Appropriately Addresses Privacy Concerns

12. This section provides further submissions on the topic of "privacy concerns" that is addressed at pages 3 and 4 of the Application.

13. As noted in the Application, the privacy regime in British Columbia has evolved considerably since 2005 when the Data Restriction was put in place, and the FEU believe that

---

[3] Ex. B-2, BCUC IR 1.2.2.

[4] Ex. B-2, BCUC IR 1.1.1.

[5] Ex. B-6, CEC IR 1.4.4.

British Columbia's private sector privacy legislation provides sufficient protection for customers. The BC Privacy Commissioner is well equipped to address the subject matter of privacy, and the Commission can remove the Data Restriction safe in the knowledge that another tribunal will maintain oversight over the FEU's collection, use and disclosure of personal information.

Background to the Data Restriction

14. By way of background, the Data Restriction originated out of a 2005 application by Kinder Morgan, a U.S. company, for the acquisition of common shares of Terasen Inc. On November 10, 2005, the Commission issued Order G-116-05 and reasons for decision granting KMI's application and establishing the Data Restriction (the KMI Decision).

15. In the KMI Decision, the Commission states:

> The Council of Canadians, Vancouver Chapter (Exhibit C18-8) raise concerns that the privacy of British Columbians may be violated under the provisions of the U.S. Patriot Act if billing and record keeping functions are relocated to offices within the U.S.[6]
>
> …
>
> The Council of Canadians, Vancouver Chapter (Exhibit C11-8) raises concerns about corporate practices with respect to the location of customer records and possible impacts on the privacy of customer information if those records were to be kept in the United States.[7]

16. In response to privacy concerns, the Commission made the following directive:

> With respect to the privacy concerns raised by the Council of Canadians, Vancouver Chapter, and other concerns about gas procurement and other critical functions, the Commission Panel concludes that it would be appropriate to attach further conditions to the approval of the Transaction to protect customer interests. The Commission Panel notes that under Section 44(2) of the

---

[6] *In the Matter of An Application by Kinder Morgan, Inc. and 0731297 B.C. Ltd. for the Acquisition of Common Shares of Terasen Inc.*, Decision, November 10, 2005 (KMI Decision), p. 20.

[7] KMI Decision, p. 35.

> UCA, "…[a] public utility must not remove or permit to be removed from British Columbia an account or record [required by the commission]…except on conditions specified by the Commission. Section 54(9) of the UCA also permits the Commission to attach conditions and requirements to an approval under Section 54 that it considers necessary and desirable in the public interest. In order to address concerns related to privacy and the general removal of critical functions from the Utilities' service areas, the Commission Panel concludes that it should establish a condition that requires KMI not to change the geographic location of any existing functions or data currently in the Terasen Utilities' service areas, without prior approval of the Commission.[8]

17. The further clarification orders that followed are described at pages 1 to 3 of the Application under the heading "Regulatory Background".

18. The Data Restriction was made in the early days of private sector privacy regulation in Canada:

(a) The *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA) is the federal private-sector privacy law. It came into force on January 1, 2001 with respect to the federally regulated private sector.

(b) British Columbia's private sector privacy statute, the *Personal Information Protection Act*, S.B.C. 2003, c. 63 (PIPA), came into force on January 1, 2004. PIPA is administered and enforced by the BC Privacy Commissioner.

19. As a result, when the KMI proceeding was unfolding, and when Order G-115-06 was issued, private sector privacy regulation in British Columbia under PIPA was in its early days. It has evolved considerably since then.

Private Sector Privacy Regulation in Canada

20. The manner in which private sector privacy regulation has evolved is demonstrated by a review of the many guidelines that have been issued by the BC Privacy Commissioner in recent years, and the significant number of decisions regarding the protection

---

[8] KMI Decision, p. 39.

of personal information that have come out of the courts and from the various privacy commissioners across Canada.[9]

21. Furthermore, in 2005 when the initial Commission order (G-116-05) was made, and at all times since then, PIPA and PIPEDA have permitted private sector organizations to store personal information outside of Canada, and both the BC and Federal Privacy Commissioners have issued guidelines that reflect this fact. The FEU submit that the Commission should remove the Data Restriction and permit the FEU to store data outside of Canada which they are lawfully permitted to do under PIPA and PIPEDA. The FEU will comply with PIPA and/or PIPEDA, and all applicable privacy guidelines if and when the FEU store data outside Canada.

22. The FEU acknowledge the concern raised by the Commission and interveners that once data is stored outside of Canada, the data can be subject to the laws of the foreign jurisdiction in which it is stored.[10] The FEU will still remain subject to PIPA and/or PIPEDA, and regardless of whether the data/servers are to be outside or inside Canada, third parties are (or future vendors will be) contractually required to meet and/or exceed the FEU's control environment for security of its enterprise wide network architecture and infrastructure.

Expertise of The BC Privacy Commissioner and the Commission

23. In addition to the fact that private sector privacy regulation has evolved since 2005, the FEU further submit that the BC Privacy Commissioner is the appropriate tribunal to address and regulate privacy concerns with respect to the FEU, as further explained below. These submissions apply equally to the Federal Privacy Commissioner, to the extent that PIPEDA applies to any personal information collected by the FEU.

24. Various levels of court, including the Supreme Court of Canada, have recognized the expertise of provincial privacy commissioners with respect to privacy issues. The Supreme

---

[9] See https://www.oipc.bc.ca/tools-guidance/guidance-documents/

[10] Ex. B-2, BCUC IR 1.4.1.

Court of Canada commented on the expertise of provincial privacy commissioners in *MacDonell c. Québec (Commission d'accès à l'information)*, 2002 SCC 71, at paras. 7 and 9:

> 7 ... The Commission d'accès à l'information has relative expertise in respect of protecting privacy and promoting access to information held by a public body. That expertise is apparent from the powers conferred on the Commissioner to achieve the objectives of the Act, and from the Commission's exclusive powers to hear requests for review made under the Access Act ...
>
> …
>
> ... By virtue of the fact that it is always interpreting the same Act, and that it does so on a regular basis, the Quebec Commissioner develops general expertise in the field of access to information. That general expertise on the part of the Commission invites this Court to demonstrate a degree of deference.

25. In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at para. 32, Rothstein J. made the following comments about the Alberta Privacy Commissioner's expertise:

> These considerations fall within the Commissioner's expertise, which centres upon balancing the rights of individuals to have their personal information protected against the need of organizations to collect, use or disclose personal information for purposes that are reasonable (s. 3 PIPA).

26. The purpose of the British Columbia Utilities Commission, and the expertise of its members, was described by Mr. Justice Goldie in *BC Hydro v. BCUC* (1996), 20 B.C.L.R. (3d) 106 (C.A.), as follows:

> In this light the Utilities Act is a current example of the means adopted in North America, firstly in the United States, to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition. The grant of monopoly through certification of public convenience and necessity was accompanied by the correlative burden on the monopoly of supplying service at approved rates to all within the area from which competition was excluded.[11]

---

[11] Para. 46.

…

> I have already described the reason for the existence of the tribunal. The expertise or skills of its members vary. Experience has demonstrated skills associated with accounting, economics, finance and engineering have been frequently utilized. Unlike labour relations tribunals where past experience in the field of labour relations is a virtual prerequisite, past experience in the regulatory field is not necessary.[12]

27. In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, the Supreme Court of Canada described the principle function of utilities commissions as setting rates, against the backdrop of an economic and social arrangement call the "regulatory compact", which it described as follows:

> These goals have resulted in an economic and social arrangement dubbed the "regulatory 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 CanLII 39 (SCC), [1929] S.C.R. 186 ("Northwestern 1929"), at pp. 192-93).
>
> 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.[13]

28. Accordingly, it is well established that the privacy commissioners have expertise with respect to matters of privacy and the protection of personal information, while the

---

[12] Para. 52.

[13] Paras. 63-64.

Commission is an economic regulator with expertise in matters such as accounting, economics, finance and engineering.

29. Accordingly, with respect to the subject matter of privacy, the Commission can remove the Data Restriction safe in the knowledge that the BC Privacy Commissioner, who has expertise with respect to privacy matters, can and will enforce PIPA with respect to any personal information stored by the FEU outside of Canada.

Conclusion

30. In conclusion, the FEU submit that the Data Restriction is no longer necessary because the provincial and federal privacy legislation and framework in place today, along with the FBCU's privacy policy, sufficiently address any and all privacy concerns, including those that were raised in the initial proceedings in 2005. The removal of the Data Restriction will not remove the FEU's obligations under PIPA and/or PIPEDA with respect to the collection, use and disclosure of personal information, and the FEU will remain under the legislative jurisdiction of provincial and federal privacy commissioners with respect to this information. The FEU submit that these considerations support granting the order sought.

(b) The Original Rationale for the Data Restriction No Longer Exists

31. In the KMI Decision the Commission described the following concern of one of the interveners:

> The Council of Canadians, Vancouver Chapter (Exhibit C18-8) raise concerns that the privacy of British Columbians may be violated under the provisions of the U.S. Patriot Act if billing and record keeping functions are relocated to offices within the U.S.[14]

32. This was a concern because, as noted in the decision, Kinder Morgan is a U.S. based company. This concern no longer exists.[15] The FEU are now Canadian owned, British Columbia companies, and therefore are accountable for the personal information that they

[14] KMI Decision, p. 20.

[15] B-1, Application, p. 4.

collect, use and disclose under the PIPA. The FEU submit that this change of circumstances supports the order sought.

(c) Technology Has Advanced Since 2005 and Customers Should Benefit

33. As noted in the Application, the technology relating to data storage and server services has advanced since 2005 when the Data Restriction was put in place.[16]

34. Several organizations offer third-party services for software, storage and servers, and some vendors only offer their products as a hosted service. Due to economies of scale, these third-party services may be less costly than in-house solutions. The Data restriction prevents the FEU from considering third-party service providers that would result in data or software being hosted on servers outside Canada. The FEU's choices for potential vendors are limited due to the restriction and the FEU may potentially pay higher prices due to the limited pool of available vendors and solutions.[17] The FEU should be able to consider these kinds of services which may result in benefits for customers in terms of both service and cost savings.[18]

35. The FEU discussed specific technology advancements in its responses to BCUC IRs series 1.6. For example, services such as Microsoft Office 365 email can displace in-house email servers as the product is hosted on the service-provider's servers, rather than in-house. Microsoft Office 365 is, at this time, only hosted in the US.[19]

36. Another example is the use of a talent sourcing firm to collect, review, and analyze, on behalf of the FEU, prospective candidates' resumes to fulfil a specific role. There are numerous vendors who offer such solutions and software that might not be available in Canada, and who store data on servers outside of Canada. The current requirement restricts the FEU's ability to use such vendors and take advantage of their technology.[20]

---

[16] Ex. B-1, Application, p. 4.

[17] Ex. B-2, BCUC IR 1.7.2.

[18] Ex. B-1, Application, pp. 4-5.

[19] Ex. B-2, BCUC IRs 1.6.1 to 1.6.3.

[20] Ex. B-2, BCUC IR 1.6.5.

37. The FEU submit that these considerations further support the orders sought.

(d) Potential Inconsistencies

38. Private sector organizations in Canada are permitted to store personal information outside of Canada. The Data Restriction is, therefore, inconsistent with Canadian private sector privacy law.[21]

39. As explained in the Application on page 4, the current data/server location is an additional burden to the FEU not faced by other private sector companies. Because of this extra burden, the FEU can be at a disadvantage when seeking the most suitable and cost effective information technology solutions to meet the customers and Companies' needs. For example, the FEU's choices for potential vendors are limited due to the restriction and the FEU may potentially pay higher prices due to the limited pool of available vendors and solutions. Other businesses that do not have such a restriction have a wider range of choices and potentially better price choices as well.[22]

40. This restriction on the FEU creates an inconsistency in practices between the FEU and FBC, which has no similar restriction. The FEU and FBC have been seeking opportunities to integrate, which can bring benefits to the ratepayers of both companies. However, because of the restriction on the FEU's data/server location, the companies may not be able to implement an information technology system/server that can be used by both companies. This may mean that the companies potentially forgo an opportunity for more advantageous negotiation positions with vendors. This may also mean two sets of information technology systems, which potentially require different resources internally or externally to operate and maintain, which would result in inefficiencies and increased costs.[23]

---

[21] Ex. B-1, Application, pp. 5-6.

[22] Ex. B-6, CEC IR 1.7.2.

[23] Ex. B-2, BCUC IR 1.8.1. See also BCUC IR 1.8.2.

D. MOVING FORWARD

41. The FEU confirm that they do not currently have a specific proposal that involves the storage of data on servers located outside of Canada. In the absence of such a proposal, the Commission asked the FEU to provide a full risk assessment of moving the data and servers outside of Canada.[24] Although the FEU were unable to provide the kind of generic risk assessment that was requested in the absence of a specific proposal, the FEU can confirm that if the Data Restriction is lifted, they currently have, and will continue to have, measures and processes in place that will continue to ensure the protection of personal information. These measures and processes are summarized in this section.

(a) Privacy Impact Assessment / Threat Risk Assessment

42. As part of the assessment process of any proposal/project that will have a significant involvement with the collection, use or disclosure of personal information, the FEU will continue to perform a Privacy Impact Assessment, as they currently do.[25] For all initiatives, a Threat Risk Assessment will be performed based on the type of initiative.[26]

(b) Vendor Due Diligence

43. External providers will be subject to a complete risk assessment, as well as the terms and conditions regarding the FEU's requirements for reliability and security.[27]

44. The FEU have a comprehensive due diligence process that begins as early as the Request for Proposal stage. This due diligence process includes risk assessments on both the privacy and security risks associated with a proposed project. If a project is initially assessed as having privacy or security concerns or deals with the disclosure of sensitive personal information, the project manager will seek to have a privacy impact assessment completed. In addition, the vendor review process can include (if appropriate) background checks, reference

---

[24] Ex. B-2, BCUC IR 1.2.8.

[25] Ex. B-2, BCUC IR 1.2.8.

[26] Ex. B-2, BCUC IR 1.3.2.

[27] Ex. B-2, BCUC IR 1.3.1.

checks and assessments completed by independent third parties. For instance, for major information systems initiatives, a recognized technology consultant will often be retained to assist in assessing a particular vendor. Finally, there are contractual terms in agreements with vendors which help to mitigate privacy or security risks that may be identified as part of the due diligence process by including representations, covenants, and insurance and indemnity provisions.[28]

45. Regardless of whether the data/servers are to be outside or inside Canada, third parties are (or future vendors will be) contractually required to meet and/or exceed the FEU's control environment for security of its enterprise wide network architecture and infrastructure. Contractual obligations will require control validation independent of the third party vendor and the findings of the validations to be reported to the FEU.[29]

46. The FEU submit that these vendor due diligence practices further support granting the order sought.

(c) Compliance with PIPA, PIPEDA and Best Practices

47. In a situation where the FEU's data would be sent offsite, regardless of whether the site is inside or outside Canada, the storage of that data would be required to comply with PIPEDA, and/or PIPA and, where appropriate, the "Three Nines" of availability and Security in Depth, which is an industry standard term referring to 99.9% system availability.[30]

(d) The FEU's Network Security

48. The FEU have implemented a control environment for security of its enterprise wide network architecture and infrastructure. This includes physical and logical security systems and control components including ensuring applicable government laws and regulations pertaining to minimum security control requirements are met. Third parties are

---

[28] Ex. B-2, BCUC IR 1.3.4.1.

[29] Ex. B-2, BCUC IRs 1.3.3.1 and 1.3.3.2.

[30] Ex. B-2, BCUC IR 1.2.8.

contractually required to meet and/or exceed the FEU's control environment. A security breach is therefore not impacted by the physical location of the FEU's data.[31]

49. The FEU have a Disaster Recovery Plan (DRP) which addresses any critical system failure that arises as a direct result of a DRP intervening event that cannot reasonably be rectified within 72 hours after the critical system failure has been identified. This DRP directly interacts with the FEU's back-up and recovery procedures to ensure business continuity. Responses to critical system failure events are not impacted by the physical location of the FEU's data.[32]

50. The FEU's control environment for security of its enterprise wide network architecture and infrastructure is subject to annual control validation by multiple independent parties.[33]

51. The FEU have an incident response protocol that addresses incident detection, classification, escalation, immediate reaction and containment, investigation and mitigation, communication (internal and external), lessons learned and improvement of preventative controls.[34]

52. The FEU submit these network security considerations further support granting the order sought.

(e) Service Levels and Customers Benefits

53. The level of service provided to customers is very important to the FEU and accordingly any proposal by a third party service provider would have to meet or exceed current service levels, regardless of the location the data is stored.[35] Cost benefits for any

---

[31] Ex. B-2, BCUC IR 1.2.9.

[32] Ex. B-2, BCUC IR 1.3.1.1.

[33] Ex. B-2, BCUC IR 1.3.3.2.1.

[34] Ex. B-2, BCUC IR 1.3.4.

[35] Ex. B-6, CEC IR 1.4.4.

initiative involving third-party services would be identified and discussed in a business case on a case-by-case basis.[36]

(f) Conclusion

54. The FEU submit that these measures adequately address the privacy concerns raised in 2005, and in this proceeding, and support the removal of the Data Restriction.

E. CONCLUSION

55. For the reasons described in these submissions, the FEU submit that the Data Restriction should be removed, so that the FEU can pursue technology solutions that will benefit customers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: December 4, 2014 ***[original signed by David Curtis]***

David Curtis
Counsel for FortisBC Energy Utilities

[36] Ex. B-6, CEC IR 1.4.5.

BOOK OF AUTHORITIES

(Provided in electronic format only
in order to conserve paper)

BOOK OF AUTHORITIES

INDEX

Information and Privacy Commissioner *Appellant*

v.

Alberta Teachers' Association *Respondent*

and

Attorney General of British Columbia, Information and Privacy Commissioner of British Columbia and B.C. Freedom of Information and Privacy Association *Interveners*

Information and Privacy Commissioner *Appelant*

c.

Alberta Teachers' Association *Intimée*

et

Procureur général de la Colombie-Britannique, Information and Privacy Commissioner of British Columbia et B.C. Freedom of Information and Privacy Association *Intervenants*

INDEXED AS: ALBERTA (INFORMATION AND PRIVACY COMMISSIONER) *v.* ALBERTA TEACHERS' ASSOCIATION

2011 SCC 61

File No.: 33620.

2011: February 16; 2011: December 14.

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

RÉPERTORIÉ : ALBERTA (INFORMATION AND PRIVACY COMMISSIONER) *c.* ALBERTA TEACHERS' ASSOCIATION

2011 CSC 61

N° du greffe : 33620.

2011 : 16 février; 2011 : 14 décembre.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Judicial review — Implied decision — Decision of adjudicator quashed on judicial review on basis of Information and Privacy Commissioner's failure to comply with statutory time limits — Issue of time limits not raised with Commissioner or adjudicator — Adjudicator consequently not specifically addressing issue and not issuing reasons in this regard — Whether a matter that was not raised at tribunal may be judicially reviewed — Whether reasons given by tribunal in other decisions may assist in determination of reasonableness of implied decision — Personal Information Protection Act, S.A. 2003, c. P-6.5, s. 50(5).

Administrative law — Standard of review — Whether a tribunal's decision relating to interpretation of its home statute or statutes closely connected to its functions is reviewable on standard of correctness or

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

Droit administratif — Contrôle judiciaire — Décision implicite — Décision d'une déléguée annulée à l'issue d'un contrôle judiciaire au motif que le commissaire à l'information et à la protection de la vie privée n'a pas observé le délai prescrit — Inobservation du délai non soulevée devant le commissaire ou sa déléguée — La déléguée n'a donc ni examiné ni abordé expressément la question dans ses motifs — Une question qui n'a pas été soulevée devant un tribunal administratif peut-elle faire l'objet d'un contrôle judiciaire? — Les motifs du tribunal administratif dans d'autres affaires peuvent-ils permettre de se prononcer sur le caractère raisonnable d'une décision implicite? — Personal Information Protection Act, S.A. 2003, ch. P-6.5, art. 50(5).

Droit administratif — Norme de contrôle — La décision d'un tribunal administratif qui interprète sa propre loi constitutive ou une loi étroitement liée à son mandat est-elle assujettie à la norme de la décision correcte ou

reasonableness — Whether category of true questions of jurisdiction or vires should be maintained when tribunal is interpreting its home statute or statutes closely connected to its functions.

The Information and Privacy Commissioner received complaints that the Alberta Teachers' Association ("ATA") disclosed private information in contravention of the Alberta *Personal Information Protection Act* ("*PIPA*"). At the time, s. 50(5) of *PIPA* provided that an inquiry must be completed within 90 days of the complaint being received unless the Commissioner notified the parties that he was extending the time period and he provided an anticipated date for completing the inquiry. The Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. Seven months later, an adjudicator delegated by the Commissioner issued an order, finding that the ATA had contravened the Act. The ATA applied for judicial review of the adjudicator's order. In argument, it claimed for the first time that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days of the complaint being received. The chambers judge quashed the adjudicator's decision on that basis. A majority of the Court of Appeal upheld the chambers judge's decision.

Held: The appeal should be allowed.

Per McLachlin C.J. and LeBel, Fish, Abella, Charron and Rothstein JJ.: Although the timelines issue was not raised before the Commissioner or the adjudicator, the adjudicator implicitly decided that providing an extension after 90 days did not automatically terminate the inquiry. The adjudicator's decision was subject to judicial review on a reasonableness standard and her decision was reasonable. The adjudicator's order should be reinstated and the matter should be remitted to the chambers judge to consider issues not dealt with and resolved in the judicial review.

A court has discretion not to undertake judicial review of an issue and generally will not review an issue that could have been, but was not, raised before the tribunal. However, in this case, the rationales for the general rule have limited application. The Commissioner has consistently expressed his views in other cases, so we have the benefit of his expertise. No evidence was required to consider the timelines issue and no prejudice was alleged.

à celle de la décision raisonnable? — La catégorie des véritables questions de compétence doit-elle subsister relativement à l'interprétation par un tribunal administratif de sa propre loi constitutive ou d'une loi étroitement liée à son mandat?

Le commissaire à l'information et à la protection de la vie privée a reçu des plaintes selon laquelle l'Alberta Teachers' Association (« ATA ») avait communiqué des renseignements privés et enfreint de ce fait la *Personal Information Protection Act* de l'Alberta (« *PIPA* »). Suivant le par. 50(5) de la *PIPA* alors en vigueur, l'enquête du commissaire devait prendre fin au plus tard 90 jours après la réception de la plainte, sauf avis du commissaire aux parties de la prorogation du délai et de la date prévue d'achèvement de l'enquête. Le commissaire n'a prorogé l'enquête et fixé la date de son achèvement que 22 mois après le dépôt de la première plainte. Sept mois plus tard, la personne qu'il a déléguée a rendu une ordonnance dans laquelle elle concluait que l'ATA avait contrevenu à la Loi. L'ATA a demandé le contrôle judiciaire de l'ordonnance et fait valoir pour la première fois qu'en ne prorogeant pas l'enquête au plus tard 90 jours après la réception de la plainte, le commissaire avait perdu compétence. Le juge en cabinet a annulé la décision de la déléguée pour ce motif. La Cour d'appel a confirmé à la majorité la décision du juge.

Arrêt : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges LeBel, Fish, Abella, Charron et Rothstein : Même si la question de l'observation du délai n'a pas été soulevée devant le commissaire ou sa déléguée, cette dernière a conclu tacitement que l'omission de proroger le délai avant l'expiration des 90 jours impartis n'avait pas automatiquement mis fin à l'enquête. Au regard de la norme de contrôle de la décision raisonnable à laquelle elle est assujettie, la décision de la déléguée est raisonnable. L'ordonnance de la déléguée est rétablie, et l'affaire est renvoyée au juge en cabinet pour qu'il statue sur les questions qui n'ont pas déjà été examinées et réglées lors du contrôle judiciaire.

La cour de justice jouit du pouvoir discrétionnaire d'entreprendre ou non un contrôle judiciaire et, en règle générale, elle s'en abstient lorsque la question aurait pu être soulevée devant le tribunal administratif mais qu'elle ne l'a pas été. Toutefois, les considérations qui justifient la règle générale ont une application limitée en l'espèce. Le commissaire a exprimé son opinion dans d'autres décisions, ce qui donne accès à son expertise. Nul élément de preuve n'était requis pour trancher la question de l'observation du délai, et nul préjudice n'était allégué.

In the present appeal, the letter notifying the parties of the extension was sent after the expiration of 90 days. An inquiry was conducted and the adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review could only be decided in one of two ways — either the consequence of an extension was that the inquiry was terminated or not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated.

In this case, a reasonableness standard applied on judicial review. The Commissioner was interpreting his own statute and the question was within his specialized expertise. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, unless the question falls into a category of question to which the correctness standard continues to apply. The timelines question does not fall into such a category: it is not a constitutional question, a question regarding the jurisdictional lines between competing specialized tribunals, a question of central importance to the legal system as a whole, nor a true question of jurisdiction or *vires*. Experience has shown that the category of true questions of jurisdiction is narrow and it may be that the time has come to reconsider whether this category exists and is necessary to identify the appropriate standard of review. Uncertainty has plagued standard of review analysis for many years. The "true questions of jurisdiction" category has caused confusion to counsel and judges alike and without a clear definition or content to the category, courts will continue to be in doubt on this question. For now, it is sufficient to say that, unless the situation is exceptional, the interpretation by a tribunal of its home statute or statutes closely connected to its function should be presumed to be a question of statutory interpretation subject to deference on judicial review. As long as the "true question of jurisdiction" category remains, a party seeking to invoke it should be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the standard of reasonableness.

The deference due to a tribunal does not disappear because its decision was implicit. Parties cannot gut the deference owed to a tribunal by failing to raise the

En l'espèce, les parties ont été informées par lettre de la prorogation du délai de 90 jours après l'expiration de celui-ci. La déléguée a mené l'enquête à terme, puis rendu une ordonnance défavorable à l'ATA. La question soulevée par l'ATA lors du contrôle judiciaire ne pouvait appeler que l'une de deux conclusions possibles : soit la prorogation n'avait pas mis fin à l'enquête, soit elle y avait mis fin. Le commissaire et sa déléguée ont implicitement décidé que la prorogation du délai après les 90 jours impartis n'a pas automatiquement mis fin à l'enquête.

Dans la présente affaire, la décision était assujettie à la norme de contrôle de la décision raisonnable. Le commissaire interprétait sa propre loi constitutive, et la question relevait de son expertise. Lorsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat, la déférence est habituellement de mise, sauf si la question relève d'une catégorie de questions à laquelle la norme de la décision correcte demeure applicable. La question de l'observation du délai n'appartient pas à une telle catégorie : elle n'est pas de nature constitutionnelle, elle n'a pas trait à la délimitation des compétences respectives de tribunaux spécialisés concurrents, elle ne revêt pas une importance capitale pour le système juridique dans son ensemble et elle ne touche pas véritablement à la compétence. L'expérience enseigne que peu de questions appartiennent à la catégorie des véritables questions de compétence, et le temps est peut-être venu de se demander si cette catégorie existe et si elle est nécessaire pour arrêter la norme de contrôle applicable. Pendant de nombreuses années, l'incertitude a pesé sur l'analyse relative à la norme de contrôle. La catégorie des « questions touchant véritablement à la compétence » a semé la confusion tant chez les juges que chez les avocats et, sans une définition claire ni de précision quant à sa teneur, les cours de justice demeureront dans l'incertitude à ce sujet. Pour l'heure, il suffit d'affirmer que, sauf situation exceptionnelle, il convient de présumer que l'interprétation par un tribunal administratif de sa propre loi constitutive ou d'une loi étroitement liée à son mandat est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire. Tant que subsiste la catégorie des « véritables questions de compétence », la partie qui prétend soulever une question qui y appartient doit établir les raisons pour lesquelles le contrôle visant l'interprétation de sa loi constitutive par un tribunal administratif ne devrait pas s'effectuer au regard de la norme de la décision raisonnable.

Un tribunal administratif ne cesse pas d'avoir droit à la déférence parce que sa décision est implicite. Les parties ne sauraient, en omettant de soulever une

issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons. When the decision under review concerns an issue that was not raised before the decision maker, the reviewing court can consider reasons which could have been offered in support of the decision. When a reasonable basis for an implied decision is apparent, a reviewing court should uphold the decision as reasonable. In some cases, it may be that the reviewing court cannot adequately show deference without first providing the decision maker the opportunity to give its own reasons for the decision. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one.

Reasons given by a tribunal in other decisions on the same issue can assist a reviewing court in determining whether a reasonable basis for an implied decision exists. Other decisions by the Commissioner and the adjudicator have provided consistent analyses of the similarly worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act* ("*FOIPA*"). The Commissioner has held that a similar 90-day time limit in s. 69(6) applies only to his duty to complete an inquiry and not to extending time to complete an inquiry. His interpretation of s. 69(6) systematically addresses the text of that provision, its purposes, and the practical realities of conducting inquiries. His interpretation of s. 69(6) satisfies the values of justification, transparency and intelligibility in administrative decision making.

It is reasonable to assume that the Commissioner's interpretations of s. 69(6) of *FOIPA* are the reasons of the adjudicator in this case. Both s. 50(5) of *PIPA* and s. 69(6) of *FOIPA* govern inquiries conducted by the Commissioner. They are identically structured and use almost identical language. It was reasonable for the adjudicator to apply the Commissioner's interpretation of s. 69(6) of *FOIPA* to s. 50(5) of *PIPA*. The interpretation does not render statutory requirements of notice meaningless. No principle of statutory interpretation requires a presumption that an extension must be granted before the expiry of the 90-day time limit simply because s. 50(5) is silent as to when an extension of time can be granted. The distinction between mandatory and directory provisions does not arise in this case because this is not a case of failure by a tribunal to comply with a legislative direction. Therefore, there exists a reasonable basis for the adjudicator's implied decision in this case.

question et en induisant ainsi le tribunal administratif en erreur quant à la nécessité de motiver sa décision, écarter la déférence due à ce dernier. Lorsque la décision contestée porte sur une question qui n'a pas été soulevée devant le décideur, la juridiction de révision peut prendre en compte les motifs qui auraient pu être donnés à l'appui. Lorsque la décision tacite a un fondement raisonnable manifeste, la juridiction de révision devrait la déclarer raisonnable et la confirmer. Il peut arriver parfois qu'une juridiction de révision ne puisse manifester la déférence voulue sans offrir d'abord au décideur administratif la possibilité d'exposer les motifs de sa décision. Il ne convient généralement pas qu'elle conclue à l'absence d'assise raisonnable sans offrir d'abord au tribunal administratif la possibilité d'en fournir une.

La juridiction de révision peut s'en remettre aux motifs d'autres décisions du tribunal administratif sur le même point pour décider si une décision implicite a un fondement raisonnable ou non. Dans d'autres décisions, le commissaire et ses délégués interprètent de manière constante le par. 69(6) de la *Freedom of Information and Protection of Privacy Act* (« *FOIPA* »), dont le libellé est semblable. Le commissaire conclut que le délai apparenté de 90 jours prévu au par. 69(6) ne vise que l'achèvement de l'enquête, et non la prorogation du délai pour la mener à terme. Son interprétation du par. 69(6) aborde successivement le texte de la disposition, son objet et l'expérience du commissaire au chapitre de la tenue d'enquêtes. Elle satisfait également aux exigences de justification, de transparence et d'intelligibilité du processus décisionnel administratif.

On peut certes présumer que les motifs du commissaire interprétant le par. 69(6) de la *FOIPA* sont repris par la déléguée en l'espèce. Le paragraphe 50(5) de la *PIPA* et le par. 69(6) de la *FOIPA* s'appliquent aux enquêtes du commissaire, ils sont conçus de la même manière et leurs libellés sont presque identiques. La déléguée pouvait légitimement appliquer au par. 50(5) de la *PIPA* l'interprétation du par. 69(6) de la *FOIPA* par le commissaire. Pareille conclusion ne rend pas inutile l'obligation légale de donner un avis. Aucun principe d'interprétation législative n'établit de présomption voulant que la prorogation doive intervenir avant l'expiration du délai de 90 jours seulement parce que le par. 50(5) ne précise pas la période pendant laquelle le délai peut être prorogé. La distinction entre les dispositions législatives impératives et celles qui sont directives ne joue pas en l'espèce, car il ne s'agit pas d'un cas où le tribunal administratif a omis de se conformer à une prescription du législateur. Par conséquent, la décision implicite de la déléguée avait une assise raisonnable.

Per Binnie and Deschamps JJ.: There is agreement with Cromwell J. that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and to the rule of law. Administrative tribunals operate within a legal framework dictated by the Constitution and limited by their respective statutory mandates and it is the courts that determine the outer limits of those mandates. On the other hand, the notion of a "true question of jurisdiction or *vires*" is not helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision.

The middle ground lies in the more nuanced approach adopted in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, that if the issue relates to the interpretation and application of a tribunal's own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply. The expression "issues of general legal importance" means issues whose resolution has significance outside the operation of the statutory scheme under consideration. "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense. The calibration will be challenging enough for reviewing judges without superadding an elusive search for something that can be labelled a true question of *vires* or jurisdiction.

On the other hand, Rothstein J.'s creation of a "presumption" based on insufficient criteria simply adds a further step to what should be a straightforward analysis. A simplified approach would be that if the issue before the reviewing court relates to the interpretation or application of a tribunal's "home statute" and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness. Otherwise, the last word on questions of law should be left with the courts.

Per Cromwell J.: In this case the applicable standard of review is reasonableness. The Commissioner's power to extend time is granted in broad terms in the context

Les juges Binnie et Deschamps : Le juge Cromwell a raison d'affirmer que la notion de compétence est fondamentale dans le contrôle judiciaire des décisions des tribunaux administratifs et pour la primauté du droit. Les tribunaux administratifs exercent leurs fonctions dans le cadre juridique que dicte la Constitution et que délimitent leurs mandats légaux respectifs, et ce sont les cours de justice qui déterminent la portée de ces mandats. Par contre, la notion de « question touchant véritablement à la compétence » ne se révèle pas utile au quotidien pour déterminer concrètement si une cour de justice est admise ou non à s'immiscer dans une décision administrative donnée.

La démarche nuancée de la Cour dans l'arrêt *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, selon laquelle lorsqu'il s'agit d'interpréter et d'appliquer sa propre loi, dans son domaine d'expertise et sans que soit soulevée une question de droit générale, la norme de la décision raisonnable s'applique habituellement, constitue un compromis entre les points de vue qui s'opposent en l'espèce. Une « question de droit générale » s'entend d'une question dont le règlement n'importe pas seulement pour le régime législatif considéré. La « raisonnabilité » est une notion générale d'apparence trompeusement simple qui confère à la juridiction de révision le pouvoir discrétionnaire étendu de choisir entre divers degrés d'examen, allant de celui relativement intense à celui qui l'est moins. Les juges saisis de demandes de contrôle judiciaire ont déjà suffisamment à faire pour déterminer l'intensité de l'examen nécessaire sans qu'on leur demande en plus de rechercher un élément insaisissable susceptible d'être qualifié de question touchant véritablement à la compétence.

En revanche, la création par le juge Rothstein d'une présomption fondée sur des critères insuffisants ne fait qu'ajouter une étape à une analyse qui devrait être simple. Suivant une démarche simplifiée, lorsque la décision visée par le contrôle judiciaire a trait à l'interprétation ou à l'application de la loi constitutive du tribunal administratif ou d'une loi connexe qui relève elle aussi essentiellement du mandat et de l'expertise du décideur, et qu'elle ne soulève pas de questions de droit générales, au-delà du régime législatif en cause, la Cour devrait se montrer déférente suivant la norme de la décision raisonnable. Sinon, il appartient à la cour de justice de statuer en dernier ressort sur les questions de droit.

Le juge Cromwell : La norme de contrôle applicable en l'espèce est celle de la décision raisonnable. Le pouvoir de prorogation est conféré au commissaire en

of a detailed and highly specialized statutory scheme which it is the Commissioner's duty to administer and under which he is required to exercise many broadly granted discretions. The adjudicator's decision on the timeliness issue should be reinstated and the matter should be remitted to the chambers judge to consider the issues not dealt with and resolved in the judicial review proceedings. Courts have a constitutional responsibility to ensure that administrative action does not exceed its jurisdiction, but they must also give effect to legislative intent when determining the applicable standard of judicial review. The standard of review analysis identifies the limits of the legality of a tribunal's actions and defines the limits of the role of the reviewing court. When existing jurisprudence has not already satisfactorily determined the standard of review applicable to the case at hand, the courts apply several relevant factors. These factors allow the courts to identify questions that are reviewable on a standard of correctness. Elevating to a virtually irrefutable presumption the general guideline that a tribunal's interpretation of its home statute will not often raise a jurisdictional question goes well beyond saying that deference will usually result where a tribunal's interpretation of its home statute is in issue. The terms "jurisdictional" and "*vires*" are unhelpful to the standard of review analysis but true questions of jurisdiction and *vires* do exist. There are legal questions in "home" statutes whose resolution legislatures do not intend to leave to the tribunal. As this Court's recent jurisprudence confirms, as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues. The fact that s. 50(5) of *PIPA* is in the Commissioner's home statute did not relieve the reviewing court of its duty to consider the argument that the provision was one whose interpretation the legislator intended to be reviewed for correctness, by examining the provision and other relevant factors.

Cases Cited

By Rothstein J.

Discussed: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **distinguished:** *Kellogg Brown and Root Canada v. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499, 434 A.R.

termes généraux dans le contexte d'un régime législatif détaillé et très spécialisé qu'il lui incombe d'administrer et en application duquel il est appelé à exercer de nombreux pouvoirs discrétionnaires accordés de manière générale. Il convient de rétablir la décision du commissaire concernant l'observation du délai et de renvoyer l'affaire au juge en cabinet pour qu'il statue sur les questions qui n'ont pas déjà été examinées et réglées lors du contrôle judiciaire. Une cour de justice a l'obligation constitutionnelle de s'assurer que les actes de l'Administration n'outrepassent pas les limites de sa compétence, mais elle doit aussi tenir compte de l'intention du législateur lorsqu'elle détermine la norme de contrôle applicable. L'analyse relative à la norme de contrôle délimite la légalité des actes du tribunal administratif et circonscrit la fonction de la cour de justice siégeant en révision. Lorsque la jurisprudence existante ne détermine pas déjà de façon satisfaisante la norme de contrôle applicable à la décision, la cour de justice applique plusieurs considérations pertinentes. Ces considérations lui permettent de déterminer quelle décision est susceptible de contrôle selon la norme de la décision correcte. Élever au rang de présomption pour ainsi dire irréfutable l'énoncé général voulant que l'interprétation par un tribunal administratif de sa loi constitutive soulève rarement une question de compétence va beaucoup plus loin qu'affirmer que la déférence est habituellement de mise envers un tribunal administratif qui interprète sa loi constitutive. L'emploi du mot « compétence » est inutile dans l'analyse relative à la norme de contrôle, mais les questions touchant véritablement à la compétence existent. Une loi constitutive renferme des dispositions qui soulèvent des questions de droit sur lesquelles le législateur n'a pas voulu que le tribunal administratif ait le dernier mot. Comme le confirme la jurisprudence récente de la Cour, suivant le droit constitutionnel ou l'intention du législateur, la décision du tribunal administratif sur certaines questions doit être correcte. La présence du par. 50(5) de la *PIPA* dans la loi constitutive du commissaire ne soustrait pas la cour de justice siégeant en révision à son obligation de se pencher — par l'examen de la disposition et de toute autre considération pertinente — sur la thèse selon laquelle le législateur a voulu que le contrôle de l'interprétation de la disposition s'effectue selon la norme de la décision correcte.

Jurisprudence

Citée par le juge Rothstein

Arrêt analysé : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **distinction d'avec l'arrêt :** *Kellogg Brown and Root Canada c. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499,

311; **referred to:** *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396; *Poirier v. Canada (Minister of Veterans Affairs)*, [1989] 3 F.C. 233; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84; *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, rev'g 2009 FCA 110, 389 N.R. 363, rev'g 2008 FC 12, 34 C.E.L.R. (3d) 138; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Syndicat des professeurs du collège de Lévis-Lauzon v. CEGEP de Lévis-Lauzon*, [1985] 1 S.C.R. 596; *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, aff'g 2009 FCA 378, 315 D.L.R. (4th) 270, rev'g 2009 FC 271, 344 F.T.R. 45; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, aff'g *sub nom. Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1, rev'g *sub nom. Nolan v. Superintendent of Financial Services* (2006), 209 O.A.C. 21; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504; *Order P2008-005; College of Alberta Psychologists*, December 17, 2008, O.I.P.C.; *Order F2006-031; Edmonton Police Service*, September 22, 2008, O.I.P.C.; *Order F2008-013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); *Order F2007-014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); *Order F2008-003; Edmonton Police Service*, December 12, 2008, O.I.P.C.; *Order F2008-016; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 82 (QL); *Order F2008-017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 434 A.R. 311; **arrêts mentionnés :** *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3; *Toussaint c. Conseil canadien des relations du travail* (1993), 160 N.R. 396; *Poirier c. Canada (Ministre des affaires des anciens combattants)*, [1989] 3 C.F. 233; *Bande indienne de Shubenacadie c. Canada (Commission des droits de la personne)*, [1998] 2 C.F. 198; *Legal Oil & Gas Ltd. c. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8; *United Nurses of Alberta, Local 160 c. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385; *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650; *Waters c. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84; *Alberta c. Nilsson*, 2002 ABCA 283, 320 A.R. 88; *A.C. Concrete Forming Ltd. c. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, inf. 2009 CAF 110, 389 N.R. 363, inf. 2008 CF 12, 34 C.E.L.R. (3d) 138; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Syndicat des professeurs du collège de Lévis-Lauzon c. CEGEP de Lévis-Lauzon*, [1985] 1 R.C.S. 596; *Union des employés de commerce, local 503 c. Roy*, [1980] C.A. 394; *Celgene Corp. c. Canada (Procureur général)*, 2011 CSC 1, [2011] 1 R.C.S. 3, conf. 2009 CAF 378, 315 D.L.R. (4th) 270, inf. 2009 CF 271, 344 F.T.R. 45; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, conf. *sub nom. Kerry (Canada) Inc. c. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1, inf. *sub nom. Nolan c. Superintendent of Financial Services* (2006), 209 O.A.C. 21; *Northrop Grumman Overseas Services Corp. c. Canada (Procureur général)*, 2009 CSC 50, [2009] 3 R.C.S. 309; *Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, 2011 CSC 59, [2011] 3 R.C.S. 616; *Petro-Canada c. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Canada (Procureur général) c. Mavi*, 2011 CSC 30, [2011] 2 R.C.S. 504; *Order P2008-005; College of Alberta Psychologists*, December 17, 2008, O.I.P.C.; *Order F2006-031; Edmonton Police Service*, September 22, 2008, O.I.P.C.; *Order F2008-013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); *Order F2007-014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); *Order F2008-003; Edmonton Police Service*, December 12, 2008, O.I.P.C.; *Order F2008-016; Edmonton (Police Service)*

79 (QL); *Order F2008-005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); *Order F2008-018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); *Order F2008-027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); *Order F2007-031; Grande Yellowhead Regional Division No. 35*, November 27, 2008, O.I.P.C.; *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.

By Binnie J.

Discussed: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; **referred to:** *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.

By Cromwell J.

Discussed: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309.

Statutes and Regulations Cited

Constitution Act, 1867, s. 96.
Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(4)(*a*).
Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25, ss. 2(b), 69(6).

(Re), [2008] A.I.P.C.D. No. 82 (QL); *Order F2008-017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 79 (QL); *Order F2008-005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); *Order F2008-018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); *Order F2008-027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); *Order F2007-031; Grande Yellowhead Regional Division No. 35*, November 27, 2008, O.I.P.C.; *Colombie-Britannique (Procureur général) c. Canada (Procureur général)*, [1994] 2 R.C.S. 41.

Citée par le juge Binnie

Arrêts analysés : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471; **arrêts mentionnés :** *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796*, [1970] R.C.S. 425; *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339.

Citée par le juge Cromwell

Arrêt analysé : *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; **arrêts mentionnés :** *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678; *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796*, [1970] R.C.S. 425; *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756; *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485; *Northrop Grumman Overseas Services Corp. c. Canada (Procureur général)*, 2009 CSC 50, [2009] 3 R.C.S. 309.

Lois et règlements cités

Freedom of Information and Protection of Privacy Act, R.S.A. 2000, ch. F-25, art. 2b), 69(6).
Loi constitutionnelle de 1867, art. 96.
Loi sur les Cours fédérales, L.R.C. 1985, ch. F-7, art. 18.1(4)*a*).

Personal Information Protection Act, S.A. 2003, c. P-6.5, ss. 3, 7, 19, 43, 47, 50(5), 54(5) [rep. S.A. 2009, c. 50, s. 38].

Authors Cited

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Macaulay, Robert W., and James L. H. Sprague. *Practice and Procedure Before Administrative Tribunals*, vol. 3. Toronto: Carswell, 2004 (loose-leaf updated 2010, release 6).

Mullan, David. "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117.

Mullan, David J. "The McLachlin Court and the Public Law Standard of Review: A Major Irritant Soothed or a Significant Ongoing Problem?", in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade*. Toronto: Irwin Law, 2011, 79.

Sopinka, John, and Mark A. Gelowitz. *The Conduct of an Appeal*, 2nd ed. Toronto: Butterworths, 2000.

APPEAL from a judgment of the Alberta Court of Appeal (Berger, Watson and Slatter JJ.A.), 2010 ABCA 26, 21 Alta. L.R. (5th) 30, 474 A.R. 169, 479 W.A.C. 169, 316 D.L.R. (4th) 117, [2010] 8 W.W.R. 457, 1 Admin. L.R. (5th) 60, [2010] A.J. No. 51 (QL), 2010 CarswellAlta 94, affirming a decision of Marshall J. (2008), 21 Alta. L.R. (5th) 24, 1 Admin. L.R. (5th) 85, [2008] A.J. No. 1592 (QL), 2008 CarswellAlta 2300. Appeal allowed.

Glenn Solomon, *Q.C.*, and *Rob W. Armstrong*, for the appellant.

Sandra M. Anderson and *Anne L. G. Côté*, for the respondent.

Written submissions only by *David Loukidelis*, *Q.C.*, *Veronica Jackson* and *Deanna Billo*, for the intervener the Attorney General of British Columbia.

Written submissions only by *T. Murray Rankin*, *Q.C.*, and *Nitya Iyer*, for the intervener the Information and Privacy Commissioner of British Columbia.

Brent B. Olthuis and *Tam C. Boyar*, for the intervener the B.C. Freedom of Information and Privacy Association.

Personal Information Protection Act, S.A. 2003, ch. P-6.5, art. 3, 7, 19, 43, 47, 50(5), 54(5) [abr. S.A. 2009, ch. 50, art. 38].

Doctrine citée

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.

Macaulay, Robert W., and James L. H. Sprague. *Practice and Procedure Before Administrative Tribunals*, vol. 3. Toronto : Carswell, 2004 (loose-leaf updated 2010, release 6).

Mullan, David. « *Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants : Let's Try Again! » (2008), 21 *C.J.A.L.P.* 117.

Mullan, David J. « The McLachlin Court and the Public Law Standard of Review : A Major Irritant Soothed or a Significant Ongoing Problem? », in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court : The First Decade*. Toronto : Irwin Law, 2011, 79.

Sopinka, John, and Mark A. Gelowitz. *The Conduct of an Appeal*, 2nd ed. Toronto : Butterworths, 2000.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Berger, Watson et Slatter), 2010 ABCA 26, 21 Alta. L.R. (5th) 30, 474 A.R. 169, 479 W.A.C. 169, 316 D.L.R. (4th) 117, [2010] 8 W.W.R. 457, 1 Admin. L.R. (5th) 60, [2010] A.J. No. 51 (QL), 2010 CarswellAlta 94, qui a confirmé une décision du juge Marshall (2008), 21 Alta. L.R. (5th) 24, 1 Admin. L.R. (5th) 85, [2008] A.J. No. 1592 (QL), 2008 CarswellAlta 2300. Pourvoi accueillli.

Glenn Solomon, *c.r.*, et *Rob W. Armstrong*, pour l'appelant.

Sandra M. Anderson et *Anne L. G. Côté*, pour l'intimée.

Argumentation écrite seulement par *David Loukidelis*, *c.r.*, *Veronica Jackson* et *Deanna Billo*, pour l'intervenant le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par *T. Murray Rankin*, *c.r.*, et *Nitya Iyer*, pour l'intervenant Information and Privacy Commissioner of British Columbia.

Brent B. Olthuis et *Tam C. Boyar*, pour l'intervenante B.C. Freedom of Information and Privacy Association.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Charron and Rothstein JJ. was delivered by

[1] ROTHSTEIN J. — Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals. This appeal provides an opportunity for this Court to address the question of how a court may give adequate deference to a tribunal when a party raises an issue before the court on judicial review, which was never raised before the tribunal and where, as a consequence, the tribunal provided no express reasons with respect to the disposition of that issue.

[2] The context in which this issue arises is the judicial review of a decision of an adjudicator delegated by the appellant, the Information and Privacy Commissioner ("Commissioner"), finding that the respondent, the Alberta Teachers' Association ("ATA"), had disclosed certain private information in contravention of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ("*PIPA*"). In response to a number of complaints about an ATA publication of private information, the Commissioner started an investigation. At the time, the Commissioner's enabling statute provided that an inquiry "must" be completed within 90 days of the complaint being received by the Commissioner, unless the Commissioner notifies the parties concerned that he is extending the period and provides an anticipated date for completing the inquiry (s. 50(5) *PIPA*). In dealing with the complaints against the ATA, the Commissioner took 22 months from the initial complaint before extending the estimated date on which the inquiry would be concluded. The adjudicator delegated by the Commissioner subsequently issued an order against the ATA before the anticipated date for completion and 29 months after the initial complaint was made.

[3] The issue of compliance with statutory timelines was not raised before the Commissioner or

Version française du jugement de la juge en chef McLachlin et des juges LeBel, Fish, Abella, Charron et Rothstein rendu par

[1] LE JUGE ROTHSTEIN — En créant un tribunal administratif, une législature confère à un décideur le pouvoir de rendre des décisions dans un domaine où il est censé posséder une expertise. Une cour de justice doit déférer aux décisions administratives qui ressortissent à ce pouvoir décisionnel. Le présent pourvoi offre à notre Cour l'occasion d'aborder la question de savoir de quelle manière il convient de déférer à la décision d'un tribunal administratif lorsque, dans le cadre d'un contrôle judiciaire, une cour de justice est saisie d'une question qui n'a pas été soulevée devant ce tribunal et sur laquelle ce dernier n'a donc pas rendu de décision expresse motivée.

[2] En l'espèce, le contrôle judiciaire visait la décision d'une personne déléguée par l'appelant, le commissaire à l'information et à la protection de la vie privée (« commissaire »), concluant que l'intimée, l'Alberta Teachers' Association (« ATA »), avait communiqué des renseignements privés et enfreint de ce fait la *Personal Information Protection Act*, S.A. 2003, ch. P-6.5 (« *PIPA* »). Le commissaire avait examiné des plaintes relatives à la publication de renseignements privés par l'ATA. Suivant la loi habilitante alors en vigueur, l'enquête du commissaire [TRADUCTION] « prend fin » au plus tard 90 jours après la réception de la plainte, sauf avis du commissaire aux parties de la prorogation du délai et de la date prévue d'achèvement de l'enquête (par. 50(5) de la *PIPA*). Dans le cas des plaintes visant l'ATA, le commissaire n'a prorogé l'enquête et fixé la date de son achèvement que 22 mois après le dépôt de la première plainte. La personne déléguée par le commissaire a subséquemment rendu une ordonnance défavorable à l'ATA avant la date prévue d'achèvement, mais 29 mois après le dépôt de la première plainte.

[3] L'inobservation du délai légal n'a été invoquée ni devant le commissaire ni devant sa déléguée.

the adjudicator. The ATA applied for judicial review of the adjudicator's order, arguing *inter alia* that the Commissioner had lost jurisdiction due to his failure to extend the period for completion of the inquiry within 90 days. The chambers judge granted the ATA's application on this basis, quashing the adjudicator's decision ((2008), 21 Alta. L.R. (5th) 24). This decision was upheld by a majority of the Court of Appeal (2010 ABCA 26, 21 Alta. L.R. (5th) 30).

[4] The Commissioner now appeals to this Court. There are three questions at issue: First, should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator? Second, if the timelines issue should be considered, what is the applicable standard of review? Third, on the applicable standard of review, does the adjudicator's continuation and conclusion of the inquiry, despite the Commissioner having provided an extension after 90 days, survive judicial review?

[5] For the reasons that follow, I would find that the timelines issue was subject to judicial review. Although the issue was not raised before the Commissioner or the adjudicator, it was implicitly decided by both the Commissioner and the adjudicator, and there was no evidentiary inadequacy or prejudice to the parties in this case. The implied decision of the Commissioner to extend the time after 90 days as implicitly adopted by the delegated adjudicator was reviewable on a reasonableness standard and I conclude that the adjudicator's decision was reasonable. Accordingly, the Commissioner's appeal should be allowed and the adjudicator's order against the ATA reinstated.

I. Facts

[6] Between October 13 and December 2, 2005, ten individuals complained to the Office of the Information and Privacy Commissioner that the ATA disclosed their personal information, in contravention of *PIPA*. They alleged that the ATA did so by publishing their names together with a statement that they were no longer required to adhere to

L'ATA a demandé le contrôle judiciaire de l'ordonnance de la déléguée au motif, notamment, qu'en ne prorogeant pas l'enquête au plus tard 90 jours après son début, le commissaire avait perdu compétence. Le juge en cabinet a fait droit à la demande et annulé la décision de la déléguée ((2008), 21 Alta. L.R. (5th) 24). La Cour d'appel a confirmé à la majorité la décision du juge (2010 ABCA 26, 21 Alta. L.R. (5th) 30).

[4] Le commissaire se pourvoit aujourd'hui devant notre Cour, et trois questions sont en litige. Premièrement, convenait-il de se pencher sur la question du délai lors du contrôle judiciaire alors qu'elle n'avait pas été soulevée devant le commissaire ou sa déléguée? Deuxièmement, dans l'affirmative, quelle était la norme de contrôle applicable? Troisièmement, au regard de cette norme, la poursuite de l'enquête par la déléguée jusqu'à sa conclusion, après que le commissaire eut prorogé le délai de 90 jours après son expiration, peut-elle survivre au contrôle judiciaire?

[5] Pour les raisons qui suivent, je suis d'avis que le contrôle judiciaire pouvait porter sur l'observation du délai. En effet, le commissaire et sa déléguée se sont tacitement prononcés sur ce point même s'il n'a pas été soulevé devant eux, et il n'y a eu ni irrégularité sur le plan de la preuve, ni préjudice causé aux parties. La norme de contrôle de la raisonnabilité s'applique à la décision du commissaire tacitement entérinée par sa déléguée de proroger le délai après l'expiration des 90 jours impartis, et j'estime que la décision du commissaire était raisonnable. Par conséquent, le pourvoi du commissaire est accueilli, et l'ordonnance de sa déléguée visant l'ATA est rétablie.

I. Les faits

[6] Entre le 13 octobre et le 2 décembre 2005, dix personnes ont saisi le Commissariat de plaintes alléguant que l'ATA avait communiqué des renseignements personnels les concernant, en contravention de la *PIPA*. Elles prétendaient en effet que l'ATA les avait identifiées dans sa publication intitulée *ATA News* en précisant qu'elles n'étaient plus

the ATA's Code of Professional Conduct in a publication called the "ATA News". The Commissioner's office informed the ATA on October 27, 2005, that it was conducting an investigation. On July 25, 2006, the investigation was concluded and a report was given to the complainants. Although the record is not clear, from their subsequent action, it would appear that the report was not satisfactory to the complainants.

[7] In September 2006, the complainants requested that an inquiry under *PIPA* be conducted. On February 7, 2007, the complainants were notified that their request was being processed. On May 17, 2007, the Commissioner issued a Notice of Inquiry setting out a deadline of June 11, 2007, for written submissions (subsequently extended to July 25, 2007), and of August 8, 2007, for rebuttals. Although the timing is not disclosed in the record, the Commissioner did delegate an adjudicator to conduct the inquiry and issue a decision.

[8] On *August 1, 2007*, the Commissioner wrote to the parties informing them that he was *extending the 90-day period* set out in s. 50(5) *PIPA* and provided an anticipated date for completion of February 1, 2009. On March 13, 2008, an order was issued by the Commissioner's delegated adjudicator. The adjudicator found that the ATA had disclosed the complainants' personal information contrary to ss. 7 and 19 *PIPA*. The issue of compliance with the timelines set out in s. 50(5) *PIPA* was not raised before the adjudicator and the adjudicator's reasons did not expressly address this issue.

[9] On April 25, 2008, the ATA filed an originating notice for judicial review of the adjudicator's order. On judicial review, the adjudicator's decision was quashed on the basis that the Commissioner lost jurisdiction for failing to comply with the timelines set out in s. 50(5) *PIPA*. By majority, the Court of Appeal upheld that decision.

II. Relevant Statutory Provisions

[10] The relevant statutory provisions, as they were worded at the relevant time, are:

assujetties au code de déontologie de l'association. Le 27 octobre 2005, le Commissariat a informé l'ATA qu'il examinait l'affaire. L'examen a pris fin le 25 juillet 2006, et un rapport a été remis aux plaignants. Bien que le dossier ne soit pas clair sur ce point, il appert de la conduite subséquente des plaignants qu'ils n'ont pas été satisfaits des conclusions.

[7] En septembre 2006, les plaignants ont demandé la tenue d'une enquête sous le régime de la *PIPA*. Le 7 février 2007, ils ont été informés que leur demande suivait son cours. Le 17 mai, au moyen d'un avis d'enquête, le commissaire a fixé au 11 juin la date limite pour le dépôt d'observations écrites (la reportant ensuite au 25 juillet), et au 8 août 2007 la date limite pour le dépôt des réfutations. Le commissaire a délégué son pouvoir de mener l'enquête et de rendre une décision, bien que le dossier ne précise pas à quelle date.

[8] Le *1er août 2007*, le commissaire a informé les parties par écrit qu'il *prorogeait le délai de 90 jours* prévu au par. 50(5) de la *PIPA* et fixait au 1er février 2009 la date prévue d'achèvement. Le 13 mars 2008, la déléguée du commissaire a statué que l'ATA avait communiqué des renseignements personnels concernant les plaignants et ainsi enfreint les art. 7 et 19 de la *PIPA*. La question de l'observation du délai prévu au par. 50(5) de la *PIPA* n'a pas été soulevée devant elle, et elle ne l'aborde pas expressément dans ses motifs.

[9] Le 25 avril 2008, par voie d'avis introductif d'instance, l'ATA a demandé le contrôle judiciaire de la décision de la déléguée. À l'issue du contrôle, la Cour du Banc de la Reine a annulé la décision au motif que l'inobservation du délai prescrit au par. 50(5) de la *PIPA* avait fait perdre compétence au commissaire. Les juges majoritaires de la Cour d'appel ont confirmé sa décision.

II. Dispositions législatives pertinentes

[10] Voici les dispositions législatives qui s'appliquaient au moment considéré en l'espèce :

Personal Information Protection Act, S.A. 2003, c. P-6.5

3 The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

43(1) The Commissioner may delegate to any person any duty, power or function of the Commissioner under this Act except the power to delegate.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the Commissioner considers appropriate.

47(1) To ask for a review or to initiate a complaint under this Part, an individual must, as soon as reasonable, deliver a written request to the Commissioner.

(2) A written request to the Commissioner for a review of a decision of an organization must be delivered within

(a) 30 days from the day that the individual asking for the review is notified of the decision, or

(b) a longer period allowed by the Commissioner.

(3) A written request to the Commissioner initiating a complaint must be delivered within a reasonable time.

(4) The time limit in subsection (2)(a) does not apply to delivering a written request for a review concerning an organization's failure to respond within a required time period.

50 . . .

(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

Personal Information Protection Act, S.A. 2003, ch. P-6.5

[TRADUCTION]

3 La présente loi a pour objet de régir la collecte, l'utilisation et la communication de renseignements personnels par un organisme d'une manière qui respecte à la fois le droit de chacun à la protection des renseignements personnels qui le concernent et le besoin de l'organisme de recueillir, d'utiliser ou de communiquer des renseignements personnels à des fins valables.

43(1) Le commissaire peut déléguer à une personne les attributions que lui confère la présente loi, sauf le pouvoir de déléguer.

(2) La délégation visée au paragraphe (1) est faite par écrit et peut être assortie des conditions ou restrictions que le commissaire estime indiquées.

47(1) La demande de réexamen ou la plainte formulée par un particulier en application de la présente partie est présentée par écrit au commissaire dès que possible.

(2) La demande de réexamen de la décision d'un organisme est présentée

a) soit dans les 30 jours qui suivent l'avis de la décision au particulier,

b) soit dans le délai prorogé par le commissaire.

(3) La plainte est présentée par écrit au commissaire dans un délai raisonnable.

(4) Le délai prévu à l'alinéa (2)a) ne s'applique pas à la demande écrite de réexamen visant l'omission d'un organisme de répondre dans le délai imparti.

50 . . .

(5) L'enquête qui fait suite à une demande écrite visée à l'article 47 prend fin dans les 90 jours qui suivent la réception de celle-ci, sauf :

a) lorsque le commissaire informe l'auteur de la demande, l'organisme visé et toute autre personne ayant reçu copie de la demande qu'il proroge ce délai,

b) et qu'il précise la date prévue d'achèvement de l'enquête.

III. Judicial History

A. *Court of Queen's Bench of Alberta, (2008), 21 Alta. L.R. (5th) 24*

[11] In reasons delivered orally, Marshall J. noted that a preliminary question raised by the ATA was whether the Commissioner had lost jurisdiction over the inquiry as a result of his failure to complete the inquiry within the timelines set out in s. 50(5) *PIPA*. Relying on *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, for the principle that "the standard of correctness still applies to matters of jurisdiction and some other matters of law" (at para. 10), he held that this question was reviewable on a standard of correctness.

[12] According to Marshall J., the reasons of Belzil J. in *Kellogg Brown and Root Canada v. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499, 434 A.R. 311, were compelling and entirely applicable in this case. Following that decision, he held that the timelines for completing a review set out in s. 50(5) are mandatory, employing the word "must" (at para. 7) and not directory. He also held that it was not necessary for him "to determine whether an extension of time must be given within the 90-day period. The time period is substantially breached in any event" (para. 12).

[13] Marshall J. then addressed the issue of unfairness raised by the Commissioner. He noted that various authorities had held that the court should not consider an issue which was not raised before a tribunal. He rejected as speculation the Commissioner's submission that, since the individual complainants were not before the court, the court would not have the benefit of additional facts available from them. He further held that "[t]he legislature has clearly stated that timely disposition of complaints is essential in a proceeding under the Act" (at para. 11) and that the "matter was not conducted in a manner required by the legislature, so it can be said that the proceedings must be found to be invalid" (para. 11).

III. Historique judiciaire

A. *Cour du Banc de la Reine de l'Alberta, (2008), 21 Alta. L.R. (5th) 24*

[11] Dans ses motifs prononcés à l'audience, le juge Marshall fait état de la question préliminaire soulevée par l'ATA — à savoir si le commissaire a perdu compétence parce qu'il n'a pas mené l'enquête à terme dans le délai prescrit au par. 50(5) de la *PIPA*. Sur le fondement du principe voulant que [TRADUCTION] « la norme de la décision correcte continue de s'appliquer aux questions de compétence et à quelques autres questions de droit » (par. 10), établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, il conclut que la norme de contrôle applicable est celle de la décision correcte.

[12] Estimant que les motifs du juge Belzil dans *Kellogg Brown and Root Canada c. Information and Privacy Commissioner (Alta.)*, 2007 ABQB 499, 434 A.R. 311, emportent l'adhésion et sont entièrement applicables à l'espèce, le juge Marshall statue qu'en raison de l'emploi du temps présent ([TRADUCTION] « *prend fin* »), la durée de l'enquête prévue au par. 50(5) est de nature impérative et non directive (par. 7). Il lui paraît également inutile [TRADUCTION] « de déterminer si la prorogation doit intervenir à l'intérieur du délai de 90 jours, car de toute manière, il y a eu inobservation grave du délai » (par. 12).

[13] Le juge Marshall se penche ensuite sur l'iniquité invoquée par le commissaire. Il relève que suivant divers arrêts de jurisprudence, une cour de justice ne doit pas examiner une question qui n'a pas été soumise au tribunal administratif. Il tient pour hypothétique et rejette la prétention du commissaire voulant que l'absence des plaignants devant elle empêche la cour de prendre connaissance de faits supplémentaires qu'ils auraient pu faire valoir. À son avis, [TRADUCTION] « [l]e législateur dit clairement que la célérité du règlement des plaintes est essentielle au déroulement d'une procédure prévue par la Loi » (par. 11) et, en l'espèce, « l'instance ne s'est pas déroulée conformément aux exigences légales, de sorte qu'on peut conclure à son irrégularité » (par. 11).

[14] Marshall J. granted the ATA's application and quashed the Commissioner's decision. However, he declined to order costs against the Commission, partly because a tribunal is rarely required to pay costs and partly because the timelines issue could have been raised before the Commissioner (para. 18).

B. *Alberta Court of Appeal, 2010 ABCA 26, 21 Alta. L.R. (5th) 30 (Watson J.A. (Slatter J.A. Concurring) and Berger J.A. Dissenting)*

(1) The Majority — Watson J.A.

[15] Watson J.A. was of the view that since the adjudicator never got a chance to say anything on the question being considered on judicial review, it was not necessary to determine the appropriate standard of review. Rather, he appears to have determined the issue of timeliness *de novo*.

[16] Watson J.A. affirmed that the timelines issue ought to have been raised before the Commissioner. Objections to a tribunal's ability to make a lawful decision should be made first to the challenged tribunal. The failure to raise the issue before the adjudicator was a defect in process that should not be encouraged and should not generally occur. He nonetheless did not reverse the judicial review decision on this ground and was of the opinion that the Court of Appeal was in a position to consider the matter.

[17] Watson J.A. found that the language of the section spoke to "extending that period" in a manner that connoted doing the "extending" while the 90 days was still running. Since the Commissioner had not extended the period within 90 days, the adjudicator's decision was not rendered within the statutory timelines. He held that the time rules specified in s. 50(5) *PIPA* were mandatory and that the consequence of breaching them was the presumptive termination of the inquiry process. Contrary to the decision of the chambers judge that the consequence of non-compliance with s. 50(5) was the automatic and incurable termination of

[14] Le juge Marshall fait droit à la demande de l'ATA et annule la décision du commissaire. Il refuse cependant de condamner le Commissariat aux dépens parce que, d'une part, il est rare qu'un tribunal administratif doive payer les dépens et, d'autre part, l'inobservation du délai aurait pu être invoquée devant le commissaire (par. 18).

B. *Cour d'appel de l'Alberta, 2010 ABCA 26, 21 Alta. L.R. (5th) 30 (le juge Watson avec l'accord du juge Slatter, le juge Berger étant dissident)*

(1) La majorité — le juge Watson

[15] Le juge Watson estime que dans la mesure où la déléguée du commissaire n'a jamais eu la possibilité de se prononcer sur la question soulevée dans le cadre du contrôle judiciaire, il n'est pas nécessaire d'arrêter la bonne norme de contrôle. Il semble plutôt statuer *de novo* sur le respect du délai.

[16] Il confirme que l'inobservation du délai aurait dû être soulevée devant le commissaire, opinant que la contestation du pouvoir d'un tribunal administratif de rendre une décision valide doit d'abord être formulée devant le tribunal en cause. L'omission de saisir ainsi la déléguée constitue selon lui un vice de procédure qu'il ne faut pas encourager et qui ne doit généralement pas se produire. Cependant, il n'infirme pas la décision du juge en cabinet pour ce motif et estime que la Cour d'appel dispose des éléments nécessaires pour se prononcer sur le sujet.

[17] Selon le juge Watson, il appert de la manière dont les mots [TRADUCTION] « proroge ce délai » sont employés dans la disposition que la prorogation doit avoir lieu avant l'expiration des 90 jours. Comme la prorogation n'est pas intervenue dans les 90 jours, la déléguée n'a pas rendu sa décision dans le délai prévu par la Loi. Le juge Watson statue que le respect du délai imparti au par. 50(5) de la *PIPA* est impératif et qu'en cas d'inobservation, l'enquête est présumée avoir pris fin. Contrairement au juge en cabinet pour qui l'inobservation du par. 50(5) met automatiquement et irrémédiablement fin à l'enquête, il estime que les motifs du commissaire

the proceedings, the reasons of the Commissioner might justify the breach and overcome the presumption of termination. However, the chambers judge had concluded that "[t]he time period is substantially breached in any event" (para. 12). Under those circumstances, the presumption of termination was not overcome. Watson J.A. therefore upheld the trial judge's decision to quash the adjudicator's decision.

(2) The Dissent — Berger J.A.

[18] In dissent, Berger J.A. concluded that *PIPA* authorized the Commissioner to extend the 90-day period either before or after the expiry of that period. When a provision is silent as to when an extension of time can be granted, there is no presumption that the extension must be granted before expiry. An interpretation of s. 50(5) that allows the Commissioner to extend the 90-day period after it expires is consistent with legislative intent because it maintains the protection of the individuals' rights to privacy which *PIPA* strives to ensure. In the present case, by the time the 90-day period had expired, the inquiry process was engaged and had progressed with the parties' participation. Because they were involved, the parties were aware that the process would continue beyond 90 days. The goals of timely resolution and keeping parties informed would not have been enhanced by requiring the Commissioner to formally communicate with the parties within 90 days.

[19] Berger J.A. found that quashing the adjudicator's order without the benefit of reasons compromised judicial review. The court generally will not decide on judicial review a question which was not put to the administrative tribunal. Without the benefit of the Commissioner's expertise and analysis relative to the questions of mixed law and fact in this case, the curial deference normally accorded to the Commissioner was rendered nugatory, thereby fettering a thorough and meaningful judicial review.

[20] Berger J.A. would have allowed the appeal and restored the adjudicator's order.

peuvent justifier l'inobservation et réfuter la présomption. Or, le juge en cabinet a conclu que, [TRADUCTION] « [d]e toute manière, il y a eu inobservation grave du délai » (par. 12), de sorte que la présomption d'achèvement n'était pas réfutée. Il confirme donc l'annulation de la décision de la déléguée du commissaire.

(2) La dissidence du juge Berger

[18] Le juge Berger estime pour sa part que la *PIPA* autorise le commissaire à proroger le délai avant ou après l'expiration des 90 jours impartis et que lorsque le texte de loi ne précise pas la période pendant laquelle un délai peut être prorogé, nulle présomption ne veut que la prorogation doive intervenir avant l'expiration du délai. L'interprétation du par. 50(5) voulant que le commissaire puisse proroger le délai de 90 jours après son expiration est compatible avec l'intention du législateur en ce qu'elle est de nature à protéger le droit à la vie privée comme le veut la *PIPA*. En l'espèce, l'enquête a débuté avant l'expiration du délai et elle a progressé avec le concours des parties. Du fait de leur participation, les parties savaient que l'enquête se poursuivrait au-delà des 90 jours. La réalisation des objectifs que sont la célérité du règlement et l'information des parties n'aurait pas été favorisée par le fait d'exiger du commissaire qu'il communique officiellement avec les parties avant l'expiration du délai.

[19] Selon le juge Berger, annuler l'ordonnance sans connaître les motifs de la déléguée a compromis le contrôle judiciaire. En règle générale, une cour de justice ne se prononce pas sur une question qui n'a pas été soumise au tribunal administratif. À défaut de l'expertise et de l'analyse du commissaire sur les questions mixtes de fait et de droit en cause, la déférence que commandent normalement ses décisions est neutralisée, ce qui empêche un contrôle judiciaire véritable et approfondi.

[20] Le juge Berger aurait accueilli l'appel et rétabli l'ordonnance de la déléguée.

IV. Analysis

[21] This appeal raises three issues, which I shall consider in turn. First, should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator? Second, if the timelines issue should be considered, what is the applicable standard of review? Third, on the applicable standard of review, does the continuation and conclusion of the inquiry, despite providing an extension after 90 days, survive judicial review?

A. *Judicial Review of an Issue That Was Not Raised Before the Tribunal*

[22] The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies."

[23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of*

IV. Analyse

[21] Le pourvoi soulève trois questions que j'examine tour à tour. Premièrement, convenait-il de se pencher sur la question du délai lors du contrôle judiciaire alors qu'elle n'avait pas été soulevée devant le commissaire ou sa déléguée? Deuxièmement, dans l'affirmative, quelle était la norme de contrôle applicable? Troisièmement, au regard de cette norme, la poursuite de l'enquête par la déléguée jusqu'à sa conclusion, après que le commissaire eut prorogé le délai après les 90 jours impartis, peut-elle survivre au contrôle judiciaire?

A. *Contrôle judiciaire relatif à un point non soulevé devant le tribunal administratif*

[22] L'ATA a demandé le contrôle judiciaire de la décision de la déléguée. Elle n'avait invoqué l'inobservation du délai ni devant le commissaire ni devant sa déléguée. Elle ne l'a même pas fait dans l'avis introductif d'instance en contrôle judiciaire, invoquant la question pour la première fois en plaidoirie. L'ATA pouvait certainement demander le contrôle judiciaire, mais elle ne pouvait contraindre la cour à examiner la question. Tout comme elle jouit du pouvoir discrétionnaire de refuser d'entreprendre un contrôle judiciaire lorsque, par exemple, il existe un autre recours approprié, une cour de justice peut également, à son gré, ne pas se saisir d'une question soulevée pour la première fois dans le cadre du contrôle judiciaire lorsqu'il lui paraît inopportun de le faire. Voir, p. ex., *Canadien Pacifique Ltée c. Bande indienne de Matsqui*, [1995] 1 R.C.S. 3, le juge en chef Lamer, par. 30 : « [L]a réparation qu'une cour de justice peut accorder dans le cadre du contrôle judiciaire est essentiellement discrétionnaire. Ce principe [général de longue date] découle du fait que les brefs de prérogative sont des recours extraordinaires [et discrétionnaires]. »

[23] En règle générale, dans une instance en contrôle judiciaire, ce pouvoir discrétionnaire n'est pas exercé au bénéfice du demandeur lorsque la question en litige aurait pu être soulevée devant le tribunal administratif mais qu'elle ne l'a pas été (*Toussaint c. Conseil canadien des relations*

Veterans Affairs), [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, at para. 4).

[24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.

[25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)

[26] Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *du travail* (1993), 160 N.R. 396 (C.A.F.), par. 5, citant *Poirier c. Canada (Ministre des Affaires des anciens combattants)*, [1989] 3 C.F. 233 (C.A.), p. 247; *Bande indienne de Shubenacadie c. Canada (Commission des droits de la personne)*, [1998] 2 C.F. 198 (1re inst.), par. 40-43; *Legal Oil & Gas Ltd. c. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, par. 12; *United Nurses of Alberta, Local 160 c. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, par. 4).

[24] Un certain nombre de considérations justifient cette règle générale, l'une des principales étant que le législateur a confié au tribunal administratif la tâche de trancher la question (*Legal Oil & Gas Ltd.*, par. 12-13). Comme l'explique notre Cour dans *Dunsmuir*, « les cours de justice doivent tenir compte de la nécessité [. . .] d'éviter toute immixtion injustifiée dans l'exercice de fonctions administratives en certaines matières déterminées par le législateur » (par. 27). La cour de justice doit donc respecter le choix du législateur de désigner le tribunal administratif comme décideur de première instance et laisser à ce tribunal administratif la possibilité de se pencher le premier sur la question et de faire connaître son avis.

[25] Le principe vaut particulièrement lorsque la question soulevée pour la première fois lors du contrôle judiciaire a trait au domaine d'expertise du tribunal administratif et à ses attributions spécialisées. La Cour doit alors être bien consciente que si elle accepte de se pencher sur la question, elle le fera sans pouvoir connaître l'opinion du tribunal administratif. (Voir *Conseil des Canadiens avec déficiences c. VIA Rail Canada Inc.*, 2007 CSC 15, [2007] 1 R.C.S. 650, par. 89, la juge Abella.)

[26] Qui plus est, soumettre une question pour la première fois lors du contrôle judiciaire peut porter indûment préjudice à la partie adverse et priver la cour de justice des éléments de preuve nécessaires pour trancher (*Waters c. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, par. 31 et 37, citant *Alberta c. Nilsson*, 2002 ABCA 283, 320 A.R. 88, par. 172, et J. Sopinka et M. A. Gelowitz, *The Conduct of an Appeal* (2e éd. 2000), p. 63-68; *A.C. Concrete*

A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).

[27] Watson J.A., for the majority of the Court of Appeal, acknowledged that "[t]he judicial review was adversely affected by the fact that the adjudicator did not hear and consider the objection", under s. 50(5) *PIPA*, to the Commissioner's authority to proceed. It was a "defect in the process" that should "not . . . be encouraged and should not generally occur" (para. 18). He nevertheless did not interfere with the chambers judge's judicial review on this ground. He observed that no additional evidence or submissions were available beyond the statements of law and policy contained in the Commissioner's prior decisions. Moreover, the Commissioner conceded that the adjudicator would have said the same as the Commissioner, had the issue been raised (para. 18). For its part, the ATA stressed in its factum before this Court that the Commissioner has consistently decided the timelines issue in other decisions and that there was nothing further for the Commissioner to decide (paras. 6, 42, 49 and 51).

[28] In these circumstances, I do not think the Court of Appeal erred in refusing to disturb the exercise of the reviewing judge's discretion to consider the timeliness issue. In this case, the rationales for the general rule have limited application. Both parties agreed that the Commissioner has expressed his views in several other decisions. Therefore, the Commissioner has had the opportunity to decide the issue at first instance and we have the benefit of his expertise, albeit without reasons in this case. No evidence was required to consider the timelines issue and no prejudice was alleged. Rather, it involved a straightforward determination of law, the basis of which was able to be addressed on judicial review, irrespective of what is the appropriate standard of review.

[29] In the present appeal, a decision on the timelines issue is necessarily implied. By his

Forming Ltd. c. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity, 2009 ONCA 292, 306 D.L.R. (4th) 251, par. 10 (la juge Gillese)).

[27] Au nom des juges majoritaires de la Cour d'appel, le juge Watson reconnaît que [TRADUCTION] « [l]e contrôle judiciaire a souffert de ce que la déléguée n'a ni entendu ni examiné la contestation », fondée sur le par. 50(5) de la *PIPA*, du pouvoir du commissaire d'aller de l'avant. Il s'agit selon lui d'un « vice de procédure qu'il ne faut pas encourager et qui ne doit généralement pas se produire » (par. 18). Toutefois, il n'infirme pas pour autant la décision du juge en cabinet. Il relève qu'exception faite des énoncés de droit et de principe contenus dans les décisions antérieures du commissaire, il n'y avait ni preuve ni argumentation supplémentaires. Le commissaire avait d'ailleurs reconnu que sa déléguée aurait tenu les mêmes propos que lui si elle avait été saisie de la question (par. 18). Dans son mémoire, l'ATA soutient pour sa part que d'autres décisions du commissaire sur la question du délai sont constantes et que le commissaire n'aurait eu aucun autre point à trancher (par. 6, 42, 49 et 51).

[28] Dans ces circonstances, je ne crois pas que la Cour d'appel a eu tort de refuser de s'immiscer dans l'exercice du pouvoir discrétionnaire du juge saisi de la demande de contrôle judiciaire de se pencher sur la question du délai. Les considérations qui justifient la règle générale ont une application limitée en l'espèce. Les deux parties reconnaissent que le commissaire a exprimé son opinion dans d'autres décisions. Le commissaire avait donc eu l'occasion de se prononcer sur la question en première instance, ce qui donne accès à son expertise malgré l'absence de motifs en l'espèce. Nul élément de preuve n'était requis pour trancher la question du délai, et nul préjudice n'était allégué. La question appelait simplement une décision sur un point de droit à partir d'éléments pouvant être examinés lors d'un contrôle judiciaire, quelle que soit la norme de contrôle applicable.

[29] En l'espèce, la question du délai a nécessairement été tranchée de façon implicite. Dans sa

letter of August 1, 2007, the Commissioner notified the parties that he was extending the 90-day period for completion of an inquiry and provided them with an anticipated date for completion of February 1, 2009. This was done after the expiry of the 90-day period. An inquiry was conducted and the Commissioner's delegated adjudicator ultimately rendered an order against the ATA. The issue raised by the ATA on judicial review, but not before the Commissioner or the adjudicator, was whether the result of the Commissioner not extending the completion date of the inquiry before the 90-day period expired resulted in the automatic termination of the inquiry. This issue could only be decided in one of two ways: either the consequence of an extension after 90 days was that the inquiry was automatically terminated or that it was not. Both the Commissioner and the adjudicator implicitly decided that providing an extension after 90 days did not result in the inquiry being automatically terminated. The Commissioner's decision was implicit in his giving notice of an extension and an anticipated date for completion after 90 days. The adjudicator's decision was implicit in her proceeding with the inquiry and rendering an order. In this appeal, this Court is reviewing the adjudicator's implied decision because hers is the decision under judicial review.

B. *What Is the Applicable Standard of Review and How Is It Applied to Implicit Decisions on Issues Not Raised Before the Administrative Tribunal?*

[30] The narrow question in this case is: Did the inquiry automatically terminate as a result of the Commissioner extending the 90-day period only after the expiry of that period? This question involves the interpretation of s. 50(5) *PIPA*, a provision of the Commissioner's home statute. There is authority 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" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to

lettre du 1er août 2007, le commissaire a informé les parties qu'il prorogeait le délai de 90 jours et que la date prévue d'achèvement de l'enquête était le 1er février 2009. Le délai de 90 jours impartis avait déjà expiré. La déléguée du commissaire a mené l'enquête à terme, puis rendu une ordonnance défavorable à l'ATA. La question non soulevée devant le commissaire ou sa déléguée, mais que l'ATA a soumise lors du contrôle judiciaire, était celle de savoir si l'omission du commissaire de proroger le délai avant l'expiration des 90 jours impartis avait automatiquement mis fin à l'enquête. Seulement deux conclusions étaient possibles : soit la prorogation après les 90 jours ne mettait pas automatiquement fin à l'enquête, soit elle y mettait fin. Le commissaire et sa déléguée ont implicitement décidé que la prorogation du délai après les 90 jours impartis n'avait pas mis fin automatiquement à l'enquête. Le commissaire, en informant les parties de la prorogation et en leur précisant la date prévue d'achèvement, et la déléguée, en effectuant l'enquête et en rendant une ordonnance, se sont implicitement prononcés sur la question. Puisque la décision implicite de la déléguée est celle visée par le contrôle judiciaire, c'est cette décision que notre Cour examine dans le présent pourvoi.

B. *Détermination de la norme de contrôle et application de celle-ci à une décision implicite sur un point non soulevé devant le tribunal administratif*

[30] Seule la question suivante se pose en l'espèce : la prorogation du délai par le commissaire après les 90 jours impartis a-t-elle automatiquement mis fin à l'enquête? Dès lors, il faut interpréter le par. 50(5) de la *PIPA*, une disposition de la loi constitutive du Commissariat. Suivant la jurisprudence, « [l]orsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie, la déférence est habituellement de mise » (*Dunsmuir*, par. 54; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 28, le juge Fish). Le principe ne vaut cependant pas lorsque l'interprétation de la loi constitutive relève

which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, . . . '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

[31] The timelines question is not a constitutional question; nor is it a question regarding the jurisdictional lines between two or more competing specialized tribunals.

[32] And it is not a question of central importance to the legal system as a whole, but is one that is specific to the administrative regime for the protection of personal information. The timelines question engages considerations and gives rise to consequences that fall squarely within the Commissioner's specialized expertise. The question deals with the Commissioner's procedures when conducting an inquiry, a matter with which the Commissioner has significant familiarity and which is specific to *PIPA*. Also, in terms of interpreting s. 50(5) *PIPA* consistently with the purposes of the Act, the relevant considerations include the interests of all parties in the timely completion of inquiries, the importance of keeping the parties informed of the progression of the process and the effect of automatic termination of an inquiry on individual privacy interests. These considerations fall within the Commissioner's expertise, which centres upon balancing the rights of individuals to have their personal information protected against the need of organizations to collect, use or disclose personal information for purposes that are reasonable (s. 3 *PIPA*).

[33] Finally, the timelines question does not fall within the category of a "true question of jurisdiction or *vires*". I reiterate Dickson J.'s oft-cited

d'une catégorie de questions à laquelle la norme de la décision correcte demeure applicable, à savoir les « questions constitutionnelles, [les] questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur, [les] questions portant sur la "délimitation des compétences respectives de tribunaux spécialisés concurrents" [et] les questions touchant véritablement à la compétence » (*Canada (Commission canadienne des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471, par. 18, les juges LeBel et Cromwell, citant *Dunsmuir*, par. 58, 60-61).

[31] La question de l'observation du délai n'est pas de nature constitutionnelle et elle n'a pas trait à la délimitation des compétences respectives de tribunaux spécialisés concurrents.

[32] Elle ne revêt pas non plus une importance capitale pour le système juridique dans son ensemble, mais vise précisément le régime administratif de protection des renseignements personnels. Elle met en jeu des considérations et des conséquences qui relèvent bel et bien de l'expertise du commissaire dans son domaine spécialisé. Elle touche à la procédure d'enquête propre à la *PIPA* et dont le commissaire a une connaissance approfondie. En outre, les considérations qui président à l'interprétation du par. 50(5) conformément aux objets de la *PIPA* comprennent l'intérêt de toutes les parties en cause à ce que l'enquête soit menée à terme avec célérité, l'importance de tenir les parties informées du déroulement du processus et les conséquences de la cessation automatique de l'enquête sur le droit de chacun au respect de sa vie privée. Ces considérations relèvent elles aussi de l'expertise du commissaire, laquelle est axée sur la mise en balance du droit de chacun à la protection de ses renseignements personnels, d'une part, et du besoin de l'organisme de recueillir, d'utiliser ou de communiquer des renseignements à des fins valables, d'autre part (art. 3 de la *PIPA*).

[33] Enfin, la question de l'observation du délai n'appartient pas à la catégorie des « questions touchant véritablement à la compétence ». Rappelons

warning in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233, cited in *Dunsmuir*, at para. 35). See also *Syndicat des professeurs du collège de Lévis-Lauzon v. CEGEP de Lévis-Lauzon*, [1985] 1 S.C.R. 596, at p. 606, *per* Beetz J., adopting the reasons of Owen J.A. in *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394. As this Court explained in *Canada (Canadian Human Rights Commission)*, "*Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Smith v. Alliance Pipeline Ltd.*, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).

[34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has

la mise en garde maintes fois citée du juge Dickson dans *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, à savoir que les cours de justice doivent « éviter de qualifier trop rapidement un point de question de compétence, et ainsi de l'assujettir à un examen judiciaire plus étendu, lorsqu'il existe un doute à cet égard » (p. 233, cité dans l'arrêt *Dunsmuir*, par. 35). Voir également *Syndicat des professeurs du collège de Lévis-Lauzon c. CEGEP de Lévis-Lauzon*, [1985] 1 R.C.S. 596, p. 606, le juge Beetz, reprenant les motifs du juge Owen dans *Union des employés de commerce, local 503 c. Roy*, [1980] C.A. 394. Comme l'explique notre Cour dans *Canada (Commission canadienne des droits de la personne)*, dans *Dunsmuir*, « la Cour se distancie expressément des définitions larges de la compétence » (par. 18, citant *Dunsmuir*, par. 59). L'expérience enseigne que peu de questions appartiennent à la catégorie des véritables questions de compétence. Depuis *Dunsmuir*, la Cour n'en a relevé aucune (voir *Celgene Corp. c. Canada (Procureur général)*, 2011 CSC 1, [2011] 1 R.C.S. 3, par. 33-34; *Smith c. Alliance Pipeline Ltd.*, par. 27-32; *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, par. 31-36). Quant à l'arrêt *Northrop Grumman Overseas Services Corp. c. Canada (Procureur général)*, 2009 CSC 50, [2009] 3 R.C.S. 309, la Cour y statue que la question soulevée a trait à la compétence et appelle donc l'application de la norme de la décision correcte, et ce, en suivant une jurisprudence bien établie, antérieure à *Dunsmuir*, qui applique cette norme au type de décision en cause, et non en relevant une question qui touche véritablement à la compétence (par. 10).

[34] La consigne voulant que la catégorie des véritables questions de compétence appelle une interprétation restrictive revêt une importance particulière lorsque le tribunal administratif interprète sa loi constitutive. En un sens, tout acte du tribunal qui requiert l'interprétation de sa loi constitutive soulève la question du pouvoir ou de la compétence du tribunal d'accomplir cet acte. Or, depuis *Dunsmuir*, la Cour s'est écartée de cette définition de la compétence. En effet, au vu de la jurisprudence récente, le temps est peut-être venu de

come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[35] Justice Cromwell takes issue with my querying whether the category of true question of jurisdiction exists and is necessary. He says that this proposition "undermine[s] the foundation of judicial review of administrative action" (para. 92).

[36] Judges and administrative law counsel well know of the uncertainty and confusion that has plagued standard of review analysis for many years. That was the animating reason for this Court's decision in *Dunsmuir*. At para. 32 of *Dunsmuir*, Bastarache and LeBel JJ. wrote:

Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

At para. 158, Deschamps J. wrote:

The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes.

At para. 145, Binnie J. wrote:

The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise

se demander si, aux fins du contrôle judiciaire, la catégorie des véritables questions de compétence existe et si elle est nécessaire pour arrêter la norme de contrôle applicable. Cependant, faute de plaidoirie sur ce point en l'espèce, je me contente d'affirmer que, sauf situation exceptionnelle — et aucune ne s'est présentée depuis *Dunsmuir* —, il convient de présumer que l'interprétation par un tribunal administratif de « sa propre loi constitutive ou [d']une loi étroitement liée à son mandat et dont il a une connaissance approfondie » est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire.

[35] Le juge Cromwell exprime son désaccord avec mon interrogation concernant l'existence et la nécessité de la catégorie des véritables questions de compétence. À son avis, mes propos « minent l'assise du contrôle judiciaire des actes de l'Administration » (par. 92).

[36] Juges et avocats spécialisés en droit administratif sont bien au fait de l'incertitude et de la confusion qui, pendant de nombreuses années, ont pesé sur l'analyse relative à la norme de contrôle et qui sont à l'origine de l'arrêt *Dunsmuir*. Les juges Bastarache et LeBel écrivent ce qui suit au par. 32 de cet arrêt :

Malgré les efforts pour l'améliorer et le clarifier, le mécanisme actuel s'est révélé difficile à appliquer. Le temps est venu de revoir le contrôle judiciaire des décisions administratives au Canada et d'établir un cadre d'analyse rationnel qui soit plus cohérent et fonctionnel.

La juge Deschamps opine pour sa part au par. 158 :

Les règles régissant le contrôle judiciaire de l'action gouvernementale ont besoin de plus qu'une simple réforme. Le droit, en ce domaine, doit être débarrassé des grilles d'analyse et des débats inutiles.

Puis, au par. 145, le juge Binnie ajoute :

La démarche actuelle commande l'examen préalable de quatre facteurs (non exhaustifs) qui, selon les détracteurs du mécanisme, prolongent indûment l'instance, accroissent l'incertitude et majorent les coûts, des arguments étant alors présentés à la cour quant à l'adéquation

against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere preparation for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case. [Emphasis deleted.]

Although these passages in *Dunsmuir* pertain to the approach to standard of review prior to *Dunsmuir*, I believe they are relevant in response to Justice Cromwell's expressed opinion.

[37] The continuing uncertainty about standard of review when the issue is the tribunal's interpretation of its home statute is well exemplified in the cases that have come before this Court subsequent to *Dunsmuir*. In *Nolan v. Superintendent of Financial Services* (2006), 209 O.A.C. 21, the Ontario Divisional Court thought the appropriate standard of review was correctness. The Court of Appeal applied a reasonableness standard (*sub nom. Kerry (Canada) Inc. v. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1), as did this Court (*sub nom. Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678). In *Alliance Pipeline Ltd. v. Smith*, 2008 FC 12, 34 C.E.L.R. (3d) 138, the judicial review judge applied a reasonableness standard, but the Court of Appeal (2009 FCA 110, 389 N.R. 363) found it unnecessary to decide whether reasonableness or correctness was the appropriate standard of review. This Court applied a reasonableness standard (2011 SCC 7, [2011] 1 S.C.R. 160). In *Celgene Corp. v. Canada (Attorney General)*, 2009 FC 271, 344 F.T.R. 45, the judicial review judge applied a correctness standard. The Federal Court of Appeal (2009 FCA 378, 315 D.L.R. (4th) 270) and this Court (2011 SCC 1, [2011] 1 S.C.R. 3) doubted that this was the proper standard. Without engaging in a standard of review analysis and for reasons of practicality, in *Northrop Grumman*, this Court applied a standard of correctness based on precedent. In the present appeal, both the judicial

de l'expertise du décideur administratif avec la nature « véritable » de la question à trancher ou quant à la préséance de la clause privative sur l'objet général de la loi, etc. Et tout cela n'est que le prélude à la plaidoirie sur la véritable question de fond. Le doute va jusqu'à un certain point de soi en la matière, comme dans tout litige (sinon il n'y en aurait pas), mais nous devrions à tout le moins (i) établir quelques présomptions et (ii) faire en sorte que les parties cessent de débattre des critères applicables et fassent plutôt valoir leurs prétentions sur le fond. [Italiques supprimés.]

Même si ces extraits de *Dunsmuir* ont trait à la démarche qui avait cours auparavant pour déterminer la norme de contrôle, j'estime qu'ils demeurent pertinents en réponse à l'opinion exprimée par le juge Cromwell.

[37] Les pourvois entendus par notre Cour depuis *Dunsmuir* montrent bien l'incertitude que suscite toujours la norme de contrôle lorsque le litige a pour objet l'interprétation de sa loi constitutive par un tribunal administratif. Dans *Nolan c. Superintendent of Financial Services* (2006), 209 O.A.C. 21, la Cour divisionnaire de l'Ontario a estimé que la bonne norme de contrôle était celle de la décision correcte. La Cour d'appel a plutôt appliqué la norme de la décision raisonnable (*sub nom. Kerry (Canada) Inc. c. DCA Employees Pension Committee*, 2007 ONCA 416, 86 O.R. (3d) 1), et notre Cour s'est rangée à son avis (*sub nom. Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678). Dans *Alliance Pipeline Ltd. c. Smith*, 2008 CF 12, 34 C.E.L.R. (3d) 138, le juge saisi de la demande de contrôle judiciaire a retenu la norme de la raisonnabilité, tandis que la Cour d'appel (2009 CAF 110, 389 N.R. 363) a jugé inutile de décider laquelle des deux normes devait s'appliquer. Notre Cour a opté pour la norme de la décision raisonnable (2011 CSC 7, [2011] 1 R.C.S. 160). Dans *Celgene Corp. c. Canada (Procureur général)*, 2009 CF 271, 344 F.T.R. 45, le juge de première instance a effectué le contrôle au regard de la norme de la décision correcte. La Cour d'appel fédérale (2009 CAF 378, 315 D.L.R. (4th) 270) et notre Cour (2011 CSC 1, [2011] 1 R.C.S. 3) ont dit douter qu'il s'agisse de la bonne norme. Sans entreprendre d'analyse relative à la norme de contrôle et pour des raisons d'ordre pratique,

review court and the Court of Appeal applied a correctness standard of review.

[38] These examples demonstrate that the "true questions of jurisdiction" category has caused confusion to counsel and judges alike and has unnecessarily increased costs to clients before getting to the actual substance of the case. Avoiding using the label "jurisdictional" only to engage in a search for the legislators' intent, as my colleague suggests at paras. 96-97, simply leads to the same debate about what constitutes a jurisdictional question. As Binnie J. directly put it in *Dunsmuir*, our objective should be to get the parties away from arguing about standard of review to arguing about the substantive merits of the case.

[39] What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[40] In Justice Cromwell's view, saying that jurisdictional questions are exceptional is not an answer to a plausible argument that a particular provision falls outside the presumption of reasonableness review and into the exceptional category of correctness review. Nor does it assist, he says, in

dans *Northrop Grumman*, notre Cour a appliqué la norme de la décision correcte en s'appuyant sur la jurisprudence. Dans la présente affaire, la juridiction de révision et la Cour d'appel ont toutes deux conclu à l'application de la norme de la décision correcte.

[38] Il appert de ces exemples que la catégorie des « questions touchant véritablement à la compétence » sème la confusion tant chez les juges que chez les avocats et qu'elle accroît inutilement les frais de justice supportés par les parties avant que l'affaire ne soit entendue au fond. Éviter de recourir à la notion de « question de compétence » pour s'en tenir à la recherche de l'intention du législateur comme le propose mon collègue aux par. 96-97 de ses motifs a seulement pour effet de relancer le débat quant à ce qui constitue une question de compétence. Comme le dit sans détour le juge Binnie dans *Dunsmuir*, nous devrions chercher à faire en sorte que les parties cessent de débattre de la norme de contrôle et fassent plutôt valoir leurs prétentions sur le fond.

[39] À mon sens, ce que je préconise en l'espèce découle naturellement de la volonté de simplification qui anime notre Cour dans *Dunsmuir*, et donne directement suite à *Alliance* (par. 26). Les véritables questions de compétence ont une portée étroite et se présentent rarement. Il convient de présumer que la norme de contrôle à laquelle est assujettie la décision d'un tribunal administratif qui interprète sa loi constitutive ou qui l'applique est celle de la décision raisonnable. Tant que subsiste la catégorie des véritables questions de compétence, la partie qui prétend soulever une question qui y appartient doit établir les raisons pour lesquelles le contrôle visant l'interprétation de sa loi constitutive par le tribunal administratif ne devrait pas s'effectuer au regard de la norme déférente de la décision raisonnable.

[40] Dans l'optique du juge Cromwell, l'affirmation voulant que les questions de compétence soient exceptionnelles ne peut être opposée à la thèse plausible qu'une disposition donnée échappe à l'application de la présomption d'assujettissement à la norme de la décision raisonnable et appartient à

determining by what means the presumption may be rebutted.

[41] Both Binnie J. and Cromwell J. object to the *creation of a presumption* of reasonableness review of the home statute of the tribunal. With respect, I find the objection perplexing in view of judicial and academic opinion that the presumption was implicitly already established in *Dunsmuir*. Professor D. J. Mullan writes in "The McLachlin Court and the Public Law Standard of Review: A Major Irritant Soothed or a Significant Ongoing Problem?", in D. A. Wright and A. M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 79, at p. 108:

> Justice John Evans of the Federal Court of Appeal has argued in his 2009 10th Heald Lecture delivered at the College of Law at the University of Saskatchewan that in *Dunsmuir* (reinforced by *Khosa*), the Court had now established (re-established?) a very strong presumption of deferential review when a statutory authority is interpreting its home, or constitutive, statute, or any other frequently encountered statute, or even common or civil law principle. I too accept that . . . .

Both Justice Evans and Professor Mullan are recognized as leading scholars in the field of administrative law in Canada.

[42] As I have explained, I am unable to provide a definition of what might constitute a true question of jurisdiction. The difficulty with maintaining the category of true questions of jurisdiction is that without a clear definition or content to the category, courts will continue, unnecessarily, to be in doubt on this question. However, at this stage, I do not rule out, in our adversarial system, counsel raising an argument that might satisfy a court that a true question of jurisdiction exists and applies in a particular case. The practical approach is to direct the courts and counsel that at this time, true questions of jurisdiction will be exceptional and, should the

la catégorie des questions exceptionnelles appelant la norme de la décision correcte. Il ajoute qu'elle ne contribue pas non plus à la détermination des moyens par lesquels la présomption peut être réfutée.

[41] Les juges Binnie et Cromwell s'opposent tous deux à l'*établissement d'une présomption* assujettissant à la norme de la décision raisonnable l'interprétation de sa loi constitutive par le tribunal administratif. Soit dit en tout respect, leur désaccord me paraît déroutant au vu de l'opinion judiciaire et doctrinale selon laquelle *Dunsmuir* établit déjà tacitement cette présomption. Le professeur D. J. Mullan écrit ce qui suit dans « The McLachlin Court and the Public Law Standard of Review : A Major Irritant Soothed or a Significant Ongoing Problem? », in D. A. Wright et A. M. Dodek, dir., *Public Law at the McLachlin Court : The First Decade* (2011), 79, p. 108 :

> [TRADUCTION] En 2009, le juge John Evans de la Cour d'appel fédérale a soutenu lors de la dixième conférence Heald tenue à la faculté de droit de l'Université de la Saskatchewan que dans *Dunsmuir* (puis dans *Khosa*), la Cour applique désormais (ou de nouveau?) la très forte présomption voulant que la déférence s'impose lors du contrôle de la décision de l'autorité déléguée qui interprète sa loi habilitante ou constitutive, une autre loi ou quelque autre texte législatif auquel elle a souvent affaire, voire un principe de common law ou de droit civil. Je le reconnais également . . .

Tant le juge Evans que le professeur Mullan sont des sommités reconnues en droit administratif canadien.

[42] Comme je l'explique précédemment, je ne peux offrir de définition quant à ce qui peut constituer une question touchant véritablement à la compétence. Or, si on conserve cette catégorie sans la définir clairement ni préciser sa teneur, les cours de justice demeureront inutilement dans l'incertitude à ce sujet. Cependant, à ce stade, je n'exclus pas que, dans notre système fondé sur le principe du contradictoire, un avocat puisse convaincre une cour de l'existence et de l'application d'une question touchant véritablement à la compétence dans une affaire donnée. Concrètement, il convient d'indiquer aux tribunaux et aux plaideurs que, pour

occasion arise, to address in a future case whether such category is indeed helpful or necessary.

[43] With respect, Justice Cromwell's reasons fail to appreciate that an invitation to consider whether a true question of jurisdiction or *vires* exists in a future case does not raise the specter of the constitutional guarantee of judicial review being an "empty shell" (para. 103). All decisions of tribunals are subject to judicial review, including decisions dealing with the scope of their statutory mandate, even if this Court were to eliminate true questions of jurisdiction as a separate category attracting a correctness review. This change would simply end the need for debate around whether the issue in any given case can be properly characterized as jurisdictional. It would not preclude judicial review on a reasonableness standard when interpretation of the home statute of the tribunal is at issue. Nor would it eliminate correctness review of decisions of tribunals interpreting their home statute where the issue is a constitutional question, a question of law that is of central importance to the legal system as a whole and that is outside the adjudicator's expertise, or a question regarding the jurisdictional lines between competing specialized tribunals. See *Alliance*, at para. 26, citing *Dunsmuir*, at paras. 58-61, and *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at para. 35, *per* Fish J.

[44] *Dunsmuir* provided guidance as to how a standard of review might be determined summarily without requiring a full standard of review analysis. One method was to identify the nature of the question at issue, which would normally or, I say, presumptively determine the standard of

l'heure, les questions touchant véritablement à la compétence sont exceptionnelles et que, si l'occasion se présente, il conviendra ultérieurement de se demander si la catégorie est effectivement utile ou nécessaire.

[43] Soit dit en tout respect, dans ses motifs, le juge Cromwell ne tient pas compte du fait que l'invitation à se demander si l'existence d'une question touchant véritablement à la compétence sera reconnue dans une affaire ultérieure ne risque pas de rendre théorique la garantie constitutionnelle dont bénéficie le contrôle judiciaire (par. 103). Toute décision d'un tribunal administratif est susceptible de contrôle judiciaire, y compris celle portant sur l'étendue de son mandat légal, et elle le demeurerait même si notre Cour supprimait la catégorie des questions touchant véritablement à la compétence en tant que catégorie distincte appelant l'application de la norme de la décision correcte. Un tel changement mettrait simplement fin à la nécessité de débattre de la question de savoir si, dans un cas donné, on peut à juste titre qualifier le point soulevé de question touchant à la compétence. Il n'empêcherait pas le contrôle judiciaire selon la norme de la décision raisonnable lorsque le litige porte sur l'interprétation de sa loi constitutive par un tribunal administratif. Il ne soustrairait pas non plus à un contrôle au regard de la décision correcte l'interprétation de sa loi constitutive par le tribunal administratif lorsque le litige porte sur une question constitutionnelle, une question de droit d'une importance capitale pour le système juridique dans son ensemble et étrangère au domaine d'expertise du décideur, ou une question relative à la délimitation des compétences respectives de tribunaux spécialisés concurrents. Voir *Alliance*, par. 26, citant *Dunsmuir*, par. 58-61, et *Nor-Man Regional Health Authority Inc. c. Manitoba Association of Health Care Professionals*, 2011 CSC 59, [2011] 3 R.C.S. 616, par. 35, le juge Fish.

[44] L'arrêt *Dunsmuir* permet de déterminer sommairement la norme de contrôle applicable sans effectuer l'analyse exhaustive s'y rapportant. L'une des avenues possibles consiste à qualifier la question en litige, ce qui définit normalement (ou, de mon point de vue, on peut le présumer) la norme

review. Contrary to the view of my colleague in para. 97, I would not wish to retreat to the application of a full standard of review analysis where it can be determined summarily.

[45] At para. 89, Binnie J. suggests that "[i]f the issue before the reviewing court relates to the interpretation and application of a tribunal's 'home statute' and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness." With respect, I think Binnie J.'s isolating matters of general legal importance as a stand-alone basis for correctness review is not consistent with what this Court has said in *Dunsmuir*, *Alliance*, *Canada (Canadian Human Rights Commission)* and *Nor-Man*.

[46] At para. 22 of *Canada (Canadian Human Rights Commission)*, LeBel and Cromwell JJ. state:

> On the other hand, our Court has reaffirmed that 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, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. [Emphasis added.]

In other words, since *Dunsmuir*, for the correctness standard to apply, the question has to not only be one of central *importance to the legal system* but also outside the *adjudicator's specialized area* of expertise.

[47] At paras. 85-87, Binnie J. reintroduces from his concurring reasons in *Dunsmuir* the concept of variable degrees of deference. The majority reasons in *Dunsmuir* do not recognize variable degrees of deference within the reasonableness standard of

de contrôle correspondante. Contrairement à l'opinion de mon collègue au par. 97 de ses motifs, je n'entends pas revenir à l'analyse exhaustive lorsqu'une démarche sommaire permet de déterminer la norme de contrôle.

[45] Au paragraphe 89 de ses motifs, le juge Binnie laisse entendre que « [s]i la décision visée par le contrôle judiciaire a trait à l'interprétation et à l'application de la loi constitutive du tribunal administratif ou d'une loi connexe qui relève elle aussi essentiellement du mandat et de l'expertise du décideur, et qu'elle ne soulève pas de questions de droit générales, au-delà des aspects administratifs du régime législatif en cause, la juridiction de révision devrait se montrer déférente en appliquant la norme de la décision raisonnable. » En toute déférence, j'estime que le juge Binnie isole les questions de droit générales pour en faire une catégorie autonome commandant la décision correcte, ce qui est incompatible avec la conclusion que tire en fait notre Cour dans *Dunsmuir*, *Alliance*, *Canada (Commission canadienne des droits de la personne)* et *Nor-Man*.

[46] Voici ce qu'affirment les juges LeBel et Cromwell au par. 22 des motifs dans *Canada (Commission canadienne des droits de la personne)* :

> D'autre part, la Cour réaffirme que les questions de droit générales qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise de l'organisme juridictionnel demeurent assujetties à la norme de la décision correcte, et ce, dans un souci de cohérence de l'ordre juridique fondamental du pays. [Je souligne.]

En d'autres termes, depuis *Dunsmuir*, pour que s'applique la norme de la décision correcte, la question doit non seulement revêtir une *importance capitale pour le système juridique*, mais elle doit aussi être étrangère au *domaine d'expertise du décideur*.

[47] Aux paragraphes 85-87 de ses motifs, le juge Binnie reprend la notion de degrés variables de déférence tirée de ses motifs concordants dans *Dunsmuir*. Dans cet arrêt, les juges majoritaires ne reconnaissent pas de degrés variables

review and with respect neither do the reasons in *Canada (Canadian Human Rights Commission)*. Once it is determined that a review is to be conducted on a reasonableness standard, there is no second assessment of how intensely the review is to be conducted. The judicial review is simply concerned with the question at issue. A review of a question of statutory interpretation is different from a review of the exercise of discretion. Each will be governed by the context. But there is no determination of the intensity of the review with some reviews closer to a correctness review and others not.

de déférence lors d'un contrôle judiciaire selon la norme de la décision raisonnable et, soit dit en tout respect, la Cour ne le fait pas non plus dans *Canada (Commission canadienne des droits de la personne)*. Une fois décidé que le contrôle doit s'effectuer selon la norme de la décision raisonnable, nulle autre démarche n'a lieu pour arrêter de degré d'intensité de l'examen. Le contrôle judiciaire ne s'intéresse qu'à la question en litige. Le contrôle d'une interprétation législative diffère de celui d'un exercice du pouvoir discrétionnaire. Il est toujours régi par le contexte de l'affaire. Mais il n'y a pas de détermination du degré d'intensité de l'examen où, dans certains cas, le contrôle se rapproche de la révision selon la norme de la décision correcte, et dans d'autres, pas.

[48] The Commissioner's interpretation of s. 50(5) *PIPA* relates to the interpretation of his own statute, is within his expertise and does not raise issues of general legal importance or true jurisdiction. His decision that an inquiry does not automatically terminate as a result of his extending the 90-day period only after the expiry of that period is therefore reviewable on the reasonableness standard.

[48] Pour le commissaire, interpréter le par. 50(5) de la *PIPA* revient à interpréter sa loi constitutive, relève de son expertise et ne soulève pas de questions de droit générales, ni de questions touchant véritablement à la compétence. Le contrôle de sa décision portant que la prorogation du délai après les 90 jours impartis ne met pas automatiquement fin à l'enquête doit donc s'effectuer selon la norme de la raisonnabilité.

[49] The oral reasons given by the chambers judge did not involve an extended discussion of the appropriate standard of review. Marshall J. assumed that *Dunsmuir* stood for the principle that "the standard of correctness still applies to matters of jurisdiction and some other matters of law" (at para. 10), and then held that the timelines question was reviewable on a standard of correctness. As I have explained, the timelines question is neither a true jurisdictional question nor any other type of question of law that attracts a correctness standard.

[49] Dans ses motifs prononcés à l'audience, le juge en cabinet ne s'étend pas sur la norme de contrôle applicable. En effet, pour le juge Marshall, l'arrêt *Dunsmuir* établit le principe selon lequel [TRADUCTION] « la norme de la décision correcte continue de s'appliquer aux questions de compétence et à quelques autres questions de droit » (par. 10). Il statue que la décision relative à l'observation du délai est susceptible de contrôle suivant la norme de la décision correcte. Comme je l'explique précédemment, il ne s'agit ni d'une véritable question de compétence ni d'une autre question de droit commandant l'application de la norme de la décision correcte.

[50] For its part, the majority of the Alberta Court of Appeal appears to have held that, since the adjudicator provided no reasons for the decision, it was not necessary to determine the appropriate standard of review in the administrative law sense. The reasons of the majority suggest that, in these

[50] Les juges majoritaires de la Cour d'appel paraissent conclure que, la déléguée n'ayant pas motivé sa décision, il n'y a pas lieu de déterminer quelle norme de contrôle s'applique en droit administratif. Ils laissent entendre qu'en pareille situation, la Cour d'appel peut simplement avoir recours

circumstances, the Court of Appeal could simply apply the standard of appellate review for questions of law, i.e., correctness. With respect, this approach cannot be maintained. Had the issue been raised before the adjudicator, it would have been subject to review on a reasonableness standard. Where the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear because the issue was not raised before the tribunal.

[51] In the present case, the adjudicator, by completing the inquiry, implicitly decided that extending the 90-day period for completion of an inquiry after the expiry of that period did not result in the automatic termination of the inquiry. However, as the issue was never raised and the decision was merely implicit, the adjudicator provided no reasons for her decision. It is therefore necessary to address how a reviewing court is to apply the reasonableness standard in such circumstances.

[52] In *Dunsmuir*, the majority explained (at paras. 47-48):

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> . . . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 . . . .

Obviously, where the tribunal's decision is implicit, the reviewing court cannot refer to the tribunal's process of articulating reasons, nor to justification, transparency and intelligibility within the tribunal's decision-making process. The reviewing court cannot give respectful attention to the reasons offered because there are no reasons.

[53] However, the direction that a reviewing court should give respectful attention to the reasons

à la norme qui s'applique en appel à une question de droit, c.-à-d. la norme de la décision correcte. En toute déférence, je ne peux souscrire à cette approche. Si la question avait été soumise à la déléguée, il y aurait eu contrôle suivant la norme de la raisonnabilité. Lorsque la juridiction de révision conclut que le tribunal administratif a implicitement statué sur une question cruciale, ce dernier ne cesse pas d'avoir droit à la déférence parce que la question n'a pas été soulevée devant lui.

[51] En menant l'enquête à terme, la déléguée a implicitement statué que la prorogation du délai après les 90 jours impartis n'avait pas automatiquement mis fin à l'enquête. Toutefois, la question n'ayant jamais été soulevée et la décision étant seulement tacite, il n'y a pas de motifs à l'appui. Il faut donc se demander comment il convient d'appliquer la norme de la raisonnabilité dans ce cas.

[52] Dans l'arrêt *Dunsmuir*, les juges majoritaires donnent l'explication suivante (par. 47-48) :

> Le caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel, ainsi qu'à l'appartenance de la décision aux issues possibles acceptables pouvant se justifier au regard des faits et du droit.
>
> . . . Nous convenons avec David Dyzenhaus que la notion de [TRADUCTION] « retenue au sens de respect » n'exige pas de la cour de révision [TRADUCTION] « la soumission, mais une attention respectueuse aux motifs donnés ou qui pourraient être donnés à l'appui d'une décision » : « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 286 . . .

De toute évidence, lorsqu'une cour de justice contrôle la décision implicite d'un tribunal administratif, elle ne peut s'en remettre à la formulation des motifs, à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel. Elle ne peut accorder d'attention respectueuse aux motifs de la décision, car il n'y en a pas.

[53] Il convient toutefois qu'elle porte une attention respectueuse aux motifs « qui pourraient être

"which could be offered in support of a decision" is apposite when the decision concerns an issue that was not raised before the decision maker. In such circumstances, it may well be that the administrative decision maker did not provide reasons *because* the issue was not raised and it was not viewed as contentious. If there exists a reasonable basis upon which the decision maker could have decided as it did, the court must not interfere.

[54] I should not be taken here as suggesting that courts should not give due regard to the reasons provided by a tribunal when such reasons are available. The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56). Moreover, this direction should not "be taken as diluting the importance of giving proper reasons for an administrative decision" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63, *per* Binnie J.). On the contrary, deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided. Nonetheless, this is subject to a duty to provide reasons in the first place. When there is no duty to give reasons (e.g., *Canada (Attorney General) v. Mavi*, 2011 SCC 30, [2011] 2 S.C.R. 504) or when only limited reasons are required, it is entirely appropriate for courts to consider the reasons that could be offered for the decision when conducting a reasonableness review. The point is that parties cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons.

[55] In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its

donnés à l'appui d'une décision » lorsque celle-ci porte sur une question qui n'a pas été soulevée devant le décideur. Il est fort possible alors que le décideur administratif n'ait pas donné de motifs *parce que* la question n'avait pas été soulevée et qu'il ne la tenait pas pour litigieuse. Lorsque la décision pourrait avoir une assise raisonnable, la cour de justice doit y déférer.

[54] Je ne laisse cependant pas entendre qu'une cour de justice n'a pas à tenir dûment compte des motifs du tribunal administratif lorsque ceux-ci existent. L'invitation à porter une attention respectueuse aux motifs « qui pourraient être donnés à l'appui d'une décision » ne confère pas à la cour de justice le [TRADUCTION] « pouvoir absolu de reformuler la décision en substituant à l'analyse qu'elle juge déraisonnable sa propre justification du résultat » (*Petro-Canada c. Workers' Compensation Board (B.C.)*, 2009 BCCA 396, 276 B.C.A.C. 135, par. 53 et 56). Elle ne doit pas non plus « être interprétée comme atténuant l'importance de motiver adéquatement une décision administrative » (*Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 63, le juge Binnie). Au contraire, la déférence inhérente à la norme de la raisonnabilité se manifeste optimalement lorsqu'une décision administrative est justifiée de façon intelligible et transparente et que la juridiction de révision contrôle la décision à partir des motifs qui l'étayent. Il doit cependant exister au départ une obligation de motiver. Lorsque cette obligation n'existe pas (voir, p. ex., *Canada (Procureur général) c. Mavi*, 2011 CSC 30, [2011] 2 R.C.S. 504) ou que sa portée est limitée, il est tout à fait indiqué, dans l'appréciation de la raisonnabilité, d'examiner les motifs qui pourraient être donnés. Le point essentiel est que les parties ne sauraient, en omettant de soulever une question et en induisant ainsi le tribunal administratif en erreur quant à la nécessité de motiver sa décision, écarter la déférence due au tribunal administratif.

[55] Il peut arriver parfois qu'une juridiction de révision ne puisse manifester la déférence voulue sans offrir d'abord au décideur administratif la possibilité d'exposer les motifs de sa décision.

own reasons for the decision. In such a case, even though there is an implied decision, the court may see fit to remit the issue to the tribunal to allow the tribunal to provide reasons. However, remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place. Accordingly, remitting the issue to the tribunal is not necessarily the appropriate option available to a court when it is asked to review a tribunal's implied decision on an issue that was not raised before the tribunal. Indeed, 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. Instead, the decision should simply be upheld as reasonable. On the other hand, a reviewing court should show restraint before finding that an implied decision on an issue not raised before the tribunal was unreasonable. It will generally be inappropriate to find that there is no reasonable basis for the tribunal's decision without first giving the tribunal an opportunity to provide one. This, of course, assumes that the Court has thought it appropriate in the particular circumstances to allow the issue to be raised for the first time on judicial review. Care must be taken not to give parties an opportunity for a second hearing before a tribunal as a result of their failure to raise at the first hearing all of the issues they ought to have raised.

C. *Application of the Reasonableness Standard in This Case*

[56] In the present case, the Court need not look far to discover a reasonable basis for the adjudicator's decision. The Commissioner and his delegated adjudicators have considered the issue, as it relates to s. 50(5) *PIPA* and to the similarly worded s. 69(6) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("*FOIPA*"), on numerous occasions and have provided a consistent analysis. The existence of other decisions of a tribunal on the same issue can be of assistance to a reviewing court in determining whether a reasonable basis for the tribunal's decision exists. In this case, a review of the reasons of the Commissioner

Alors, même s'il y a décision implicite, il est possible qu'elle juge opportun de renvoyer la décision au tribunal administratif pour qu'il la motive. Le renvoi peut toutefois faire échec à la volonté de mettre sur pied un processus décisionnel à la fois rapide et économique qui préside souvent au départ à la création d'un tribunal administratif spécialisé. Ce n'est donc pas nécessairement la solution à retenir à l'issue du contrôle judiciaire de la décision implicite d'un décideur administratif sur un point qui n'a pas été soulevé devant lui. En effet, lorsque la décision a un fondement raisonnable manifeste, il n'est généralement pas nécessaire de renvoyer l'affaire au tribunal administratif. La juridiction de révision devrait simplement la déclarer raisonnable et la confirmer. Par contre, elle devrait user de retenue avant de conclure au caractère déraisonnable d'une décision implicite rendue sur un point non soulevé devant le tribunal administratif. Il ne convient généralement pas qu'elle conclue à l'absence d'assise raisonnable sans offrir d'abord au tribunal administratif la possibilité d'en fournir une. Il faut évidemment supposer que, dans la situation particulière considérée, elle a jugé opportun de permettre que la question soit soulevée pour la première fois lors du contrôle judiciaire. Il faut se garder de donner aux parties la possibilité d'être entendues une autre fois par le tribunal administratif parce qu'elles ont omis de faire état à la première audience de toutes les questions à débattre.

C. *Application en l'espèce de la norme de la raisonnabilité*

[56] Dans la présente affaire, point n'est besoin de chercher loin pour trouver un fondement raisonnable à la décision de la déléguée. La question touchant à l'application du par. 50(5) de la *PIPA* ou du par. 69(6) de la *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, ch. F-25 (« *FOIPA* »), dont les libellés sont semblables, a été examinée à maintes reprises par le commissaire et ses délégués, et leur analyse se révèle constante. La juridiction de révision peut s'en remettre aux autres décisions que le tribunal administratif a rendues sur le même point pour se prononcer sur l'existence d'un fondement raisonnable. En l'occurrence,

and the adjudicators in other cases allows this Court to determine without difficulty that a reasonable basis exists for the adjudicator's implied decision in this case. Indeed, in the circumstances here, it is safe to assume that the numerous and consistent reasons in these decisions would have been the reasons of the adjudicator in this case.

[57] In *Order P2008-005; College of Alberta Psychologists*, December 17, 2008, O.I.P.C., the Commissioner's delegated adjudicator considered the issue of whether there could be an extension after the expiry of the 90-day period under s. 50(5) *PIPA*. Adopting the Commissioner's analysis of s. 69(6) *FOIPA* in *Order F2006-031; Edmonton Police Service*, September 22, 2008, O.I.P.C., as applicable to s. 50(5) *PIPA*, she decided that "time extensions under section 50(5) can be done after expiry of the 90-day period" (para. 27). She looked at the text of s. 50(5) *PIPA* and reasoned that "[t]he placing of the phrase 'within 90 days' is such that this modifier refers only to the time within which the inquiry must be completed, rather than to a time within which the extension must be done" (para. 27). She went on to explain that, if "there is ambiguity, a purposive interpretation of section 50, in the context of the entire Act, leads to the conclusion that the purpose of the Act would be best served if the provision were interpreted as permitting an extension after 90 days" (para. 27).

[58] Finally, her interpretation of s. 50(5) was informed by practical realities of procedures under *PIPA*, which could make it impossible for adequate notice, including an anticipated date of completion, to be provided before the expiry of 90 days. In the case before her,

> at the time the 90 days expired, the interviews with the parties had not yet been completed. Indeed, because the mediator was not appointed until after further information had been sought and obtained from the Applicant, the mediation process was only commencing. At that time, it was impossible to know whether there would be a need for an inquiry. It makes no sense to speak of anticipating a date for completion of an inquiry until the inquiry itself can be anticipated in the sense of

l'examen des motifs du commissaire ou de ses délégués dans d'autres affaires permet de déterminer sans peine que la décision implicite de la déléguée a une assise raisonnable. On peut certes présumer que ces motifs abondants et constants auraient été repris par la déléguée dans la présente affaire.

[57] Dans l'ordonnance *P2008-005; College of Alberta Psychologists*, 17 décembre 2008, O.I.P.C., la déléguée du commissaire examine la question de la prorogation du délai après les 90 jours impartis sous le régime du par. 50(5) de la *PIPA*. Estimant que l'analyse du commissaire se rapportant à l'application du par. 69(6) de la *FOIPA* dans l'ordonnance *F2006-031; Edmonton Police Service*, 22 septembre 2008, O.I.P.C., vaut pour le par. 50(5) de la *PIPA*, elle conclut que [TRADUCTION] « la prorogation du délai suivant le par. 50(5) peut intervenir après l'expiration des 90 jours » (par. 27). Après examen de la disposition, elle opine que « [v]u leur emplacement dans le libellé, les mots "dans les 90 jours" ne définissent que le délai dans lequel l'enquête doit être menée à terme, et non celui dans lequel la prorogation doit intervenir » (par. 27). Elle ajoute que dans la mesure où « il y a ambiguïté, l'interprétation téléologique de l'art. 50 au regard de l'ensemble de la Loi mène à la conclusion que l'interprétation autorisant la prorogation du délai après les 90 jours impartis est davantage compatible avec l'objet de la Loi » que celle qui l'interdit (par. 27).

[58] Enfin, elle interprète le par. 50(5) en fonction du déroulement réel de la procédure prévue par la *PIPA*, lequel pourrait faire en sorte que l'avis requis, y compris la communication de la date prévue d'achèvement, ne puisse être dûment donné avant l'expiration du délai de 90 jours. Elle dit ce qui suit au sujet de l'affaire dont elle est saisie :

> [TRADUCTION] . . . à l'expiration du délai de 90 jours, les entretiens avec les parties n'avaient pas encore pris fin. En fait, le processus de médiation venait à peine de commencer, car le médiateur n'avait été nommé qu'après l'obtention d'un complément d'information du demandeur. On ne pouvait alors savoir si une enquête serait nécessaire. On ne saurait prévoir la date à laquelle prendra fin une enquête alors qu'on ne sait même pas s'il y en aura une. [. . .] Ce n'est que lorsqu'il est apparu

being expected. . . . It was only after it became clear that the mediation had failed and the matter would go to inquiry that it became necessary to undertake the next phase. [para. 36]

[59] In my view, it was reasonable to interpret s. 50(5) *PIPA* in a manner consistent with s. 69(6) *FOIPA*. Both provisions govern inquiries conducted by the Commissioner. The two provisions are identically structured and use almost identical language. For ease of reference, I repeat that s. 50(5) *PIPA* then provided:

50 . . .

(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

[60] Section 69(6) *FOIPA* provides:

69 . . .

(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner

(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and

(b) provides an anticipated date for the completion of the review.

[61] Given that the reasons in *Order P2008-005* adopted the Commissioner's reasoning in *Order F2006-031*, the analysis in *Order F2006-031* can provide further assistance in determining the existence of a reasonable basis for the adjudicator's implied decision in this case. Indeed, the

clairement que la médiation avait échoué et que la tenue d'une enquête s'imposait qu'il a fallu passer à l'étape suivante. [par. 36]

[59] Selon moi, il était raisonnable que l'interprétation du par. 50(5) de la *PIPA* s'inspire de celle du par. 69(6) de la *FOIPA*. En effet, les deux dispositions s'appliquent aux enquêtes du commissaire, elles sont conçues de la même manière et leurs libellés sont presque identiques. Afin de faciliter sa consultation, je reproduis à nouveau le texte du par. 50(5) de la *PIPA* dans la version qui s'appliquait au moment considéré :

[TRADUCTION] **50** . . .

(5) L'enquête qui fait suite à une demande écrite visée à l'article 47 prend fin dans les 90 jours qui suivent la réception de celle-ci, sauf :

a) lorsque le commissaire informe l'auteur de la demande, l'organisme visé et toute autre personne ayant reçu copie de la demande qu'il proroge ce délai,

b) et qu'il précise la date prévue d'achèvement de l'enquête.

[60] Le paragraphe 69(6) de la *FOIPA* prévoit ce qui suit :

[TRADUCTION] **69** . . .

(6) L'enquête entreprise en application du présent article prend fin dans les 90 jours suivant la réception de la demande d'enquête, sauf :

a) lorsque le commissaire informe l'auteur de la demande d'enquête, la direction de l'organisme public visé et toute autre personne ayant reçu copie de la demande d'enquête qu'il proroge ce délai,

b) et qu'il précise la date prévue d'achèvement de l'enquête.

[61] Comme les motifs de l'ordonnance *P2008-005* reprennent le raisonnement du commissaire dans l'ordonnance *F2006-031*, l'analyse qui figure dans cette dernière ordonnance peut aussi servir à déterminer si la décision implicite de la déléguée en l'espèce a un fondement raisonnable. D'ailleurs,

Commissioner and his delegated adjudicators have repeatedly relied upon the detailed reasoning in *Order F2006-031* when deciding whether there can be an extension after 90 days under s. 69(6) *FOIPA* (see *Order F2008-013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); *Order F2007-014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); *Order F2008-003; Edmonton Police Service*, December 12, 2008, O.I.P.C.; *Order F2008-016; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 82 (QL); *Order F2008-017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 79 (QL); *Order F2008-005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); *Order F2008-018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); *Order F2008-027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); *Order F2007-031; Grande Yellowhead Regional Division No. 35*, November 27, 2008, O.I.P.C.).

[62] In *Order F2006-031*, the Commissioner considered the text of the provision, finding that

> [s]ection 69(6) does not expressly state whether I must notify the parties that I am extending the 90 days and provide an anticipated date for completion of the review before the 90-day period expires. Placing the phrase "within 90 days" at the beginning of the provision makes it unclear whether the phrase is meant to refer to (i) the duty to complete the inquiry, as set out in the beginning of the provision, or (ii) the power in section 69(6)(a) and section 69(6)(b) to extend the 90-day period.
>
> In my view, the placement of the phrase "within 90 days" indicates that the 90 days refers only to my duty to complete the inquiry, and does not refer to my power to extend the 90-day period in section 69(6)(a) and section 69(6)(b). [paras. 53-54]

[63] In my view, this is a reasonable interpretation of the text of s. 69(6) *FOIPA* and of s. 50(5) *PIPA*. The placement of "within 90 days" suggests that it may refer to the completion of the inquiry and not to providing an extension.

[64] The ATA submits that interpreting s. 50(5) *PIPA* to allow an extension after the expiry of 90

le commissaire et ses délégués ont souvent fait fond sur ces motifs détaillés lorsqu'ils ont eu à statuer sur la prorogation du délai de 90 jours prévu au par. 69(6) de la *FOIPA* (voir l'ordonnance *F2008-013; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 71 (QL); l'ordonnance *F2007-014; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 72 (QL); l'ordonnance *F2008-003; Edmonton Police Service*, 12 décembre 2008, O.I.P.C.; l'ordonnance *F2008-016; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 82 (QL); l'ordonnance *F2008-017; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 79 (QL); l'ordonnance *F2008-005; Edmonton (Police Service) (Re)*, [2008] A.I.P.C.D. No. 81 (QL); l'ordonnance *F2008-018; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 3 (QL); l'ordonnance *F2008-027; Edmonton (Police Service) (Re)*, [2009] A.I.P.C.D. No. 20 (QL); et l'ordonnance *F2007-031; Grande Yellowhead Regional Division No. 35*, 27 novembre 2008, O.I.P.C.).

[62] Dans l'ordonnance *F2006-031*, le commissaire conclut ce qui suit après examen du texte de la disposition :

> [TRADUCTION] Le paragraphe 69(6) ne précise pas si je dois informer ou non les parties de la prorogation du délai de 90 jours et de la date prévue d'achèvement de l'enquête avant l'expiration du délai de 90 jours. Comme les mots « dans les 90 jours » figurent dans la première partie de la disposition, il est difficile de déterminer s'ils visent (i) l'obligation de mener à terme l'enquête énoncée au début de l'article ou (ii) le pouvoir conféré aux al. 69(6)a) et b) de proroger le délai de 90 jours.
>
> Selon moi, l'emplacement des mots « dans les 90 jours » fait en sorte que le délai vise uniquement l'obligation de mener à terme l'enquête et non le pouvoir de le proroger conféré aux al. 69(6)a) et b). [par. 53-54]

[63] Cette interprétation du par. 69(6) de la *FOIPA* et du par. 50(5) de la *PIPA* me paraît raisonnable. La position des mots [TRADUCTION] « dans les 90 jours » donne à penser qu'ils peuvent se rapporter à l'achèvement de l'enquête, mais non à la prorogation du délai.

[64] L'ATA soutient qu'interpréter le par. 50(5) de la *PIPA* de sorte qu'il permette de proroger le

days would render the requirements of notice nugatory (Factum, at para. 75). I do not agree. The mere fact that an extension and an anticipated date for completion is given after the expiry of 90 days does not eliminate its value in keeping the parties informed of the progression of the process. As the Commissioner noted, in most cases that progress to an inquiry, the parties will be involved in the process and will know that it will not be completed within 90 days (*Order F2006-031*, at para. 58). Even if provided after 90 days, the notice of extension, which includes an anticipated date for completion, still provides information to the parties about how the matter is progressing and when the parties can expect it to be completed.

[65] The ATA argues that the principle of statutory interpretation, *expressio unius est exclusio alterius*, leads to the conclusion that an extension must be made before the expiry of 90 days: when the legislature intended to allow an extension to be made either before or after the expiry of a time period; it said so expressly. The now repealed s. 54(5) *PIPA* authorized a court to, "on application made either before or after the expiry of the period referred to in subsection (3) [i.e., 45 days], extend that period if the court considers it appropriate to do so". According to the ATA, absence of such language in s. 50(5) *PIPA* necessarily implies that the legislature did not intend for the Commissioner to be able to extend the period for completion of an inquiry "before or after" the 90-day period has expired (Factum, at para. 76).

[66] This argument, while having some merit, is far from determinative. As Justice Berger pointed out, there are also many statutory provisions in Alberta that expressly restrict extensions to those granted before expiry of a time period (at para. 57, citing *Credit Union Act*, R.S.A. 2000, c. C-32, s. 13; *Expropriation Act*, R.S.A. 2000, c. E-13, s. 23, *Garage Keepers' Lien Act*, R.S.A. 2000, c. G-2, s. 6(3); *Insurance Act*, R.S.A. 2000, c. I-3, s. 796; *Land Titles Act*, R.S.A. 2000, c. L-4, s. 140; *Legal Profession Act*, R.S.A. 2000, c. L-8, s. 80(3); and *Loan and Trust Corporations Act*, R.S.A. 2000, c. L-20, s. 257). I agree with Justice Berger that,

délai après les 90 jours impartis neutralise l'obligation d'informer les parties (mémoire, par. 75). Je ne peux faire droit à cette prétention. Le seul fait que le délai soit prorogé et la date prévue d'achèvement précisée après l'expiration du délai de 90 jours ne rend pas l'avis inutile aux fins de tenir les parties informées de l'évolution de l'instance. Comme le signale le commissaire, dans la plupart des cas qui donnent lieu à une enquête, les parties prennent part au processus et savent que celui-ci ne prendra pas fin dans les 90 jours (ordonnance *F2006-031*, par. 58). Même s'il est donné passé le délai de 90 jours, l'avis de prorogation, qui précise aussi la date prévue d'achèvement, informe toujours les parties du cheminement du dossier et du moment auquel l'enquête devrait prendre fin.

[65] Selon l'ATA, la règle d'interprétation législative *expressio unius est exclusio alterius* mène à la conclusion que la prorogation doit intervenir avant l'expiration des 90 jours, car lorsque le législateur veut permettre la prorogation avant ou après l'expiration d'un délai, il le dit clairement. En effet, avant son abrogation, le par. 54(5) de la *PIPA* disposait qu'une cour de justice [TRADUCTION] « qui le juge indiqué peut, sur demande présentée avant ou après l'expiration du délai prévu au paragraphe (3) [c.-à-d. 45 jours], proroger ce délai ». Il faudrait donc nécessairement conclure de l'absence de ces mots au par. 50(5) de la *PIPA* que le législateur n'a pas voulu que le commissaire puisse proroger le délai imparti pour mener à terme l'enquête [TRADUCTION] « avant ou après » l'expiration des 90 jours prévus (mémoire, par. 76).

[66] Bien que le raisonnement se tienne, il est loin d'être concluant. Comme le souligne le juge Berger, de nombreuses dispositions albertaines ne permettent expressément la prorogation d'un délai qu'avant son expiration (par. 57, citant les lois suivantes : *Credit Union Act*, R.S.A. 2000, ch. C-32, art. 13; *Expropriation Act*, R.S.A. 2000, ch. E-13, art. 23; *Garage Keepers' Lien Act*, R.S.A. 2000, ch. G-2, par. 6(3); *Insurance Act*, R.S.A. 2000, ch. I-3, art. 796; *Land Titles Act*, R.S.A. 2000, ch. L-4, art. 140; *Legal Profession Act*, R.S.A. 2000, ch. L-8, par. 80(3); et *Loan and Trust Corporations Act*, R.S.A. 2000, ch. L-20, art. 257). Je conviens avec

"when . . . the provision is silent as to when an extension of time can be granted, there is no presumption that silence means that the extension must be granted before expiry" (para. 58). I am therefore unable to conclude that the *expressio unius* principle renders the adjudicator's interpretation unreasonable.

[67] The Commissioner developed his analysis by relying on established principles of statutory interpretation to resolve any potential ambiguity through a purposive interpretation of the provision. He explained:

> To the extent that there is any ambiguity, by interpreting section 69(6) purposively as I will do below, the provision allows me to extend the time after the 90-day period expires.
>
> In Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, (Markham, Ontario: Butterworths Canada Ltd., 2002), the author quotes Duff C.J. in *McBratney v. McBratney* (1919), 59 S.C.R. 550. Duff, C.J. set out the principles that govern judicial reliance on purpose in interpretation, in order to resolve ambiguity. The first of these principles set out by Ruth Sullivan at page 219 is:
>
> > If the ordinary meaning of legislation is ambiguous, the interpretation that best accords with the purpose of the legislation should be adopted. [paras. 54-55]

[68] Referring to s. 2(b) *FOIPA*, the Commissioner affirmed that the purpose of *FOIPA* was "to provide a mechanism for controlling the collection, use and disclosure of personal information by public bodies", which *FOIPA* achieves "by giving [the Commissioner] the power to review the collection, use and disclosure of personal information" (para. 57). In his view, the specific purpose of s. 69(6) *FOIPA* was "to ensure that such reviews are conducted in a timely way, and also that parties are kept aware of the timing of the process so they may participate and plan their affairs accordingly" (para. 57). The purpose of *FOIPA* is uncontroversial, as it is expressly articulated at s. 2(b). I consider the Commissioner's view of the purpose of s. 69(6) *FOIPA* to be reasonable. It is similarly reasonable to determine that the purpose of s. 50(5) *PIPA* is to ensure timely completion of

le juge Berger que [TRADUCTION] « lorsque [. . .] le texte de loi ne précise pas la période pendant laquelle un délai peut être prorogé, nulle présomption ne veut que la prorogation doive intervenir avant l'expiration du délai » (par. 58). Je ne puis donc conclure que l'interprétation de la déléguée est déraisonnable au regard de la maxime *expressio unius*.

[67] L'analyse du commissaire s'appuie sur des principes d'interprétation législative reconnus et vise à dissiper toute ambiguïté éventuelle au moyen d'une démarche téléologique. Il explique :

> [TRADUCTION] Dans la mesure où il y a ambiguïté, l'interprétation téléologique du par. 69(6) à laquelle je me livre ci-après m'autorise à proroger le délai après les 90 jours impartis.
>
> Dans *Sullivan and Driedger on the Construction of Statutes*, Ruth Sullivan, 4e éd. (Markham, Ontario : Butterworths Canada Ltd., 2002), l'auteure cite l'arrêt *McBratney c. McBratney* (1919), 59 R.C.S. 550, dans lequel le juge en chef Duff expose les principes suivant lesquels, pour résoudre une ambiguïté, il peut être tenu compte de l'objet d'une loi pour l'interpréter. Le premier de ces principes que cite l'auteur à la p. 219 est le suivant :
>
> > Si le sens ordinaire de la loi est ambigu, il convient d'opter pour l'interprétation qui correspond le mieux à l'objet de la loi. [par. 54-55]

[68] Renvoyant à son al. 2b), le commissaire affirme que la *FOIPA* a pour objet de [TRADUCTION] « contrôler la collecte, l'utilisation et la communication de renseignements personnels par un organisme public », et ce, « par l'octroi [au commissaire] du pouvoir d'enquêter sur la collecte, l'utilisation et la communication de renseignements personnels » (par. 57). Selon lui, le par. 69(6) de la *FOIPA* vise précisément « à faire en sorte que le processus soit mené à terme avec célérité et que les parties soient tenues informées de son déroulement afin qu'elles puissent y participer et prendre des arrangements en conséquence » (par. 57). L'objet de la *FOIPA* étant expressément énoncé à l'al. 2b), il ne prête pas à controverse. J'estime que l'opinion du commissaire quant à l'objet du par. 69(6) de la *FOIPA* est raisonnable. Il me paraît également raisonnable de conclure que le par. 50(5) de la *PIPA* vise à faire en

reviews and to keep the parties informed about the process.

[69] According to the Commissioner, "[i]n most cases that advance to inquiry . . . at the time the 90-day period expires, the inquiry process has been fully engaged and is progressing with the participation of the parties. Because they are involved, the parties are fully aware that the process will continue beyond 90 days" (para. 58). For this reason, the Commissioner did "not believe that the goal of a timely resolution of issues, and of keeping the parties informed, would be advanced by requiring [him] to formally communicate to the parties within 90 days something they already know: that the matter will not be completed within 90 days" (para. 58).

[70] The Commissioner then addressed the practical difficulty of satisfying the s. 69(6)(b) *FOIPA* requirement to provide an anticipated date of completion with the extension if the extension must necessarily be made within 90 days. He pointed out that s. 68 *FOIPA* empowers him to authorize a mediation upon receipt of a request for review. The mediation itself could take up some or all of the 90 days. If the mediation is unsuccessful or mediation is not authorized, the matter would move to inquiry. An inquiry must accord the parties procedural fairness, which can mean accommodating requests for adjournments, to adduce further evidence and to adjourn to review and make submissions on the new evidence. In short, the Commissioner explained that "the parties, as much as [he], have carriage of the matter" and that "[t]he time within which the matter will be completed is largely determined by their actions, schedules and the issues they raise" (para. 62). For this reason, it may not be feasible for the Commissioner to provide an anticipated date for completion within 90 days and the parties are well aware of how the matter is progressing in any event (paras. 59-62).

sorte que l'enquête soit menée à terme avec célérité et que les parties soient tenues au courant de l'évolution du processus.

[69] Selon le commissaire, [TRADUCTION] « [d]ans la plupart des cas qui atteignent l'étape de l'enquête [. . .], lorsque le délai de 90 jours expire, le processus est engagé et suit son cours avec la participation des parties. Parce qu'elles y participent, les parties savent parfaitement qu'il durera plus de 90 jours » (par. 58). C'est pourquoi le commissaire « ne croi[t] pas qu'exiger de [lui] qu'[il] communique officiellement avec les parties avant l'expiration du délai de 90 jours pour les informer de ce qu'elles savent déjà, à savoir que l'enquête ne sera pas menée à terme dans les 90 jours, favorise la réalisation de l'objectif qui consiste à faire preuve de célérité dans le règlement d'une affaire et à tenir les parties informées » (par. 58).

[70] Le commissaire fait ensuite état de la difficulté de respecter dans les faits l'exigence, prévue à l'al. 69(6)b) de la *FOIPA*, d'informer les parties à la fois de la date prévue d'achèvement et de la prorogation du délai si la prorogation doit nécessairement avoir lieu avant l'expiration des 90 jours. Il signale que l'art. 68 de la *FOIPA* l'habilite à autoriser la médiation lorsqu'il reçoit une demande d'enquête. Or, pendant cette médiation, une bonne partie, voire la totalité, du délai de 90 jours peut s'écouler. Lorsque la médiation n'est pas autorisée ou qu'elle échoue, on passe alors à l'étape de l'enquête, laquelle est assujettie aux règles d'équité procédurale. Dès lors, il faut faire droit aux demandes d'ajournement pour présentation d'un complément de preuve ou examen d'un nouvel élément de preuve et formulation d'observations à son sujet. Bref, le commissaire explique que [TRADUCTION] « le déroulement de l'affaire dépend tout autant des parties que de [lui] » et que « [l]a durée du processus tient en grande partie à leurs actes, à leur emploi du temps et aux questions qu'elles soulèvent » (par. 62). Voilà pourquoi il peut ne pas être en mesure de communiquer la date prévue d'achèvement avant l'expiration du délai de 90 jours, sans compter que les parties sont de toute manière parfaitement au courant de l'évolution du dossier (par. 59-62).

[71] The Commissioner therefore concluded that

> neither the purpose of the [*FOIPA*] in general nor section 69(6) in particular is advanced by interpreting the provision as creating an absolute "deadline", beyond which a proceeding that is underway cannot continue unless I have, before the 90 days expires, expressly stated that the matter will continue beyond 90 days, and projected a new final date for completion. [para. 63]

[72] In my view, the Commissioner's reasoning in support of his conclusion that extending the period for completion of an inquiry after the expiry of 90 days does not result in the automatic termination of the inquiry under s. 69(6) *FOIPA* satisfies the values of justification, transparency and intelligibility in administrative decision making. The decision is carefully reasoned, systematically addressing: (i) the text of the provision, (ii) the purposes of *FOIPA* in general and of s. 69(6), in particular, and (iii) the practical realities of conducting inquiries drawn from the Commissioner's experience administering *FOIPA*. It was reasonable for the Commissioner's delegated adjudicator, in *Order P2008-005*, to adopt this detailed reasoning and apply it to s. 50(5) *PIPA*. I therefore have no difficulty concluding that there exists a reasonable basis for the adjudicator's implied decision in this case that extending the 90-day period after the expiry of that period did not terminate the process.

D. *The Mandatory/Directory Distinction Does Not Arise in This Case*

[73] The parties, the trial judge and the Court of Appeal all approached the timelines issue as though it engaged the distinction between mandatory and directory legislative provisions. R. W. Macaulay and J. L. H. Sprague succinctly explain the mandatory/directory distinction as follows:

> Where a provision is imperative it must be complied with. The consequence of failing to comply with an imperative provision will vary depending on whether the imperative direction is mandatory or directory. Failing to comply with a mandatory direction will

[71] La commissaire conclut donc :

> [TRADUCTION] . . . il ne sert ni l'objet de la [*FOIPA*] en général ni l'objet de son par. 69(6) en particulier d'interpréter la disposition de manière qu'elle établisse une « date limite » ferme faisant obstacle à la poursuite d'une affaire en cours sauf si, avant l'expiration du délai de 90 jours, j'ai expressément déclaré que l'enquête durerait plus longtemps et arrêté une nouvelle date prévue d'achèvement. [par. 63]

[72] Je suis d'avis que le raisonnement à l'issue duquel le commissaire conclut que la prorogation du délai après les 90 jours impartis pour mener à terme l'enquête ne met pas automatiquement fin à celle-ci suivant le par. 69(6) de la *FOIPA* satisfait aux exigences de justification, de transparence et d'intelligibilité du processus décisionnel administratif. La décision est soigneusement motivée et aborde successivement (i) le texte de la disposition, (ii) l'objet de la *FOIPA* en général et du par. 69(6) en particulier et (iii) l'expérience du commissaire au chapitre de la tenue d'enquêtes et de l'application de la *FOIPA*. Dans l'ordonnance *P2008-005*, la déléguée du commissaire pouvait raisonnablement reprendre ces motifs détaillés et les appliquer au par. 50(5) de la *PIPA*. Il m'est donc aisé de conclure qu'il y a en l'espèce un fondement raisonnable à la décision implicite de la déléguée suivant laquelle la prorogation du délai passé les 90 jours impartis n'a pas mis fin au processus.

D. *Absence d'application en l'espèce de la distinction entre une disposition impérative et une disposition directive*

[73] Les parties, le juge en cabinet et la Cour d'appel supposent tous que la question de l'observation du délai fait intervenir la distinction entre les dispositions législatives impératives et celles qui sont directives. R. W. Macaulay et J. L. H. Sprague expliquent succinctement cette distinction :

> [TRADUCTION] La disposition de nature obligatoire commande l'observation. Son non-respect a des conséquences différentes selon que la prescription est impérative ou directive. L'inobservation d'une prescription impérative emporte la nullité de toute mesure

render any subsequent proceedings void while failing to comply with [a] directory command will not result in such invalidation (although the person to whom the command was directed will not be relieved from the duty of complying with it . . . .

(*Practice and Procedure Before Administrative Tribunals* (loose-leaf), vol. 3, pp. 22-126 to 22-126.1)

[74] This Court has previously expressed doubt as to the usefulness of the mandatory/directory distinction. In *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, Iacobucci J. affirmed that

[t]he "mandatory" and "directory" labels themselves offer no magical assistance as one defines the nature of a statutory direction. Rather, the inquiry itself is blatantly result-oriented. . . . Thus, the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from *Reference re Manitoba Language Rights*, [[1985] 1 S.C.R. 721], the principle is "vague and expedient" (p. 742). This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. [p. 123]

[75] In any event, the mandatory/directory distinction does not arise in this case. This distinction is concerned with the consequences of *failing to comply* with a legislative direction. Here, we are not dealing with the consequences of the Commissioner's failure to comply with s. 50(5) *PIPA*. Instead, we are concerned with interpreting the statute to determine when s. 50(5) *PIPA* requires the Commissioner to extend the period for completion of an inquiry. The issue was not "what is the consequence of non-compliance with the provision?", but "did the adjudicator comply with the provision?".

[76] Therefore, I do not agree with Marshall J. that the finding in *Kellogg Brown and Root Canada* that the requirements of s. 50(5) *PIPA* are mandatory is "entirely applicable here" (para. 12). Rather, I would adopt the adjudicator's analysis in *Order P2008-005* in which she explains that *Kellogg*

subséquente, tandis que celle d'une prescription directive ne donne pas lieu à une telle invalidation (mais la personne visée par la prescription demeure tenue de s'y conformer . . .

(*Practice and Procedure Before Administrative Tribunals* (feuilles mobiles), vol. 3, p. 22-126 à 22-126.1)

[74] Notre Cour a déjà mis en doute l'utilité de cette distinction. Dans *Colombie-Britannique (Procureur général) c. Canada (Procureur général)*, [1994] 2 R.C.S. 41, le juge Iacobucci affirme :

Les étiquettes « impérative » et « directive » ne sont elles-mêmes d'aucun secours magique pour définir la nature d'une fonction prévue par la loi. L'examen lui-même est plutôt incontestablement axé sur le résultat. [. . .] Ainsi, l'application de la distinction entre ce qui est impératif et ce qui est directif est, la plupart du temps, fondée sur une question de fin et non de moyens. En ce sens, pour citer de nouveau le *Renvoi relatif aux droits linguistiques au Manitoba*, [[1985] 1 R.C.S. 721], le principe est « vague » et « utilisé comme expédient » (p. 742). Cela signifie que le tribunal appelé à décider ce qui est impératif ou directif ne recourt à aucun outil spécial pour prendre sa décision. La décision repose sur le processus habituel d'interprétation législative. [p. 123]

[75] Quoi qu'il en soit, cette distinction ne joue pas en l'espèce, car elle s'intéresse aux conséquences du *non-respect* d'une prescription du législateur, alors que nous ne sommes pas aux prises en l'espèce avec les conséquences de l'omission du commissaire de se conformer au par. 50(5) de la *PIPA*. Il nous faut plutôt interpréter la loi pour déterminer à quel moment le délai peut être prorogé en application de ce paragraphe. La question n'est pas celle de savoir quelle est la conséquence du non-respect de la disposition, mais bien si la déléguée s'est conformée à la disposition.

[76] Je ne saurais donc convenir avec le juge Marshall que la conclusion, tirée dans *Kellogg Brown and Root Canada*, selon laquelle les exigences du par. 50(5) de la *PIPA* sont impératives est [TRADUCTION] « entièrement applicable en l'espèce » (par. 12). Je me range plutôt à l'avis de la

Brown and Root Canada has no application to a case such as this one where the Commissioner provides an extension after 90 days. The decision in that case was premised on the fact that *no time extension was ever* issued (at para. 27, citing para. 14 of *Kellogg Brown and Root Canada*). For that reason, the consequences of non-compliance with s. 50(5) *PIPA* arose in *Kellogg Brown and Root Canada*, but they do not arise here. As the matter is not before this Court, it is not necessary to comment on the conclusion in *Kellogg Brown and Root Canada* that s. 50(5) *PIPA* imposes a mandatory direction.

V. Conclusion

[77] I would allow the appeal with costs in this Court and in the Court of Appeal and reinstate the adjudicator's decision on the timelines issue. In accordance with the recommendation of the Commissioner, the matter is remitted to the chambers judge to consider the issues not previously dealt with and resolved in the judicial review.

The reasons of Binnie and Deschamps JJ. were delivered by

[78] BINNIE J. — My colleagues Rothstein J. and Cromwell J. have staked out compelling positions on both sides of the argument about the role, function and even the existence of "true questions of jurisdiction or *vires*". While I agree with much that is said by both colleagues, I find myself occupying a middle ground which, given the importance of the issue, I believe is worth defending. I therefore append these brief reasons concurring in the result.

[79] I agree with Cromwell J. that the concept of jurisdiction is fundamental to judicial review of administrative tribunals and, more generally, to the rule of law. Administrative tribunals operate within a legal framework which is both dictated by s. 96 of the *Constitution Act, 1867*, and limited by their

déléguée dans l'ordonnance *P2008-005*, à savoir que *Kellogg Brown and Root Canada* ne s'applique pas lorsque, comme en l'espèce, le commissaire proroge le délai passé les 90 jours impartis. En effet, dans cette affaire, la décision tenait à ce qu'il n'y avait *jamais eu de prorogation* (par. 27, citant *Kellogg Brown and Root Canada*, par. 14). C'est pourquoi les conséquences découlant de l'inobservation du par. 50(5) de la *PIPA* jouent dans *Kellogg Brown and Root Canada*, mais pas en l'espèce. La question n'étant pas soulevée devant elle, notre Cour n'a pas à se prononcer sur la conclusion tirée dans *Kellogg Brown and Root Canada*, à savoir que le par. 50(5) constitue une prescription impérative.

V. Conclusion

[77] Je suis d'avis d'accueillir le pourvoi avec dépens devant notre Cour et devant la Cour d'appel et de rétablir la décision de la déléguée concernant le délai. Conformément à la recommandation du commissaire, l'affaire est renvoyée au juge en cabinet pour qu'il statue sur les questions qui n'ont pas déjà été examinées et réglées lors du contrôle judiciaire.

Version française des motifs des juges Binnie et Deschamps rendus par

[78] LE JUGE BINNIE — Mes collègues les juges Rothstein et Cromwell font valoir des points de vue opposés, mais tous deux convaincants, sur le rôle, la fonction et l'existence même de la catégorie des « questions touchant véritablement à la compétence ». Je souscris en grande partie à ce qu'ils avancent, mais ma position est intermédiaire et, compte tenu de l'importance du sujet, il me paraît opportun d'exprimer mon opinion. Voici donc de brefs motifs concordants quant au résultat.

[79] Je conviens avec le juge Cromwell que la notion de compétence est fondamentale dans le contrôle judiciaire des décisions des tribunaux administratifs et, plus généralement, pour la primauté du droit. Les tribunaux administratifs exercent leurs fonctions dans le cadre juridique que

respective statutory mandates. The courts, not the tribunals, determine the outer limits of those mandates. Cromwell J. puts the point succinctly, at para. 98, when he writes that within the limits imposed by the Constitution,

> [t]he fact that a provision is in the tribunal's own statute or statutes closely connected to its function with which it will have particular familiarity thus may well be an important indicator that the legislature intended to leave its interpretation to the tribunal. But there are legal questions in "home" statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal's delegated power are more likely to be set out.

[80] On the other hand, just because the notion of a "true question of jurisdiction or *vires*" works well at the conceptual level does not mean that it is helpful at the practical everyday level of deciding whether or not the courts are entitled to intervene in a particular administrative decision. On this point, Cromwell J. adopts, at para. 95, the deeply problematic statement by the *Dunsmuir* majority that jurisdiction should be understood in the "narrow sense of whether or not the tribunal had the authority to . . . decide a particular matter" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 59). As Professor D. Mullan pointed out in "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at pp. 126-30, this formulation was not narrow but so broad as to risk bringing back from the dead the preliminary question jurisprudence from which Cromwell J. endeavours to dissociate himself, which reached its unfortunate zenith in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756.

[81] In response to this controversy about *vires* and jurisdiction, Rothstein J. lays down the sweeping

dicte l'art. 96 de la *Loi constitutionnelle de 1867* et que délimitent leurs mandats légaux respectifs. Ce sont les cours de justice, et non les tribunaux administratifs, qui déterminent la portée de ces mandats. Le juge Cromwell le dit succinctement lorsqu'il écrit au par. 98 de ses motifs que dans les limites établies par la Constitution,

> [l]a présence d'une disposition dans la loi constitutive du tribunal administratif ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie peut fort bien constituer un indice important de l'intention du législateur de laisser au tribunal administratif le soin de l'interpréter. Or, une loi constitutive renferme des dispositions qui soulèvent des questions de droit sur lesquelles le législateur n'a pas voulu que le tribunal administratif ait le dernier mot. Il est en effet difficile d'imaginer à quel autre endroit les limites du pouvoir délégué au tribunal administratif pourraient être prévues.

[80] Par contre, ce n'est pas parce que la notion de « question touchant véritablement à la compétence » se manie bien conceptuellement qu'elle se révèle utile au quotidien pour déterminer concrètement si une cour de justice est admise ou non à s'immiscer dans une décision administrative donnée. Au paragraphe 95 de ses motifs, le juge Cromwell reprend sur ce point l'affirmation foncièrement problématique des juges majoritaires dans *Dunsmuir* selon laquelle la compétence s'entend au « sens strict de la faculté du tribunal administratif de [. . .] trancher une question » (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 59). Comme le signale le professeur D. Mullan dans « *Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants : Let's Try Again! » (2008), 21 *C.J.A.L.P.* 117, p. 126-130, cette formulation n'est pas stricte, mais si générale qu'elle risque de redonner vie à la doctrine de la condition préalable — dont le juge Cromwell s'efforce de se dissocier — qui a connu son regrettable apogée dans *Metropolitan Life Insurance Co. c. International Union of Operating Engineers*, *Local 796*, [1970] R.C.S. 425, et *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756.

[81] Au vu de cette controverse suscitée par la notion de compétence, le juge Rothstein affirme

proposition that "it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review" (para. 34). Cromwell J. says, disapprovingly, that in the absence of further guidance, such a presumption is unlikely to be of "any assistance to reviewing courts" (para. 92). His solution, on the other hand, would be to return us to a "more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly" (para. 99). This "thorough examination" is to be based on a variation of the pragmatic and functional test associated with *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, as repositioned in *Dunsmuir*. I do not think, with respect, that generalities about "legislative intent" are any more likely to provide quick and straightforward "assistance to reviewing courts" than Rothstein J.'s offer of a presumption.

[82] It may be recalled that the willingness of the courts to defer to administrative tribunals on questions of the interpretation of their "home statutes" originated in the context of elaborate statutory schemes such as labour relations legislation. In such cases, the tribunal members were not only better versed in the practicalities of how the scheme could and did operate, but in many cases, the legislature tried to curb the enthusiasm of the courts to intervene by inserting explicit privative clauses. Over the years, acceptance of judicial deference grew even on questions of law (see, e.g., *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557), but never to the point of presuming, as Rothstein J. does, that whenever the tribunal is interpreting its "home statute" or statutes, it is entitled to deference. It is not enough, it seems to me, to say that the tribunal has selected one from a number of interpretations of a particular provision that the provisions can reasonably bear,

catégoriquement qu'« [il suffit en l'espèce] d'affirmer que, sauf situation exceptionnelle — et aucune ne s'est présentée depuis *Dunsmuir* —, il convient de présumer que l'interprétation par un tribunal administratif de "sa propre loi constitutive ou [d']une loi étroitement liée à son mandat et dont il a une connaissance approfondie" est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire » (par. 34). Exprimant son désaccord, le juge Cromwell fait valoir qu'à défaut d'autres repères, cette présomption « n'aide en rien les cours siégeant en révision » (par. 92). Il propose cependant de revenir à « un examen approfondi de l'intention du législateur lorsqu'une partie avance la thèse plausible que le tribunal administratif doit interpréter correctement une disposition en particulier » (par. 99). Cet « examen approfondi » doit être fondé sur une variante de l'analyse pragmatique et fonctionnelle associée à l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, et reformulée dans *Dunsmuir*. Soit dit en tout respect, je ne crois pas que l'expression de généralités au sujet de l'« intention du législateur » « n'aide [davantage, de manière rapide et simple] les cours siégeant en révision » que la présomption préconisée par le juge Rothstein.

[82] Il convient de rappeler que la volonté des cours de justice de déférer aux décisions des tribunaux administratifs portant sur l'interprétation de leurs lois constitutives a vu le jour dans le contexte de régimes législatifs élaborés, telle la législation du travail. Non seulement les membres de ces tribunaux étaient alors plus familiarisés que les cours de justice avec l'application possible et concrète du régime, mais dans bien des cas, le législateur avait tenté de freiner l'ardeur interventionniste de ces dernières en prévoyant des clauses d'inattaquabilité (appelées traditionnellement « *clauses privatives* ») explicites. Au fil des ans, la reconnaissance de la déférence judiciaire s'est accrue, même sur des points de droit (voir, p. ex., *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557), mais jamais au point de présumer, comme le fait le juge Rothstein, que du moment que le tribunal administratif interprète sa ou ses lois constitutives, il a droit à la déférence, c'est-à-dire

no matter how fundamentally the tribunal's legal opinion affects the rights of the parties who appear before it. On issues of procedural fairness or natural justice, for example, the courts should not defer to a tribunal's view of the extent to which its "home statute" permits it to proceed in what the courts conclude is an unfair manner.

[83] The middle ground between Cromwell J. and Rothstein J., it seems to me, lies in the more nuanced approach recently adopted by the Court in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*CHRC*"), where it was said that "if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference" (para. 24 (emphasis added)). Rothstein J. puts aside the limiting qualifications in this passage when he comes to formulating his presumption, which is triggered entirely by the location of the controversy in the "home statute".

[84] *CHRC* is also helpful in emphasizing the expression "issues of general legal importance" and downplaying (while citing) the *Dunsmuir* majority's more extravagant requirement of a question of law "of central importance to the legal system as a whole" (para. 60). While judicial self-citation is generally to be avoided, I feel encouraged by *CHRC* to resuscitate what I said on this point in my concurring reasons in *Dunsmuir*:

> It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges. [para. 128]

qu'il lui suffit de retenir l'une des interprétations raisonnables possibles de la disposition en cause, peu importe l'incidence fondamentale de son choix sur les parties. En ce qui concerne l'équité procédurale et la justice naturelle, par exemple, une juridiction de révision ne devrait pas déférer à l'avis d'un tribunal administratif quant à la mesure dans laquelle sa loi constitutive lui permet d'agir d'une manière que les cours de justice tiennent pour inéquitable.

[83] La démarche nuancée de notre Cour dans le récent arrêt *Canada (Commission des droits de la personne) c. Canada (Procureur général)*, 2011 CSC 53, [2011] 3 R.C.S. 471 (« *CCDP* »), où elle dit que « lorsqu'il s'agit d'interpréter et d'appliquer sa propre loi, dans son domaine d'expertise et sans que soit soulevée une question de droit générale, la norme de la décision raisonnable s'applique habituellement, et le Tribunal a droit à la déférence » (par. 24 (je souligne)), me paraît constituer un compromis entre les points de vue exprimés par les juges Cromwell et Rothstein. Le juge Rothstein fait abstraction des conditions qui figurent dans cet extrait lorsqu'il formule sa présomption, dont l'application dépend entièrement de l'emplacement de la disposition litigieuse dans la loi constitutive.

[84] L'arrêt *CCDP* se révèle également utile en ce qu'il met l'accent sur la notion de « question de droit générale » et minimise (même s'il la mentionne) celle, plus extravagante, de question de droit d'« une importance capitale pour le système juridique dans son ensemble » retenue par les juges majoritaires dans *Dunsmuir* (par. 60). Il convient certes d'éviter de se citer soi-même, mais *CCDP* m'incite à rappeler ce que je dis sur le sujet dans mes motifs concordants dans *Dunsmuir* :

> Sauf le respect que je leur dois, tout débat quant à savoir si une question de droit donnée est « d'une importance capitale pour le système juridique dans son ensemble » distrait la cour dans l'accomplissement de sa tâche. Il devrait suffire de soustraire à l'application de la norme de la décision correcte l'interprétation de la loi constitutive du décideur administratif ou de quelque loi très connexe faisant appel à l'expertise de ce dernier (en matière de relations de travail, par exemple). Cette exception mise à part, nous devrions préférer la clarté à la complexité superflue et statuer que la cour de révision a le dernier mot sur une question de droit générale. [par. 128]

I would interpret the reference in *CHRC* to "issues of general legal importance" as being to issues whose resolution has significance outside the operation of the statutory scheme under consideration. After all, some administrative decision makers have considerable legal expertise and resources. Others have little or none.

[85] What then is involved in a "reasonableness" review of a tribunal's interpretation of its home statute? The *Dunsmuir* majority said that "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions" (para. 47). It is clear that "the range of acceptable and rational solutions" is context specific and varies with the circumstances including the nature of the issue under review. In *CHRC*, the reviewing court was called on to judicially review a tribunal's decision that its home statute gave it the statutory power to award costs. On appeal, the Court applied a "reasonableness" standard (referring at several points to the issue being within the "core function and expertise of the Tribunal", e.g., at para. 25). The reasonableness analysis nevertheless followed the well-worn path of Driedger's golden rule and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983)). In other words, the intensity of scrutiny was not far removed from a correctness analysis, in my respectful opinion, just as was the case in *Dunsmuir* itself.

[86] In matters of general policy or broad discretion, on the other hand, the courts also apply "reasonableness" but with a much less aggressive attitude. In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, for example, the question was pure policy, namely whether Mr. Khosa had shown "sufficient humanitarian and compassionate considerations" to warrant, in the opinion of the immigration appeal board, discretionary relief from a removal order whose validity Mr. Khosa did not contest.

À mon avis, une « question de droit générale » au sens de *CCDP* s'entend d'une question dont le règlement n'importe pas seulement pour le régime législatif considéré. Après tout, certains décideurs administratifs sont dotés d'une expertise et de ressources juridiques considérables. D'autres en ont peu ou n'en ont pas.

[85] En quoi consiste alors le contrôle selon la norme de la « raisonnabilité » de l'interprétation de sa loi constitutive par le tribunal administratif? Dans *Dunsmuir*, les juges majoritaires disent qu'« [i]l est loisible au tribunal administratif d'opter pour l'une ou l'autre des différentes solutions rationnelles acceptables » (par. 47). Les « différentes solutions rationnelles acceptables » dépendent évidemment du contexte et varient en fonction des circonstances, dont la nature de la question visée par le contrôle. Dans *CCDP*, la juridiction de révision était appelée à contrôler la décision d'un tribunal administratif selon laquelle sa loi constitutive l'autorisait à adjuger des dépens. En appel, la Cour a appliqué la norme de la décision « raisonnable » (mentionnant à quelques reprises que la question relevait « essentiellement du mandat et de l'expertise du Tribunal », notamment au par. 25). Dans son analyse du caractère raisonnable, la Cour reprend néanmoins la démarche usitée fondée sur la règle d'or de Driedger et l'arrêt *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27 (E. A. Driedger, *Construction of Statutes* (2e éd. 1983)). En d'autres mots, dans *CCDP*, le degré d'intensité de l'examen est, à mon humble avis, assez proche de celui propre à la norme de la décision correcte. C'est aussi le cas dans *Dunsmuir* d'ailleurs.

[86] Par contre, en matière de politique générale ou de pouvoir discrétionnaire étendu, les juridictions de révision appliquent aussi la norme de la décision « raisonnable », mais de manière beaucoup moins stricte. Dans *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par exemple, la question relevait strictement de la politique, à savoir si M. Khosa avait fait la preuve de « motifs d'ordre humanitaire justifiant », de l'avis de la Commission d'appel de l'immigration, la mesure discrétionnaire consistant à lever la mesure de renvoi dont il ne contestait pas la validité.

[87] In this case, the reasons of both Rothstein J. and Cromwell J. show a much more intense level of scrutiny of the issue before the Information and Privacy Commissioner than was the case in *Khosa*, and for good reason. "Reasonableness" is a deceptively simple omnibus term which gives reviewing judges a broad discretion to choose from a variety of levels of scrutiny from the relatively intense to the not so intense (or, as the *Dunsmuir* majority put it, assessing the "degree of deference" (para. 62)). Predictability is important to litigants and those who try to advise them on whether or not to initiate proceedings. It remains to be seen in future cases how the discretion of reviewing judges will be supervised at the appellate level to achieve such predictability. The *Dunsmuir* majority noted that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the [administrative] decision-making process" (para. 47). Such values are no less important in the process of judicial review.

[87] Dans la présente affaire, les motifs du juge Rothstein comme ceux du juge Cromwell appellent un examen de la décision du commissaire à l'information et à la protection de la vie privée beaucoup plus strict que dans *Khosa*. Il y a une bonne raison à cela. La « raisonnabilité » est une notion générale d'apparence trompeusement simple qui confère à la juridiction de révision le pouvoir discrétionnaire de choisir entre divers degrés d'examen, allant de celui relativement intense à celui qui l'est moins (ou, pour reprendre les mots employés par les juges majoritaires dans *Dunsmuir*, déterminer le « degré de déférence » (par. 62)). La prévisibilité est importante pour les justiciables et ceux qui tentent de les conseiller quant à savoir s'il vaut la peine ou non de saisir les tribunaux. Reste à voir comment, dans les affaires ultérieures, les juridictions d'appel se prononceront sur l'exercice de ce pouvoir discrétionnaire par les juridictions de révision pour assurer une telle prévisibilité. Dans *Dunsmuir*, les juges majoritaires font observer que le « caractère raisonnable tient principalement à la justification de la décision, à la transparence et à l'intelligibilité du processus décisionnel [administratif] » (par. 47). Ces considérations n'importent pas moins dans le contexte du contrôle judiciaire.

[88] All of this is challenging enough for the reviewing judge without superadding to the debate at the working level Cromwell J.'s search for the elusive "true" question of *vires* or jurisdiction. Accordingly, I support Rothstein J.'s effort to euthanize the issue (apart from legislative provisions which guarantee its survival, as in s. 18.1(4)(*a*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7). I would nevertheless respectfully part company with Rothstein J. in his effort to dilute the significance of expertise and general legal importance as conditions precedent to any deference to an administrative tribunal on matters of law, including the interpretation of its "home statute".

[88] Les juges saisis de demandes de contrôle judiciaire ont déjà suffisamment à faire sans qu'on leur demande en plus d'entreprendre la recherche du juge Cromwell visant l'insaisissable question touchant « véritablement » à la compétence. Par conséquent, je me range à l'avis du juge Rothstein quant à la nécessité d'en finir avec cette catégorie de questions (sauf lorsque des dispositions législatives assurent sa survie, comme l'al. 18.1(4)*a*) de la *Loi sur les Cours fédérales*, L.R.C. 1985, ch. F-7). Mais, en toute déférence, je suis en désaccord avec la volonté du juge Rothstein de diminuer l'importance de l'expertise et de la question de droit générale comme conditions préalables à la manifestation de déférence envers la décision d'un tribunal administratif sur une question de droit, y compris l'interprétation de sa loi constitutive.

[89] The creation of a "presumption" based on insufficient criteria simply adds a further step to what should be a straightforward analysis. If the

[89] La création d'une « présomption » fondée sur des critères insuffisants ne fait qu'ajouter une étape à une analyse qui devrait être simple. Si la

issue before the reviewing court relates to the interpretation and application of a tribunal's "home statute" and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness. Otherwise, in my respectful opinion, the last word on questions of law should be left with the courts.

The following are the reasons delivered by

CROMWELL J. —

I. Introduction

[90] I agree with the disposition of this appeal proposed by my colleague Rothstein J. and, for the most part, with his lucid and persuasive reasons. I respectfully do not agree, however, with some of my colleague's views set out, either expressly or by implication, in paras. 33-46.

[91] My colleague suggests that true questions of jurisdiction or *vires* arise so rarely when a tribunal is interpreting its home statute that it may be asked whether "the category of true questions of jurisdiction exists" and further that "the interpretation by the tribunal of 'its own statute or statutes closely connected to its function, with which it will have particular familiarity' should be presumed to be a question of statutory interpretation subject to deference on judicial review" (para. 34). There is no indication of how, if at all, this *presumption* could be rebutted. I have two difficulties with this position.

[92] The first difficulty concerns elevating to a virtually irrefutable presumption the general guideline that a tribunal's interpretation of its "home" statute will not often raise a jurisdictional question.

décision visée par le contrôle judiciaire a trait à l'interprétation et à l'application de la loi constitutive du tribunal administratif ou d'une loi connexe qui relève elle aussi essentiellement du mandat et de l'expertise du décideur, et qu'elle ne soulève pas de questions de droit générales, au-delà des aspects administratifs du régime législatif en cause, la juridiction de révision devrait se montrer déférente en appliquant la norme de la décision raisonnable. Sinon, à mon humble avis, il appartient à la juridiction de révision de statuer en dernier ressort sur les questions de droit.

Version française des motifs rendus par

LE JUGE CROMWELL —

I. Introduction

[90] Je suis d'accord sur la manière dont mon collègue le juge Rothstein statue dans le présent pourvoi et je souscris pour l'essentiel à ses motifs limpides et convaincants. Mais en toute déférence, je demeure en désaccord sur certains volets de son opinion exprimés expressément ou tacitement aux par. 33-46.

[91] Mon collègue laisse entendre qu'il arrive si rarement qu'un tribunal administratif appelé à interpréter sa loi constitutive soit saisi d'une question touchant véritablement à la compétence qu'il est permis de se demander si « la catégorie des véritables questions de compétence existe », et il ajoute qu'« il convient de présumer que l'interprétation par un tribunal administratif de "sa propre loi constitutive ou [d']une loi étroitement liée à son mandat et dont il a une connaissance approfondie" est une question d'interprétation législative commandant la déférence en cas de contrôle judiciaire » (par. 34). Nulle précision n'est donnée quant à la manière dont cette *présomption* peut être réfutée, si toutefois elle peut l'être. Je vois là deux difficultés.

[92] La première tient à ce qu'on élève au rang de présomption pour ainsi dire irréfutable l'énoncé général voulant que l'interprétation par un tribunal administratif de sa loi constitutive soulève rarement

This goes well beyond saying that "[d]eference will usually result" with respect to such questions (as in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54) or that "courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority" (as in *Nolan v. Kerry (Canada) Inc*., 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 34). In my view this is no "natural extension" of the approach set out by the majority of the Court in *Dunsmuir*, as is made plain by the fact that my colleague does not cite a word from the majority judgment which supports his position. Creating a presumption without providing guidance on how one could tell whether it has been rebutted does not, in my respectful view, provide any assistance to reviewing courts. The second difficulty concerns the suggestion that jurisdictional questions may not in fact exist at all. Respectfully, these propositions undermine the foundation of judicial review of administrative action.

[93] *Dunsmuir* was clear that at the heart of judicial review of administrative action is a balance between legality and legislative supremacy. On one hand, the principle of legality requires the courts to ensure that administrative tribunals and agencies exercise their delegated powers lawfully. This includes the requirement that "[a]dministrative bodies . . . be correct in their determinations of true questions of jurisdiction or *vires*": *Dunsmuir*, at para. 59. In other words, there are some questions with respect to which the courts are obliged to substitute their understanding of the correct answer for the tribunal's understanding of the correct answer. On the other hand, the principle of legislative supremacy means that, in carrying out their functions, courts must be respectful of legislative intent that these bodies should be largely undisturbed by the courts in exercising those powers (para. 27). While courts have the constitutional responsibility "to review administrative action and ensure that

une question de compétence. C'est aller beaucoup plus loin que ne le fait notre Cour lorsqu'elle affirme (dans *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 54) que « la déférence est habituellement de mise » à cet égard ou (dans *Nolan c. Kerry (Canada) Inc.*, 2009 CSC 39, [2009] 2 R.C.S. 678, par. 34) que « la déférence est habituellement de mise lorsque le tribunal administratif interprète sa propre loi constitutive et [qu']il convient d'appliquer la norme de la décision correcte uniquement dans des cas exceptionnels, c'est-à-dire lorsque l'interprétation de cette loi soulève la question générale de la compétence du tribunal ». À mon sens, le point de vue de mon collègue ne « découle [pas] naturellement » de l'analyse des juges majoritaires dans *Dunsmuir* et, d'ailleurs, le juge Rothstein ne cite aucun extrait des motifs majoritaires dans cet arrêt à l'appui de son opinion. Soit dit en tout respect, la création d'une présomption sans précision de la manière dont on peut déterminer si elle est réfutée ou non n'aide en rien les cours siégeant en révision. En deuxième lieu, je ne peux convenir que les questions de compétence pourraient en fait ne pas exister du tout. Avec tout le respect que je dois à mon collègue, ces propos minent l'assise du contrôle judiciaire des actes de l'Administration.

[93] Il ressort de l'arrêt *Dunsmuir* que l'équilibre entre la légalité et la suprématie législative est au cœur du contrôle judiciaire des actes de l'Administration. D'une part, le principe de légalité exige de la cour de justice qu'elle s'assure que le tribunal ou l'organisme administratif a exercé son pouvoir délégué conformément à la loi, notamment que l'« organisme administratif [a] statu[é] correctement sur une question touchant véritablement à la compétence » (*Dunsmuir*, par. 59). Autrement dit, la cour de justice est tenue, à l'égard de certaines questions, de substituer son opinion à celle du tribunal administratif quant à savoir ce qui constitue la réponse correcte. D'autre part, le principe de suprématie législative veut qu'en s'acquittant de ses fonctions, la cour de justice respecte la volonté du législateur en s'abstenant le plus souvent de s'immiscer alors dans le fonctionnement d'un tel organisme (par. 27). Une cour de justice a l'obligation constitutionnelle « de contrôler les

it does not exceed its jurisdiction", they also must give effect to legislative supremacy by determining the applicable standard of judicial review by "establishing legislative intent" (paras. 29-31).

[94] I agree that the use of the terms "jurisdiction" and "*vires*" have often proved unhelpful to the standard of review analysis. This, however, should not distract us from the fundamental principles: as a matter of either constitutional law or legislative intent, a tribunal must be correct on certain issues in the sense that the courts and not the tribunal have the last word on what is "correct". These core principles of judicial review of administrative action were laid down by the Court as recently as the 2008 decision in *Dunsmuir*. I therefore can neither agree with my colleague that the fact that a legislative provision is in a "home statute" has become a virtually unchallengeable proxy for legislative intent nor join him in speculating about whether jurisdictional review even exists. The standard of review analysis not only identifies the limits of the legality of the tribunal's actions, but also defines the limits of the role of the reviewing court. The reviewing court cannot consider the "substantive merits" of a judicial review application or statutory appeal unless it identifies and applies the appropriate standard of review. That is what defines those "substantive merits".

II. Legislative Intent

[95] I begin with the significance of the terms "jurisdiction" and "*vires*". I remain of the view that true questions of jurisdiction or *vires* exist. As I will explain later in these reasons, the jurisprudence affirms that they do. However, for the purposes of the standard of review analysis, I attach little weight to these terms. They add little to the analysis, and can cause problems. Undue emphasis on the concepts they embody bedevilled administrative law with preliminary jurisdictional questions that allowed for undue interference with

actes de l'Administration et de s'assurer que celle-ci n'outrepasse pas les limites de sa compétence », mais elle doit aussi tenir compte de la suprématie législative en déterminant la norme de contrôle applicable « en fonction de l'intention du législateur » (par. 29-31).

[94] Je conviens que l'emploi du mot « compétence » s'est souvent révélé inutile dans l'analyse relative à la norme de contrôle. Il ne faut cependant pas perdre de vue les principes fondamentaux : suivant le droit constitutionnel ou l'intention du législateur, la décision du tribunal administratif sur certaines questions doit être correcte, et ce sont les cours de justice qui décident en dernier ressort quelle est la décision « correcte ». Ces principes fondamentaux régissant le contrôle judiciaire des actes de l'Administration ont été énoncés dans l'arrêt *Dunsmuir* rendu par notre Cour tout juste en 2008. Je ne peux donc ni convenir avec mon collègue que la présence d'une disposition dans une loi constitutive est devenue l'expression presque incontestable de l'intention du législateur, ni m'interroger comme lui sur l'existence même du contrôle sur une question de compétence. L'analyse relative à la norme de contrôle non seulement délimite la légalité des actes du tribunal administratif, mais circonscrit la fonction de la cour de justice siégeant en révision. Cette dernière ne peut examiner les « prétentions sur le fond » qui forment l'assise d'une demande de contrôle judiciaire ou d'un appel prévu par la loi que si elle détermine et applique la bonne norme de contrôle. C'est ce qui définit ces « prétentions sur le fond ».

II. L'intention du législateur

[95] Considérons d'abord l'utilité du mot « compétence ». Je demeure d'avis que les questions touchant véritablement à la compétence existent. Comme je l'explique ci-après, la jurisprudence confirme leur existence. Cependant, pour les besoins de l'analyse relative à la norme de contrôle, j'accorde peu d'importance à ce terme. Il n'ajoute rien à l'analyse et peut être source de problèmes. L'accent mis à tort sur la notion qui le sous-tend a embrouillé le droit administratif par le recours à des conditions préalables liées à la compétence

administrative decisions. This Court's jurisprudence has long eschewed an expansive approach to "jurisdiction" that animated early cases such as *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756. As was wisely said in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, at p. 233, courts "should not be alert to brand as jurisdictional . . . that which may be doubtfully so". In *Dunsmuir*, the Court repeated this sentiment and noted that such questions will be "narrow" and that jurisdiction should be understood in the "narrow sense of whether or not the tribunal had the authority to make the inquiry . . . whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59).

[96] The touchstone of judicial review is legislative intent: *Dunsmuir*, at para. 30. (I put aside situations in which there is clear legislative intent to prevent judicial review of jurisdiction as such preclusion is not permitted as a matter of constitutional law: see, e.g., *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.) This focus means that whether a question falls into the category of "jurisdictional" is largely beside the point. What matters is whether the legislature intended that a particular question be left to the tribunal or to the courts.

[97] Where the existing jurisprudence has not already determined in a satisfactory manner the degree of deference to be accorded to an administrative decision maker operating in a particular statutory scheme, the courts are to apply a number of relevant factors to the case at hand, factors which include the presence or absence of a privative clause, the purpose of the tribunal as determined by interpretation of its enabling legislation, the nature of the question at issue and the expertise of

qui autorisaient une immixtion indue dans les décisions administratives. La jurisprudence de notre Cour écarte depuis longtemps l'interprétation large de la « compétence » qui caractérise d'anciennes décisions, telles *Metropolitan Life Insurance Co. c. International Union of Operating Engineers, Local 796*, [1970] R.C.S. 425, et *Bell c. Ontario Human Rights Commission*, [1971] R.C.S. 756. Comme le dit judicieusement notre Cour dans l'arrêt *Syndicat canadien de la Fonction publique, section locale 963 c. Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227, il va de soi que les tribunaux « devraient éviter de qualifier trop rapidement un point de question de compétence [. . .] lorsqu'il existe un doute à cet égard » (p. 233). Dans *Dunsmuir*, notre Cour le rappelle, faisant observer que l'examen d'une telle question a une « portée étroite » et que la compétence doit s'entendre « au sens strict de la faculté du tribunal administratif de connaître de la question [de savoir] si les pouvoirs dont le législateur l'a investi l'autorisent à trancher une question » (par. 59).

[96] La pierre d'assise du contrôle judiciaire réside dans l'intention du législateur : *Dunsmuir*, par. 30. (Je fais abstraction du cas où le législateur a manifestement voulu empêcher le contrôle judiciaire d'une décision portant sur la compétence alors que le droit constitutionnel le lui interdit : voir, p. ex., *Crevier c. Procureur général du Québec*, [1981] 2 R.C.S. 220.) Vu l'importance de cet élément, la question de savoir si une question appartient ou non à la catégorie des « questions de compétence » n'a que peu de pertinence. Ce qui compte c'est de savoir si le législateur a voulu laisser au tribunal administratif ou aux cours de justice le soin de trancher une question précise.

[97] Lorsque la jurisprudence existante ne détermine pas déjà de façon satisfaisante le degré de déférence qui s'impose à l'endroit d'une mesure prise par un décideur administratif dans le cadre d'un régime législatif donné, la cour de justice applique un certain nombre de considérations à l'affaire dont elle est saisie, y compris l'existence ou l'inexistence d'une disposition d'inattaquabilité (traditionnellement appelée « clause privative »), la raison d'être du tribunal administratif

the tribunal. These are the concrete criteria, clearly established by the Court's jurisprudence, which are used to identify questions that are reviewable for correctness because the legislature intended the courts to have the last word on what constitutes a "correct" answer. These questions may be called "jurisdictional": see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 28. However, labelling them as such does nothing to assist the analysis. I therefore agree with Rothstein J. to the extent that he considers that, as analytical tools, the labels of "jurisdiction" and "*vires*" need play no part in the courts' everyday work of reviewing administrative action.

[98] As the Court noted in *Dunsmuir*, "[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 (citations omitted)). The fact that a provision is in the tribunal's own statute or statutes closely connected to its function with which it will have particular familiarity thus may well be an important indicator that the legislature intended to leave its interpretation to the tribunal. But there are legal questions in "home" statutes whose resolution the legislature did not intend to leave to the tribunal; indeed, it is hard to imagine where else the limits of a tribunal's delegated power are more likely to be set out. The majority of the Court in *Dunsmuir* (at para. 59) identified an example of such a question by referring to *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485. Writing for the Court, Rothstein J. identified another in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, at para. 10, stating that "[t]he issue on this appeal is jurisdictional in that it goes to whether the [Canadian International Trade Tribunal] can hear a complaint initiated by a non-Canadian supplier". In reaching this conclusion, the Court noted that this standard of review had been determined *in a satisfactory manner* by the

suivant l'interprétation de sa loi constitutive, la nature de la question en cause et l'expertise du tribunal. Ce sont là les éléments concrets, clairement issus de la jurisprudence de notre Cour, qui permettent de déterminer qu'une décision est susceptible de contrôle selon la norme de la décision correcte du fait que le législateur a voulu que les cours de justice décident en dernier ressort quelle est la décision « correcte ». On peut dire d'une telle décision qu'elle porte sur une « question de compétence » : voir *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, par. 28. Or, cette qualification ne facilite en rien l'analyse. Je conviens donc avec le juge Rothstein que, sur le plan analytique, l'appellation « question de compétence » n'a aucun rôle à jouer au quotidien dans le contrôle judiciaire de l'action administrative.

[98] La Cour signale dans *Dunsmuir* que « [l]orsqu'un tribunal administratif interprète sa propre loi constitutive ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie, la déférence est habituellement de mise » (par. 54 (références omises)). La présence d'une disposition dans la loi constitutive du tribunal administratif ou une loi étroitement liée à son mandat et dont il a une connaissance approfondie peut fort bien constituer un indice important de l'intention du législateur de laisser au tribunal administratif le soin de l'interpréter. Or, une loi constitutive renferme des dispositions qui soulèvent des questions de droit sur lesquelles le législateur n'a pas voulu que le tribunal administratif ait le dernier mot. Il est en effet difficile d'imaginer à quel autre endroit les limites du pouvoir délégué au tribunal administratif pourraient être prévues. Dans *Dunsmuir* (au par. 59), les juges majoritaires de notre Cour renvoient à *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, 2004 CSC 19, [2004] 1 R.C.S. 485, pour donner un exemple d'affaire soulevant une telle question. Dans l'arrêt *Northrop Grumman Overseas Services Corp. c. Canada (Procureur général)*, 2009 CSC 50, [2009] 3 R.C.S. 309, le juge Rothstein relève un autre cas au nom de la Cour : « [e]n l'espèce, la Cour est saisie d'une question de compétence étant donné qu'il s'agit de décider si le [Tribunal canadien du commerce extérieur]

existing jurisprudence (para. 10). Recast to sidestep the language of "jurisdiction" or "*vires*", these two cases demonstrate that there are provisions in home statutes that tribunals must interpret correctly.

[99] The point is this. The proposition that provisions of a "home statute" are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in "home" statutes are "exceptional" is not an answer to a plausible argument that a particular provision falls outside the "presumption" of reasonableness review and into the "exceptional" category of correctness review. Nor does it assist in determining by what means the "presumption" may be rebutted.

[100] The respondent's position in this case is that s. 50(5) of the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, is a provision the Commissioner was obliged to interpret correctly. While the fact that this provision is in the Commissioner's "home" statute suggests caution in accepting that characterization of the provision, this alone does not relieve the reviewing court of examining the provision and the other relevant factors to determine the legislature's intent in relation to it.

[101] When this is done, my view is that the legislature did not intend to authorize judicial review for correctness of the Commissioner's interpretation of s. 50(5). The power to extend time is granted in broad terms in the context of a detailed and highly specialized statutory scheme which it is the Commissioner's duty to administer and under

peut entendre une plainte présentée [. . .] par un fournisseur non canadien » (par. 10). Pour arriver à sa conclusion, la Cour signale que la jurisprudence a déterminé *de façon satisfaisante* la norme de contrôle applicable (par. 10). Reformulés sans renvoi à la notion de « compétence », il appert de ces deux arrêts qu'une loi constitutive renferme des dispositions que le tribunal administratif doit interpréter correctement.

[99] Voici ce qui importe. L'idée que les dispositions d'une loi constitutive sont habituellement susceptibles de contrôle selon la norme de la décision raisonnable n'écarte pas un examen approfondi de l'intention du législateur lorsqu'une partie avance la thèse plausible que le tribunal administratif doit interpréter correctement une disposition en particulier. Autrement dit, l'affirmation voulant qu'une telle disposition d'une loi constitutive soit « exceptionnelle » ne peut être opposée à la thèse plausible qu'une disposition donnée échappe à la « présomption » d'assujettissement à la norme de la décision raisonnable et appartient à la catégorie des questions « exceptionnelles » qui commandent la décision correcte. Elle ne permet pas non plus de déterminer par quel moyen la « présomption » peut être réfutée.

[100] L'intimée soutient en l'espèce que le par. 50(5) de la *Personal Information Protection Act*, S.A. 2003, ch. P-6.5, est une disposition que le commissaire était tenu d'interpréter correctement. Même si sa présence dans la loi constitutive du commissaire appelle la prudence avant de conclure que l'interprétation de la disposition touche à la compétence, elle n'est pas suffisante pour soustraire la cour de justice siégeant en révision à son obligation d'examiner la disposition et toute autre considération permettant de cerner l'intention du législateur y afférente.

[101] À l'issue d'un tel examen, il appert selon moi que le législateur n'a pas voulu permettre le contrôle de l'interprétation du par. 50(5) par le commissaire selon la norme de la décision correcte. Le pouvoir de prorogation est conféré en termes généraux dans le contexte d'un régime législatif détaillé et très spécialisé qu'il incombe au

which he is required to exercise many broadly granted discretions. The respondent's contention that s. 50(5) is a provision whose interpretation is reviewable on a correctness standard should be rejected because, having regard to the nature of the statutory scheme, the nature of the Commissioner's broadly conferred duties to administer that highly specialized scheme, and the nature of the provision in issue, it was the legislature's intent to leave to the Commissioner the question of whether s. 50(5) allowed him to extend the time limit after the 90 days had expired. I therefore agree with my colleague's conclusion that the applicable standard of review is reasonableness.

commissaire d'administrer et en application duquel ce dernier est appelé à exercer de nombreux pouvoirs discrétionnaires accordés de manière générale. La prétention de l'intimée selon laquelle le par. 50(5) constitue une disposition dont l'interprétation est susceptible de contrôle selon la norme de la décision correcte doit être rejetée car, étant donné la nature du régime législatif, la nature des obligations du commissaire, formulées de manière générale, d'administrer ce régime très spécialisé et la nature de la disposition considérée, le législateur a voulu laisser au commissaire le soin de décider si le par. 50(5) l'autorise à proroger le délai après les 90 jours impartis. Je conviens donc avec mon collègue que la norme de contrôle applicable est celle de la décision raisonnable.

III. Jurisdictional Review

[102] I do not join my colleague in asking whether the category of true questions of jurisdiction exists. I have signalled above that the language of "jurisdiction" or "*vires*" might be unhelpful in the standard of review analysis. But I remain of the view that correctness review exists, both as a matter of constitutional law and statutory interpretation. This will be true, on occasion, with respect to a tribunal's interpretation of its "home" statute. As the Court affirmed in *Dunsmuir*, "judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits" (para. 31).

III. Contrôle de la compétence

[102] Contrairement à mon collègue, je ne m'interroge pas sur l'existence de la catégorie des questions touchant véritablement à la compétence. Je fais observer précédemment que dire d'une question qu'elle touche à la « compétence » peut se révéler inutile dans l'analyse relative à la norme de contrôle. Toutefois, je reste d'avis qu'il existe des questions soumises à la norme de la décision correcte sur le fondement tant du droit constitutionnel que de l'interprétation législative. Cela se confirmera à l'occasion lorsqu'un tribunal administratif interprétera sa loi constitutive. Comme l'affirme notre Cour dans *Dunsmuir*, « le contrôle judiciaire bénéficie de la protection constitutionnelle au Canada, surtout lorsqu'il s'agit de définir les limites de la compétence et de les faire respecter » (par. 31).

[103] In the face of such a clear and recent statement by the Court, I am not ready to suggest, as my colleague does, at para. 34, that this constitutional guarantee may in fact be an empty shell. To be clear, this constitutional guarantee does not merely assure judicial review for reasonableness; it guarantees jurisdictional review on the correctness standard. *Dunsmuir* was clear and unequivocal on this point as the passage I have just cited demonstrates. I think it unfortunate that the Court should be seen to be engaging in casual questioning

[103] Au vu d'une telle prise de position claire et récente de notre Cour, je ne suis pas disposé à laisser entendre, comme le fait mon collègue au par. 34 de ses motifs, que cette protection constitutionnelle pourrait en fait être théorique. En clair, cette protection constitutionnelle n'assure pas simplement le contrôle judiciaire au regard de la norme de la décision raisonnable, elle garantit le contrôle judiciaire d'une décision sur la compétence au regard de la norme de la décision correcte. C'est ce qui ressort de manière non équivoque de l'extrait précité

of the ongoing authority of what it said so clearly and so recently. Parliament and the legislatures, as a matter of constitutional law, cannot oust judicial review for correctness of a tribunal's interpretation of jurisdiction limiting provisions. Of course, there is no suggestion that this principle is engaged in this case.

IV. Conclusion

[104] I agree with Rothstein J. that the appeal should be allowed with costs in this Court and in the Court of Appeal; that the adjudicator's decision on the timeliness issue should be reinstated; and that the matter should be remitted to the chambers judge to consider the issues not dealt with and resolved in the judicial review proceedings.

Appeal allowed with costs.

Solicitors for the appellant: Jensen Shawa Solomon Duguid Hawkes, Calgary.

Solicitors for the respondent: Field, Edmonton.

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

Solicitors for the intervener the Information and Privacy Commissioner of British Columbia: Heenan Blaikie, Vancouver.

Solicitors for the intervener the B.C. Freedom of Information and Privacy Association: Hunter Litigation Chambers Law Corporation, Vancouver.

de *Dunsmuir*. Je trouve malheureux que la Cour paraisse laisser entendre à la légère que les propos si clairs qu'elle a tenus si récemment pourraient ne plus être valables. Les législateurs fédéral et provinciaux ne peuvent, sur le plan constitutionnel, soustraire au contrôle judiciaire selon la norme de la décision correcte l'interprétation par un tribunal administratif d'une disposition qui limite sa compétence. Mais je ne laisse évidemment pas entendre que ce principe soit en jeu en l'espèce.

IV. Conclusion

[104] À l'instar du juge Rothstein, je suis d'avis d'accueillir le pourvoi avec dépens devant notre Cour et la Cour d'appel, de rétablir la décision du commissaire concernant l'observation du délai et de renvoyer l'affaire au juge en cabinet pour qu'il statue sur les questions qui n'ont pas déjà été examinées et réglées lors du contrôle judiciaire.

Pourvoi accueilli avec dépens.

Procureurs de l'appelant : Jensen Shawa Solomon Duguid Hawkes, Calgary.

Procureurs de l'intimée : Field, Edmonton.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenant Information and Privacy Commissioner of British Columbia : Heenan Blaikie, Vancouver.

Procureurs de l'intervenante B.C. Freedom of Information and Privacy Association : Hunter Litigation Chambers Law Corporation, Vancouver.

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/ Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

INDEXED AS: ATCO GAS AND PIPELINES LTD. *v.* ALBERTA (ENERGY AND UTILITIES BOARD)

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard

Ville de Calgary *Appelante/Intimée au pourvoi incident*

c.

ATCO Gas and Pipelines Ltd. *Intimée/ Appelante au pourvoi incident*

et

Alberta Energy and Utilities Board, Commission de l'énergie de l'Ontario, Enbridge Gas Distribution Inc. et Union Gas Limited *Intervenantes*

RÉPERTORIÉ : ATCO GAS AND PIPELINES LTD. *c.* ALBERTA (ENERGY AND UTILITIES BOARD)

Référence neutre : 2006 CSC 4.

N° du greffe : 30247.

2005 : 11 mai; 2006 : 9 février.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish et Charron.

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

Droit administratif — Organismes et tribunaux administratifs — Organismes de réglementation — Compétence — Doctrine de la compétence par déduction nécessaire — Demande présentée à l'Alberta Energy and Utilities Board par un service public de gaz naturel pour obtenir l'autorisation de vendre des bâtiments et un terrain ne servant plus à la fourniture de gaz naturel — Autorisation accordée à la condition qu'une partie du produit de la vente soit attribuée aux clients du service public — L'organisme avait-il le pouvoir exprès ou tacite d'attribuer le produit de la vente? — Dans l'affirmative, sa décision d'exercer son pouvoir discrétionnaire de protéger l'intérêt public en attribuant aux clients une partie du produit de la vente était-elle raisonnable? — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

Droit administratif — Contrôle judiciaire — Norme de contrôle — Alberta Energy and Utilities Board

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).

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

— Norme de contrôle applicable à la décision de l'organisme concernant son pouvoir d'attribuer aux clients le produit de la vente des biens d'un service public — Norme de contrôle applicable à la décision de l'organisme d'exercer son pouvoir discrétionnaire en attribuant le produit de la vente — Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 15(3) — Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 37 — Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 26(2).

ATCO est un service public albertain de distribution de gaz naturel. L'une de ses filiales a demandé à l'Alberta Energy and Utilities Board (« Commission ») l'autorisation de vendre des bâtiments et un terrain situés à Calgary, comme l'exigeait la *Gas Utilities Act* (« GUA »). ATCO a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. Elle a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement de la valeur comptable et au recouvrement des frais d'aliénation, et de reconnaître le droit de ses actionnaires au profit net. La ville de Calgary a défendu les intérêts des clients, s'opposant à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

Convaincue que la vente ne serait pas préjudiciable aux clients, la Commission l'a autorisée au motif que « la vente ne risquait pas de leur infliger un préjudice financier qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure ». Dans une deuxième décision, elle a décidé de l'attribution du produit net de la vente. Elle a conclu qu'elle avait le pouvoir d'autoriser l'aliénation projetée en l'assortissant de conditions aptes à protéger l'intérêt public, suivant le par. 15(3) de l'*Alberta Energy and Utilities Board Act* (« AEUBA »). Elle a appliqué une formule reconnaissant que le profit réalisé lorsque le produit de la vente excède le coût historique peut être réparti entre les clients et les actionnaires et elle a attribué aux clients une partie du gain net tiré de la vente. La Cour d'appel de l'Alberta a annulé la décision et renvoyé l'affaire à la Commission en lui enjoignant d'attribuer à ATCO la totalité du produit net.

Arrêt (la juge en chef McLachlin et les juges Binnie et Fish sont dissidents) : Le pourvoi est rejeté et le pourvoi incident est accueilli.

Les juges Bastarache, LeBel, Deschamps et Charron : Compte tenu des facteurs pertinents de l'analyse pragmatique et fonctionnelle, la norme de contrôle

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. [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. [7] [41] [43] [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,

applicable à la décision de la Commission portant sur sa compétence est celle de la décision correcte. En l'espèce, la Commission n'avait pas le pouvoir d'attribuer le produit de la vente des biens de l'entreprise de services publics. La Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui conféraient la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients quelque partie du produit de la vente des biens. [21-34]

L'analyse de l'AEUBA, de la *Public Utilities Board Act* (« PUBA ») et de la GUA mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Suivant le sens grammatical et ordinaire des mots qui y sont employés, le par. 26(2) de la GUA, le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA sont silencieux en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente. Le paragraphe 26(2) de la GUA lui conférait le pouvoir d'autoriser une opération, sans plus. La véritable portée du par. 15(3) de l'AEUBA, qui confère à la Commission le pouvoir d'assortir une ordonnance des conditions qu'elle juge nécessaires dans l'intérêt public, et celle de l'art. 37 de la PUBA, qui l'investit d'un pouvoir général, est occultée lorsque l'on considère isolément ces dispositions. En elles-mêmes, les dispositions sont vagues et sujettes à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. La notion d'« intérêt public » est très large et élastique, mais la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites. Son pouvoir apparemment vaste doit être interprété dans le contexte global des lois en cause, qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Il appert du contexte que les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables et à préserver l'intégrité et la fiabilité du réseau d'alimentation. [7] [41] [43] [46]

Ni l'historique de la réglementation des services publics de l'Alberta en général ni les dispositions législatives conférant ses pouvoirs à l'Alberta Energy and Utilities Board en particulier ne font mention du pouvoir de la Commission d'attribuer le produit de la vente ou de son pouvoir discrétionnaire de porter atteinte au droit de propriété. Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la

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. [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. [39] [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

GUA que son principal mandat à l'égard des entreprises de services publics est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première. Les objectifs de viabilité, d'équité et d'efficacité, qui expliquent le mode de fixation des tarifs, sont à l'origine d'un arrangement économique et social qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus. Le paiement du tarif par le client n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens du service public. L'objet de la législation est de protéger le client et l'investisseur, et la Commission a pour mandat d'établir une tarification qui favorise les avantages financiers de l'un et de l'autre. Toutefois, ce subtil compromis ne supprime pas le caractère privé de l'entreprise. Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. Sans compter que l'entreprise n'est pas à l'abri de la perte pouvant en découler. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. [54-69]

Non seulement le pouvoir d'attribuer le produit de la vente n'est pas expressément prévu par la loi, mais on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Pour que s'applique la doctrine de la compétence par déduction nécessaire, la preuve doit établir que l'exercice de ce pouvoir est nécessaire dans les faits à la Commission pour que soient atteints les objectifs de la loi, ce qui n'est pas le cas en l'espèce. Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini, comme celui prévu dans l'AEUBA, la GUA ou la PUBA, d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits. Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut adopter une disposition le prévoyant expressément. [39] [77-80]

Indépendamment de la conclusion que la Commission n'avait pas compétence, la décision d'exercer le pouvoir discrétionnaire de protéger l'intérêt public en répartissant le produit de la vente comme elle l'a fait ne satisfaisait pas à la norme de la raisonnabilité. Lorsqu'elle

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. [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. [91-92] [98-99] [110] [113] [122] [148]

a conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients, la Commission n'a pas cerné d'intérêt public à protéger et aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Enfin, on ne peut conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs. [82-85]

La juge en chef McLachlin et les juges Binnie et Fish (dissidents) : La décision de la Commission devrait être rétablie. Le paragraphe 15(3) de l'AEUBA conférait à la Commission le pouvoir d'« imposer les conditions supplémentaires qu'elle juge[ait] nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de vendre le terrain et les bâtiments en cause présentée par ATCO. Dans l'exercice de ce pouvoir, et vu la « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait suivant le par. 22(1) de la GUA, la Commission a réparti le gain net en se fondant sur des considérations d'intérêt public. Son pouvoir discrétionnaire n'est pas illimité et elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré. Dans la présente affaire, en attribuant un tiers du gain net à ATCO et deux tiers à la base tarifaire, la Commission a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients. Selon elle, attribuer aux clients la totalité du profit n'aurait pas incité l'entreprise à accroître son efficacité et à réduire ses coûts et l'attribuer à l'entreprise aurait pu encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'était accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée. La Commission pouvait accueillir la demande d'ATCO et lui attribuer la totalité du profit, mais la solution qu'elle a retenue en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. L'« intérêt public » tient essentiellement et intrinsèquement à l'opinion et au pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. Il n'appartient pas à notre Cour de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer son opinion à celle de la Commission. La décision que la Commission a rendue dans l'exercice de son pouvoir se situe dans les limites des opinions exprimées par les organismes de réglementation, que la norme applicable soit celle du manifestement déraisonnable ou celle du raisonnable simpliciter. [91-92] [98-99] [110] [113] [122] [148]

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. [93] [123-147]

Cases Cited

By Bastarache J.

Referred to: *Re ATCO Gas-North*, Alta. E.U.B., Decision 2001-65, July 31, 2001; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Decision 2000-41, July 5, 2000; *Pushpanathan v.*

La prétention d'ATCO selon laquelle attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé; dans ce dernier cas, les clients supportent les coûts et le taux de rendement est fixé par un organisme de réglementation, et non par le marché. La mesure retenue par la Commission ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. On ne peut non plus faire droit à la prétention d'ATCO voulant que la Commission se soit indûment livrée à une tarification rétroactive. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission. Dans son pourvoi incident, ATCO prétend en outre que la Cour d'appel de l'Alberta a établi à tort une distinction entre le profit tiré de la vente d'un terrain dont le coût historique n'est pas amorti et le profit tiré de la vente d'un bien amorti, comme un bâtiment. Il ressort de la pratique réglementaire que de nombreux organismes de réglementation, mais pas tous, jugent cette distinction non pertinente. Ce n'est pas que l'organisme de réglementation doive l'écarter systématiquement, mais elle n'est pas aussi déterminante que le prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. Enfin, la prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain diminue ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. De plus, il appert qu'une telle perte est prise en considération dans la procédure d'établissement des tarifs. [93] [123-147]

Jurisprudence

Citée par le juge Bastarache

Arrêts mentionnés : *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65, 31 juillet 2001; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41, 5 juillet 2000; *Pushpanathan c.*

Canada (Minister of 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;

Canada (Ministre de la Citoyenneté et de l'Immigration), [1998] 1 R.C.S. 982; *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19; *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL); *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374; *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453, conf. par [1977] 2 R.C.S. 822; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63; *Re Alberta Government Telephones*, Alta. P.U.B., Décision nº E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84116, 12 octobre 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); *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26; *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, conf. par (1983), 42 O.R. (2d) 731; *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601; *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182, conf. par [1985] 1 R.C.S. 174; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186; *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698; *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989); *Market St. Ry. Co. c. 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, autorisation de pourvoi refusée, [1981] 2 R.C.S. vii; *Re Consumers' Gas Co.*, E.B.R.O. 410-II, 411-II, 412-II, 23 mars 1987; *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2

Hongkong Bank of Canada v. Wheeler Holdings Ltd., [1993] 1 S.C.R. 167.

By Binnie J. (dissenting)

Atco Ltd. v. Calgary Power Ltd., [1982] 2 S.C.R. 557; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *TransAlta Utilities Corp. v. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19; *Calgary Power Ltd. v. Copithorne*, [1959] S.C.R. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Memorial Gardens Association (Canada) Ltd. v. Colwood Cemetery Co.*, [1958] S.C.R. 353; *Union Gas Co. of Canada Ltd. v. Sydenham Gas and Petroleum Co.*, [1957] S.C.R. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, 2001 SCC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, June 30, 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, March 1, 1991; *Re Natural Resource Gas Ltd.*, O.E.B., RP-2002-0147, EB-2002-0446, June 27, 2003; *Yukon Energy Corp. v. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. v. City of Edmonton*, [1979] 1 S.C.R. 684; *New York Water Service Corp. v. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84116, October 12, 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Decision No. E84081, June 29, 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Decision No. E84115, October 12, 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984.

Statutes and Regulations Cited

Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, ss. 13, 15, 26(1), (2), 27.

R.C.S. 919, 2000 CSC 64; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167.

Citée par le juge Binnie (dissident)

Atco Ltd. c. Calgary Power Ltd., [1982] 2 R.C.S. 557; *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29; *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171; *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19; *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353; *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185; *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79; *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37; *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976; *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (1982); *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991; *Re Natural Resource Gas Ltd.*, C.É.O., RP-2002-0147, EB-2002-0446, 27 juin 2003; *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58; *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (1988); *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992); *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (1990); *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (1973); *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976); *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684; *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960); *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995); *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996); *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84116, 12 octobre 1984; *Re Alberta Government Telephones*, Alta. P.U.B., Décision nº E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision nº E84115, 12 octobre 1984; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision nº E84113, 12 octobre 1984.

Lois et règlements cités

Alberta Energy and Utilities Board Act, R.S.A. 2000, ch. A-17, art. 13, 15, 26(1), (2), 27.

Gas Utilities Act, R.S.A. 2000, c. G-5, ss. 16, 17, 22, 24, 26, 27(1), 36 to 45, 59.
Interpretation Act, R.S.A. 2000, c. I-8, s. 10.
Public Utilities Act, S.A. 1915, c. 6, ss. 21, 23, 24, 29(g).
Public Utilities Board Act, R.S.A. 2000, c. P-45, ss. 36, 37, 80, 85(1), 87, 89 to 95, 101(1), (2), 102(1).

Authors Cited

Anisman, Philip, and Robert F. Reid. *Administrative Law Issues and Practice*. Scarborough, Ont.: Carswell, 1995.

Black, Alexander J. "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349.

Blake, Sara. *Administrative Law in Canada*, 3rd ed. Markham, Ont.: Butterworths, 2001.

Brown, David M. *Energy Regulation in Ontario*. Aurora, Ont.: Canada Law Book, 2001 (loose-leaf updated November 2004, release 3).

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto: Canvasback, 1998 (loose-leaf updated July 2005).

Brown-John, C. Lloyd. *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* Toronto: Butterworths, 1981.

Canadian Institute of Resources Law. *Canada Energy Law Service: Alberta*. Edited by Steven A. Kennett. Toronto: Thomson Carswell, 1981 (loose-leaf updated 2005, release 2).

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000.

Cross, Phillip S. "Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard?" (1990), 126 *Pub. Util. Fort.* 44.

Depoorter, Ben W. F. "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass.: Edward Elgar, 2000.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Green, Richard, and Martin Rodriguez Pardina. *Resetting Price Controls for Privatized Utilities: A Manual for Regulators*. Washington, D.C.: World Bank, 1999.

Kahn, Alfred E. *The Economics of Regulation: Principles and Institutions*, vol. 1, *Economic Principles*. Cambridge, Mass.: MIT Press, 1988.

MacAvoy, Paul W., and J. Gregory Sidak. "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233.

Milner, H. R. "Public Utility Rate Control in Alberta" (1930), 8 *Can. Bar Rev.* 101.

Gas Utilities Act, R.S.A. 2000, ch. G-5, art. 16, 17, 22, 24, 26, 27(1), 36 à 45, 59.
Interpretation Act, R.S.A. 2000, ch. I-8, art. 10.
Public Utilities Act, S.A. 1915, ch. 6, art. 21, 23, 24, 29g).
Public Utilities Board Act, R.S.A. 2000, ch. P-45, art. 36, 37, 80, 85(1), 87, 89 à 95, 101(1), (2), 102(1).

Doctrine citée

Anisman, Philip, and Robert F. Reid. *Administrative Law Issues and Practice*. Scarborough, Ont. : Carswell, 1995.

Black, Alexander J. « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349.

Blake, Sara. *Administrative Law in Canada*, 3rd ed. Markham, Ont. : Butterworths, 2001.

Brown, David M. *Energy Regulation in Ontario*. Aurora, Ont. : Canada Law Book, 2001 (loose-leaf updated November 2004, release 3).

Brown, Donald J. M., and John M. Evans. *Judicial Review of Administrative Action in Canada*. Toronto : Canvasback, 1998 (loose-leaf updated July 2005).

Brown-John, C. Lloyd. *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* Toronto : Butterworths, 1981.

Côté, Pierre-André. *Interprétation des lois*, 3e éd. Montréal : Thémis, 1999.

Cross, Phillip S. « Rate Treatment of Gain on Sale of Land: Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44.

Depoorter, Ben W. F. « Regulation of Natural Monopoly », in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts*. Northampton, Mass. : Edward Elgar, 2000.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.

Green, Richard, and Martin Rodriguez Pardina. *Resetting Price Controls for Privatized Utilities : A Manual for Regulators*. Washington, D.C. : World Bank, 1999.

Institut canadien du droit des ressources. *Canada Energy Law Service : Alberta*. Edited by Steven A. Kennett. Toronto : Thomson Carswell, 1981 (loose-leaf updated 2005, release 2).

Kahn, Alfred E. *The Economics of Regulation : Principles and Institutions*, vol. 1, *Economic Principles*. Cambridge, Mass. : MIT Press, 1988.

MacAvoy, Paul W., and J. Gregory Sidak. « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233.

Mullan, David J. *Administrative Law.* Toronto: Irwin Law, 2001.

Netz, Janet S. "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts.* Northampton, Mass.: Edward Elgar, 2000.

Reid, Robert F., and Hillel David. *Administrative Law and Practice*, 2nd ed. Toronto: Butterworths, 1978.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont.: Butterworths, 2002.

Trebilcock, Michael J. "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada.* Toronto: Macmillan of Canada, 1978, 94.

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.

Brian K. O'Ferrall and *Daron K. Naffin*, for the appellant/respondent on cross-appeal.

Clifton D. O'Brien, *Q.C.*, *Lawrence E. Smith*, *Q.C.*, *H. Martin Kay*, *Q.C.*, and *Laurie A. Goldbach*, for the respondent/appellant on cross-appeal.

J. Richard McKee and *Renée Marx*, for the intervener the Alberta Energy and Utilities Board.

Written submissions only by *George Vegh* and *Michael W. Lyle*, for the intervener the Ontario Energy Board.

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.

Milner, H. R. « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101.

Mullan, David J. *Administrative Law.* Toronto : Irwin Law, 2001.

Netz, Janet S. « Price Regulation : A (Non-Technical) Overview », in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics*, vol. III, *The Regulation of Contracts.* Northampton, Mass. : Edward Elgar, 2000.

Reid, Robert F., and Hillel David. *Administrative Law and Practice*, 2nd ed. Toronto : Butterworths, 1978.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont. : Butterworths, 2002.

Trebilcock, Michael J. « The Consumer Interest and Regulatory Reform », in G. B. Doern, ed., *The Regulatory Process in Canada.* Toronto : Macmillan of Canada, 1978, 94.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (les juges Wittmann et LoVecchio (*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, qui a infirmé une décision de l'Alberta Energy and Utilities Board, [2002] A.E.U.B.D. No. 52 (QL). Pourvoi rejeté et pourvoi incident accueilli, la juge en chef McLachlin et les juges Binnie et Fish sont dissidents.

Brian K. O'Ferrall et *Daron K. Naffin*, pour l'appelante/intimée au pourvoi incident.

Clifton D. O'Brien, *c.r.*, *Lawrence E. Smith*, *c.r.*, *H. Martin Kay*, *c.r.*, et *Laurie A. Goldbach*, pour l'intimée/appelante au pourvoi incident.

J. Richard McKee et *Renée Marx*, pour l'intervenante Alberta Energy and Utilities Board.

Argumentation écrite seulement par *George Vegh* et *Michael W. Lyle*, pour l'intervenante la Commission de l'énergie de l'Ontario.

Argumentation écrite seulement par *J. L. McDougall*, *c.r.*, et *Michael D. Schafler*, pour l'intervenante Enbridge Gas Distribution Inc.

Argumentation écrite seulement par *Michael A. Penny* et *Susan Kushneryk*, pour l'intervenante Union Gas Limited.

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

BASTARACHE J. —

1. Introduction

1 At the heart of this appeal is the issue of the jurisdiction of an administrative board. More specifically, the Court must consider whether, on the appropriate standard of review, this utility board appropriately set out the limits of its powers and discretion.

2 Few areas of our lives are now untouched by regulation. Telephone, rail, airline, trucking, foreign investment, insurance, capital markets, broadcasting licences and content, banking, food, drug and safety standards, are just a few of the objects of public regulations in Canada: M. J. Trebilcock, "The Consumer Interest and Regulatory Reform", in G. B. Doern, ed., *The Regulatory Process in Canada* (1978), 94. Discretion is central to the regulatory agency policy process, but this discretion will vary from one administrative body to another (see C. L. Brown-John, *Canadian Regulatory Agencies: Quis custodiet ipsos custodes?* (1981), at p. 29). More importantly, in exercising this discretion, statutory bodies must respect the confines of their jurisdiction: they cannot trespass in areas where the legislature has not assigned them authority (see D. J. Mullan, *Administrative Law* (2001), at pp. 9-10).

3 The business of energy and utilities is no exception to this regulatory framework. The respondent in this case is a public utility in Alberta which delivers natural gas. This public utility is nothing more than a private corporation subject to certain regulatory constraints. Fundamentally, it is like any other privately held company: it obtains the necessary funding from investors through public issues of shares in stock and bond markets; it is the

Version française du jugement des juges Bastarache, LeBel, Deschamps et Charron rendu par

LE JUGE BASTARACHE —

1. Introduction

Le présent pourvoi a pour objet la compétence d'un tribunal administratif. Plus précisément, notre Cour doit déterminer, selon la norme de contrôle appropriée, si l'organisme de réglementation a correctement circonscrit ses attributions et son pouvoir discrétionnaire.

De nos jours, rares sont les facettes de notre vie qui échappent à la réglementation. Le service téléphonique, les transports ferroviaire et aérien, le camionnage, l'investissement étranger, l'assurance, le marché des capitaux, la radiodiffusion (licences et contenu), les activités bancaires, les aliments, les médicaments et les normes de sécurité ne constituent que quelques-uns des objets de la réglementation au Canada : M. J. Trebilcock, « The Consumer Interest and Regulatory Reform », dans G. B. Doern, dir., *The Regulatory Process in Canada* (1978), 94. Le pouvoir discrétionnaire est au cœur de l'élaboration des politiques des organismes administratifs, mais son étendue varie d'un organisme à l'autre (voir C. L. Brown-John, *Canadian Regulatory Agencies : Quis custodiet ipsos custodes?* (1981), p. 29). Et, plus important encore, dans l'exercice de son pouvoir discrétionnaire, l'organisme créé par voie législative doit s'en tenir à son domaine de compétence : il ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence (voir D. J. Mullan, *Administrative Law* (2001), p. 9-10).

Le secteur de l'énergie et des services publics n'y échappe pas. En l'espèce, l'intimée est un service public albertain de distribution de gaz naturel. Il ne s'agit en fait que d'une société privée assujettie à certaines contraintes réglementaires. Essentiellement, elle est dans la même situation que toute société privée : elle obtient son financement par l'émission d'actions et d'obligations; ses ressources, ses terrains et ses autres biens lui

sole owner of the resources, land and other assets; it constructs plants, purchases equipment, and contracts with employees to provide the services; it realizes profits resulting from the application of the rates approved by the Alberta Energy and Utilities Board ("Board") (see P. W. MacAvoy and J. G. Sidak, "The Efficient Allocation of Proceeds from a Utility's Sale of Assets" (2001), 22 *Energy L.J.* 233, at p. 234). That said, one cannot ignore the important feature which makes a public utility so distinct: it must answer to a regulator. Public utilities are typically natural monopolies: technology and demand are such that fixed costs are lower for a single firm to supply the market than would be the case where there is duplication of services by different companies in a competitive environment (see A. E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), vol. 1, at p. 11; B. W. F. Depoorter, "Regulation of Natural Monopoly", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, "Price Regulation: A (Non-Technical) Overview", in B. Bouckaert and G. De Geest, eds., *Encyclopedia of Law and Economics* (2000), vol. III, 396, at p. 398; A. J. Black, "Responsible Regulation: Incentive Rates for Natural Gas Pipelines" (1992), 28 *Tulsa L.J.* 349, at p. 351). Efficiency of production is promoted under this model. However, governments have purported to move away from this theoretical concept and have adopted what can only be described as a "regulated monopoly". The utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service (see Kahn, at p. 11).

As in any business venture, public utilities make business decisions, their ultimate goal being to maximize the residual benefits to shareholders. However, the regulator limits the utility's managerial discretion over key decisions, including prices, service offerings and the prudency of plant and equipment investment decisions. And more relevant to this case, the utility, outside the ordinary course of business, is limited in its right to sell

appartiennent en propre; elle construit des installations, achète du matériel et, pour fournir ses services, conclut des contrats avec des employés; elle réalise des profits en pratiquant des tarifs approuvés par l'Alberta Energy and Utilities Board (« Commission ») (voir P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234). Cela dit, on ne peut faire abstraction de la caractéristique importante qui rend un service public si distinct : il doit rendre compte à un organisme de réglementation. Les services publics sont habituellement des monopoles naturels : la technologie requise et la demande sont telles que les coûts fixes sont moindres lorsque le marché est desservi par une seule entreprise au lieu de plusieurs faisant double-emploi dans un contexte concurrentiel (voir A. E. Kahn, *The Economics of Regulation : Principles and Institutions* (1988), vol. 1, p. 11; B. W. F. Depoorter, « Regulation of Natural Monopoly », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 498; J. S. Netz, « Price Regulation : A (Non-Technical) Overview », dans B. Bouckaert et G. De Geest, dir., *Encyclopedia of Law and Economics* (2000), vol. III, 396, p. 398; A. J. Black, « Responsible Regulation : Incentive Rates for Natural Gas Pipelines » (1992), 28 *Tulsa L.J.* 349, p. 351). Ce modèle favorise l'efficience de la production. Toutefois, les gouvernements ont voulu s'éloigner du concept théorique et ont opté pour ce qu'il convient d'appeler un « monopole réglementé ». La réglementation des services publics vise à protéger la population contre un comportement monopolistique et l'inélasticité de la demande qui en résulte tout en assurant la qualité constante d'un service essentiel (voir Kahn, p. 11).

Comme toute autre entreprise, un service public prend des décisions d'affaires, son objectif ultime étant de maximiser les profits revenant aux actionnaires. Cependant, l'organisme de réglementation restreint son pouvoir discrétionnaire à l'égard de certains éléments clés, dont les prix, les services offerts et l'opportunité d'investir dans des installations et du matériel. Et, plus important encore dans la présente affaire, il restreint également son

4

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.

pouvoir de vendre ses biens en dehors du cours normal de ses activités : son autorisation doit être obtenue pour la vente d'un bien affecté jusqu'alors à la prestation d'un service réglementé (voir MacAvoy et Sidak, p. 234).

C'est dans ce contexte qu'on demande à notre Cour de déterminer si, lorsqu'elle autorise un service public à vendre un bien désaffecté, la Commission peut, suivant ses lois habilitantes, attribuer aux clients une partie du gain net obtenu. Dans l'affirmative, il nous faut décider si la Commission a raisonnablement exercé son pouvoir et respecté les limites de sa compétence : était-elle autorisée, en l'espèce, à attribuer une partie du gain net aux clients?

La ville de Calgary (« Ville ») défend les intérêts des clients dans le cadre du présent pourvoi. Elle soutient que la Commission peut décider de l'attribution du produit de la vente en vertu de son pouvoir d'autoriser ou non l'opération et de protéger l'intérêt public. Cette thèse me paraît peu convaincante.

L'analyse de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45 (« PUBA »), et de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA ») (voir leurs dispositions pertinentes en annexe) mène à une seule conclusion : la Commission n'a pas le pouvoir de décider de la répartition du gain net tiré de la vente d'un bien par un service public. Son pouvoir apparemment vaste de rendre toute décision et d'imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public doit être interprété dans le contexte global des lois en cause qui visent à protéger non seulement le consommateur, mais aussi le droit de propriété reconnu au propriétaire dans une économie de libre marché. Les limites du pouvoir de la Commission sont inhérentes à sa principale fonction qui consiste à fixer des tarifs justes et raisonnables (la tarification) et à préserver l'intégrité et la fiabilité du réseau d'alimentation.

1.1 *Overview of the Facts*

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*

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

1.1 *Aperçu des faits*

8 ATCO Gas - South (« AGS »), une filiale d'ATCO Gas and Pipelines Ltd. (« ATCO »), a fait parvenir à la Commission une lettre dans laquelle elle lui demandait, en application du par. 25.1(2) (l'actuel par. 26(2)) de la GUA, l'autorisation de vendre des biens situés à Calgary (le *Calgary Stores Block*). Ces biens étaient constitués d'un terrain et de bâtiments, mais c'est le terrain qui présentait le plus grand intérêt, et l'acquéreur comptait démolir les bâtiments et réaménager le terrain, ce qu'il a d'ailleurs fait. Devant la Commission, AGS a indiqué que les biens n'étaient plus utilisés pour fournir un service public ni susceptibles de l'être et que leur vente ne causerait aucun préjudice aux clients. AGS a en fait laissé entendre que l'opération se traduirait par une économie pour les clients du fait que la valeur comptable nette des biens ne serait plus prise en compte dans l'établissement de la base tarifaire, diminuant d'autant les tarifs. ATCO a demandé à la Commission d'autoriser l'opération et l'affectation du produit de la vente au paiement du solde de la valeur comptable et au recouvrement des frais d'aliénation, puis de permettre le versement du gain net aux actionnaires. La Commission a examiné la demande sur dossier sans entendre de témoins ni tenir d'audience. La Ville, Federation of Alberta Gas Co-ops Ltd., Gas Alberta Inc. et des intervenants municipaux ont déposé des observations écrites. Tous s'opposaient à ce que le produit de la vente soit attribué aux actionnaires comme le préconisait ATCO.

1.2 *Historique judiciaire*

1.2.1 La Commission

1.2.1.1 *Décision 2001-78*

9 Dans une première décision relative à la demande d'autorisation de la vente des biens, la Commission a appliqué le critère de l'« absence de préjudice » et soupesé les répercussions possibles sur les tarifs et la qualité des services offerts aux clients, ainsi que l'opportunité de l'opération, compte tenu de l'acquéreur et de la procédure d'appel d'offres ou de vente suivie. Elle a conclu à l'« absence de

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

préjudice ». Elle s'est dite convaincue que la vente ne serait pas préjudiciable aux clients étant donné l'entente de location judicieusement conclue en vue du remplacement des installations vendues. Elle a estimé qu'il n'y aurait pas d'effet négatif sur les tarifs exigés des clients, du moins les cinq premières années de la location. La Commission a en fait jugé que la vente permettrait aux clients d'obtenir les mêmes services à meilleur prix. Elle ne s'est pas prononcée sur les effets de l'opération sur les frais d'exploitation futurs; à titre d'exemple, elle n'a pas tenu compte des frais liés à l'entente de location conclue par ATCO. La Commission a dit que les parties intéressées et elle pourraient se pencher sur ces frais dans le cadre d'une demande générale d'approbation de tarifs.

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

Dans une deuxième décision, la Commission a décidé de l'attribution du produit net de la vente. Elle a fait état de la politique réglementaire et des principes généraux présidant à la décision, même si les dispositions législatives applicables n'énumèrent pas les facteurs précis devant être pris en compte. Elle a fait mention du critère de l'« absence de préjudice » élaboré auparavant et dont elle avait résumé la raison d'être dans sa décision 2001-65 (*Re ATCO Gas-North*) : [TRADUCTION] « La Commission estime que son pouvoir de limiter ou de compenser le préjudice que pourraient subir les clients en leur attribuant tout ou partie du produit de la vente découle de son vaste mandat de protéger les clients dans l'intérêt public » (p. 16).

La Commission a ensuite analysé les répercussions de l'arrêt *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171, de la Cour d'appel de l'Alberta, en se référant à différentes décisions qu'elle avait rendues. Citant sa décision 2000-41 (*Re TransAlta Utilities Corp.*), voici comment elle a résumé la « *formule TransAlta* » :

> [TRADUCTION] Dans des décisions subséquentes, la Commission a conclu que pour la Cour d'appel, lorsque le prix de vente des biens est plus élevé que leur coût historique, les actionnaires ont droit à la valeur comptable nette (en fonction de la valeur historique),

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]

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.

les clients ont droit à la différence entre la valeur comptable nette et le coût historique, et toute appréciation des biens (c.-à-d. la différence entre le coût historique et le prix de vente) est répartie entre les actionnaires et les clients. Le montant attribué aux actionnaires est calculé en multipliant le ratio prix de vente/coût historique par la valeur comptable nette et celui qui revient aux clients est obtenu en multipliant ce ratio par la différence entre le coût historique et la valeur comptable nette. Toutefois, lorsque le prix de vente n'est pas supérieur au coût historique, les clients ont droit à la totalité du gain réalisé lors de la vente. [par. 27]

La Commission a également cité la décision 2001-65 renfermant les explications suivantes :

[TRADUCTION] Selon la Commission, lorsque l'application de la formule TransAlta donne un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit au montant plus élevé. Par contre, lorsqu'elle débouche sur un montant inférieur à celui obtenu en appliquant le critère de l'absence de préjudice, les clients ont droit à ce dernier montant. De plus, cette approche est compatible avec la manière dont elle a appliqué jusqu'à maintenant la formule TransAlta. [par. 28]

En ce qui concerne son pouvoir de répartir le produit net de la vente, la Commission a dit : 12

[TRADUCTION] Le fait qu'un service public réglementé doive obtenir de la Commission l'autorisation de se départir d'un bien montre que l'assemblée législative a voulu limiter son droit de propriété. Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher un service public de se départir d'un bien. Selon nous, il s'ensuit également que la Commission peut autoriser une aliénation en l'assortissant de conditions aptes à protéger les intérêts des clients.

Pour ce qui est de l'argument d'AGS selon lequel l'attribution aux clients d'un montant supérieur à celui obtenu en appliquant le critère de l'absence de préjudice équivaudrait à une tarification rétroactive, la Commission cite à nouveau l'arrêt *TransAlta* dans lequel la Cour d'appel a reconnu que la Commission pouvait assimiler à un « revenu » un montant payable aux clients pour les indemniser de l'amortissement excédentaire pris en compte dans la tarification antérieure. Il ne saurait y avoir de tarification rétroactive lorsqu'un service public se dessaisit d'un bien auparavant inclus dans la base tarifaire et que la Commission applique la formule TransAlta.

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:

L'argument de la société voulant que les biens (le *Calgary Stores Block*) ne soient plus des biens du service public parce qu'ils ne sont plus requis pour fournir le service ne nous convainc pas. La Commission signale que les biens pourraient encore servir à la prestation de services destinés aux clients de l'entreprise réglementée. En fait, les services anciennement fournis grâce aux biens demeurent requis, mais leur prestation sera assurée par des installations existantes et des installations récemment louées. La Commission note de plus que même dans le cas où un bien et le service qu'il fournissait aux clients ne sont plus requis, elle a déjà attribué plus que le montant obtenu par l'application du critère de l'absence de préjudice lorsque le produit de l'aliénation a été supérieur au coût historique. [par. 47-49]

La Commission a ensuite appliqué le critère de l'absence de préjudice aux faits de l'espèce. Elle a signalé que, dans sa décision relative à la demande d'autorisation, elle avait conclu au respect de ce critère, mais n'avait alors tiré aucune conclusion concernant l'incidence sur les frais d'exploitation, notamment l'entente de location obtenue par ATCO.

Puis, après avoir examiné les observations portant sur l'attribution du gain net, la Commission a rejeté l'argument selon lequel le fait que le nouveau propriétaire n'utiliserait pas les bâtiments situés sur le terrain était déterminant à cet égard. Elle a conclu que les bâtiments avaient alors une certaine valeur, mais elle n'a pas jugé nécessaire de la préciser. Elle a reconnu et confirmé que suivant la *formule TransAlta*, le profit inattendu réalisé lorsque le produit de la vente excède le coût historique pouvait être réparti entre les clients et les actionnaires. Elle a estimé qu'il y avait lieu en l'espèce d'appliquer la formule et de tenir compte de la totalité du gain issu de l'opération sans dissocier la partie attribuable au terrain et celle correspondant aux bâtiments.

Pour ce qui est de la répartition du gain entre les clients et les actionnaires d'ATCO, la Commission a tenté de mettre en balance la volonté des clients d'obtenir des services à la fois sûrs et fiables à un prix raisonnable et celle des investisseurs de toucher un rendement raisonnable :

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]

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.

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)

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

[TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.

À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation. [par. 112-113]

16 La Commission a poursuivi en concluant que le partage du gain net résultant globalement de la vente du terrain et des bâtiments, selon la *formule TransAlta*, était équitable dans les circonstances et conforme à ses décisions antérieures.

17 Elle a décidé de répartir le produit brut de la vente (6 550 000 $) comme suit : 465 000 $ à ATCO pour les frais d'aliénation (265 000 $) et la dépollution (200 000 $), 2 014 690 $ aux actionnaires et 4 070 310 $ aux clients. Un montant de 225 245 $ devait être prélevé de la somme attribuée aux actionnaires pour radier des registres d'ATCO la valeur comptable nette des biens vendus. De la somme attribuée aux clients, 3 045 813 $ étaient alloués aux clients d'ATCO Gas - South et 1 024 497 $ à ceux d'ATCO Pipelines - South.

1.2.2 La Cour d'appel de l'Alberta ((2004), 24 Alta. L.R. (4th) 205, 2004 ABCA 3)

18 ATCO a interjeté appel de la décision. Elle a fait valoir que la Commission n'avait pas compétence pour attribuer le produit de la vente, qui aurait dû revenir en entier aux actionnaires. Selon elle, en touchant une partie du produit de la vente, les clients gagnaient sur tous les tableaux puisqu'ils n'avaient pas supporté le coût de la rénovation des biens vendus et qu'ils profiteraient d'économies grâce à l'entente de location. La Cour d'appel de l'Alberta lui a donné raison, accueillant l'appel et annulant la décision. Elle a renvoyé l'affaire à la

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

Commission, lui enjoignant d'attribuer à ATCO la totalité du solde à répartir selon la ligne 11 du tableau d'attribution du produit de la vente. Pour les motifs qui suivent, il y a lieu de confirmer en partie le jugement de la Cour d'appel, qui n'a pas eu tort de statuer que la Commission n'avait pas le pouvoir d'attribuer le produit de la vente aux clients.

2. Analyse

2.1 *Questions en litige*

Nous sommes saisis d'un pourvoi et d'un pourvoi incident. Dans son pourvoi, la Ville affirme que contrairement à ce qu'a estimé la Cour d'appel, la Commission avait le pouvoir d'attribuer aux clients une partie du gain net résultant de la vente d'un bien affecté au service public même si elle avait conclu, au moment d'autoriser la vente, qu'aucun préjudice ne serait causé au public. Dans son pourvoi incident, ATCO conteste le pouvoir de la Commission d'attribuer aux clients toute partie du produit de la vente. Elle soutient en particulier que la Commission n'a pas le pouvoir de leur attribuer l'équivalent de l'amortissement calculé les années antérieures. Peu importe la formulation de la question en litige, notre Cour est appelée en l'espèce à décider si la Commission a le pouvoir d'attribuer le gain net tiré de la vente d'un bien d'une entreprise de services publics.

Vu la conclusion à laquelle j'arrive, point n'est besoin de se demander si la Commission a raisonnablement réparti le produit de la vente. Néanmoins, comme je le signale au par. 82, vu les motifs de mon collègue, je me penche brièvement sur la question de l'exercice du pouvoir discrétionnaire.

2.2 *Norme de contrôle*

Une décision administrative étant à l'origine du présent pourvoi, il faut déterminer le degré de déférence auquel a droit l'organisme qui l'a rendue. S'exprimant au nom de la Cour d'appel, le juge Wittmann a conclu que la question de la compétence de la Commission commandait l'application de la norme de la décision correcte. ATCO en convient, et moi aussi. Il n'y a pas lieu de faire preuve de

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.

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).

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.

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.

déférence à l'égard de la décision de la Commission concernant son pouvoir d'attribuer le gain net tiré de la vente des biens. L'examen des facteurs énoncés par notre Cour dans l'arrêt *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, confirme cette conclusion, tout comme son raisonnement dans l'arrêt *United Taxi Drivers' Fellowship of Southern Alberta c. Calgary (Ville)*, [2004] 1 R.C.S. 485, 2004 CSC 19.

22 Bien qu'il ne soit pas nécessaire d'approfondir la question de la norme de contrôle applicable en l'espèce, je l'examinerai brièvement puisque, dans ses motifs, le juge Binnie se prononce sur l'exercice du pouvoir discrétionnaire. Les quatre facteurs à considérer pour déterminer la norme de contrôle applicable à la décision d'un tribunal administratif sont les suivants : (1) l'existence d'une clause privative; (2) l'expertise du tribunal ou de l'organisme; (3) l'objet de la loi applicable et des dispositions en cause; (4) la nature du problème (*Pushpanathan*, par. 29-38).

23 Dans la présente affaire, il faut se garder de conclure hâtivement que la question en litige en est une de « compétence » puis de laisser tomber l'analyse pragmatique et fonctionnelle. L'examen exhaustif des facteurs s'impose.

24 Premièrement, le par. 26(1) de l'AEUBA prévoit un droit d'appel restreint qui ne peut être exercé que sur une question de compétence ou de droit et seulement avec l'autorisation d'un juge :

[TRADUCTION]

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

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.

De plus, l'AEUBA renferme une clause d'immunité de contrôle (ou clause privative) prévoyant que toute mesure, ordonnance ou décision de la Commission est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire (art. 27).

Le fait que la loi prévoit un droit d'appel sur une question de compétence ou de droit seulement permet de conclure à l'application d'une norme de contrôle plus stricte et donne à penser que notre Cour doit se montrer moins déférente vis-à-vis de la Commission relativement à ces questions (voir *Pushpanathan*, par. 30). Cependant, l'existence d'une clause d'immunité de contrôle et d'un droit d'appel n'est pas décisive, de sorte qu'il nous faut examiner la nature de la question à trancher et l'expertise relative du tribunal administratif à cet égard.

Deuxièmement, comme l'a fait remarquer la Cour d'appel, nul ne conteste que la Commission est un organisme spécialisé doté d'une grande expertise en ce qui concerne les ressources et les services publics de l'Alberta dans le domaine énergétique (voir, p. ex., *Consumers' Gas Co. c. Ontario (Energy Board)*, [2001] O.J. No. 5024 (QL) (C. div.), par. 2; *Coalition of Citizens Impacted by the Caroline Shell Plant c. Alberta (Energy Utilities Board)* (1996), 41 Alta. L.R. (3d) 374 (C.A.), par. 14. Il s'agit en fait d'un tribunal administratif permanent qui régit depuis nombre d'années les services publics réglementés.

Quoi qu'il en soit, notre Cour s'intéresse non pas à l'expertise générale de l'instance administrative, mais à son expertise quant à la question précise dont elle est saisie. Par conséquent, même si l'on tiendrait normalement pour acquis que l'expertise de la Commission est beaucoup plus grande que celle d'une cour de justice, la nature de la question en litige « neutralise », pour reprendre le terme employé par la Cour d'appel (par. 35), la déférence qu'appelle cette considération. Comme je l'explique plus loin, l'expertise de la Commission n'est pas mise à contribution lorsqu'elle se prononce sur l'étendue de ses pouvoirs.

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.

28 Troisièmement, trois lois s'appliquent en l'espèce : la PUBA, la GUA et l'AEUBA. Suivant ces lois, la Commission a pour mission de protéger l'intérêt public quant à la nature et à la qualité des services fournis à la collectivité par les entreprises de services publics : *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576; *Dome Petroleum Ltd. c. Public Utilities Board (Alberta)* (1976), 2 A.R. 453 (C.A.), par. 20-22, conf. par [1977] 2 R.C.S. 822. L'objet premier de ce cadre législatif est de réglementer adéquatement un service de gaz dans l'intérêt public ou, plus précisément, de réglementer un monopole dans l'intérêt public, grâce principalement à l'établissement des tarifs. J'y reviendrai.

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).

29 La disposition qui nous intéresse au premier chef, le sous-al. 26(2)d)(i) de la GUA, qui exige qu'un service public obtienne de l'organisme de réglementation l'autorisation de vendre un bien, vise à protéger les clients contre les effets préjudiciables de toute opération de l'entreprise en veillant à l'accroissement des avantages financiers qu'ils en tirent (MacAvoy et Sidak, p. 234-236).

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.

30 Même si, à première vue, on peut considérer que l'objet des lois pertinentes et la raison d'être de la Commission sont de réaliser un équilibre délicat entre divers intéressés — le service public et les clients — et, par conséquent, qu'ils impliquent un processus décisionnel polycentrique (*Pushpanathan*, par. 36), l'interprétation des lois habilitantes et des dispositions en cause (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) n'est pas, contrairement à ce qu'a conclu la Cour d'appel, une question polycentrique. Il s'agit plutôt de déterminer si, interprétées correctement, les lois habilitantes confèrent à la Commission le pouvoir d'attribuer le profit tiré de la vente d'un bien. Lorsque aucune question de principe n'est soulevée, le mandat premier de la Commission n'est pas d'interpréter l'AEUBA, la GUA ou la PUBA de manière abstraite, mais de veiller à ce que la tarification soit toujours juste et raisonnable (voir *Atco Ltd.*, p. 576). En l'espèce, ce rôle de protection n'entre pas en jeu. Partant, le troisième facteur commande l'application d'une norme de contrôle moins déférente.

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.

Quatrièmement, la nature du problème n'est pas la même pour chacune des questions en litige. Les parties demandent en substance à notre Cour de répondre à deux questions (énoncées précédemment). Premièrement, le pouvoir d'attribuer le produit de la vente relève-t-il du mandat légal de la Commission? Dans sa décision, cette dernière a statué qu'elle avait le pouvoir d'attribuer aux clients une partie du produit de la vente des biens d'un service public. Elle a invoqué à l'appui ses pouvoirs légaux, les principes d'équité inhérents au « pacte réglementaire » (voir par. 63 des présents motifs) et ses décisions antérieures. Il s'agit clairement d'une question de droit et de compétence. L'on pourrait soutenir que la Commission ne possède pas une plus grande expertise qu'une cour de justice à cet égard. Une cour de justice est appelée à interpréter des dispositions ne comportant aucun aspect technique, ce qui n'était pas le cas de la disposition en litige dans l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, [2003] 1 R.C.S. 476, 2003 CSC 28, par. 86. Qui plus est, l'interprétation de notions générales comme l'« intérêt public » et l'« imposition de conditions » (que l'on retrouve à l'al. 15(3)d) de l'AEUBA), n'est pas étrangère à une cour de justice et n'appartient pas à un domaine dans lequel il a été jugé qu'un tribunal administratif avait une plus grande expertise qu'une cour de justice. Deuxièmement, la méthode employée en l'espèce et l'attribution en résultant étaient-elles raisonnables? Pour répondre à cette question, il faut examiner la jurisprudence, les considérations de principe et la pratique d'autres organismes, ainsi que le détail de l'attribution en l'espèce. Il s'agit en somme d'une question mixte de fait et de droit.

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"

Au vu des quatre facteurs, je conclus que chacune des questions en litige appelle une norme de contrôle distincte. Statuer sur le pouvoir de la Commission d'attribuer le produit de la vente d'un bien d'un service public requiert l'application de la norme de la décision correcte. Comme l'a dit la Cour d'appel, l'accent est mis sur les dispositions invoquées et interprétées par la Commission (al. 26(2)d) de la GUA et 15(3)d) de l'AEUBA) et la

(*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.

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.

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?*

Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute; they

question « touche la compétence » (*Pushpanathan*, par. 28). De plus, gardant présents à l'esprit tous les facteurs considérés, le caractère général de la proposition est un autre élément qui milite en faveur de la norme de la décision correcte, comme je l'ai dit dans l'arrêt *Pushpanathan* (par. 38) :

> . . . plus les propositions avancées sont générales, et plus les répercussions de ces décisions s'écartent du domaine d'expertise fondamental du tribunal, moins il est vraisemblable qu'on fasse preuve de retenue. En l'absence d'une intention législative implicite ou expresse à l'effet contraire manifestée dans les critères qui précèdent, on présumera que le législateur a voulu laisser aux cours de justice la compétence de formuler des énoncés de droit fortement généralisés.

33 La deuxième question, qui porte sur la méthode employée par la Commission pour attribuer le produit de la vente, appelle vraisemblablement une norme de contrôle plus déférente. D'une part, l'expertise de la Commission, dans ce domaine en particulier, son vaste mandat, la technicité de la question et l'objet général des lois en cause portent à croire que sa décision justifie un degré relativement élevé de déférence. D'autre part, l'absence d'une clause d'immunité de contrôle visant les questions de compétence et la nécessité de se référer au droit pour trancher la question, appellent l'application d'une norme de contrôle moins déférente privilégiant le caractère raisonnable de la décision. Il n'est toutefois pas nécessaire que je précise quelle norme de contrôle aurait été applicable en l'espèce.

34 Comme le montre l'analyse qui suit, je suis d'avis que la Cour d'appel n'a pas commis d'erreur de fait ou de droit lorsqu'elle a conclu que la Commission avait outrepassé sa compétence en se méprenant sur les pouvoirs que lui confèrent la loi et la common law. Cependant, elle a eu tort de ne pas conclure en outre que la Commission n'avait pas le pouvoir d'attribuer aux clients *quelque* partie du produit de la vente des biens.

2.3 *La Commission a-t-elle rendu une décision correcte au sujet de sa compétence?*

35 Un tribunal ou un organisme administratif est une création de la loi : il ne peut outrepasser les pouvoirs que lui confère sa loi habilitante, il doit

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 that has been

[TRADUCTION] « s'en tenir à son domaine de compétence et ne peut s'immiscer dans un autre pour lequel le législateur ne lui a pas attribué compétence » : Mullan, p. 9-10 (voir également S. Blake, *Administrative Law in Canada* (3e éd. 2001), p. 183-184).

Pour décider si la Commission a eu raison de conclure qu'elle avait le pouvoir d'attribuer le produit de la vente des biens d'un service public, je dois interpréter le cadre législatif à l'origine de ses attributions et de ses actes.

2.3.1 Principes généraux d'interprétation législative

Depuis un certain nombre d'années, notre Cour fait sienne l'approche moderne d'E. A. Driedger en matière d'interprétation des lois (*Construction of Statutes* (2e éd. 1983), p. 87) :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

(Voir, p. ex., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21; *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26; *H.L. c. Canada (Procureur général)*, [2005] 1 R.C.S. 401, 2005 CSC 25, par. 186-187; *Marche c. Cie d'Assurance Halifax*, [2005] 1 R.C.S. 47, 2005 CSC 6, par. 54; *Barrie Public Utilities*, par. 20 et 86; *Contino c. Leonelli-Contino*, [2005] 3 R.C.S. 217, 2005 CSC 63, par. 19.)

Toutefois, dans le domaine du droit administratif, plus particulièrement, la compétence des tribunaux et des organismes administratifs a deux sources : (1) l'octroi exprès par une loi (pouvoir explicite) et (2) la common law, suivant la doctrine de la déduction nécessaire (pouvoir implicite) (voir également D. M. Brown, *Energy Regulation in Ontario* (éd. feuilles mobiles), p. 2-15).

La Ville soutient que le pouvoir exprès de la Commission d'autoriser la vente des biens d'un

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

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)).

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

service public englobe — implicitement et explicitement — celui de décider de l'attribution du produit de la vente. ATCO réplique que non seulement ce pouvoir n'est pas expressément prévu par la loi, mais qu'on ne peut « déduire » du régime législatif qu'il découle nécessairement du pouvoir exprès. Je suis d'accord avec elle et voici pourquoi.

2.3.2 Pouvoir explicite : sens grammatical et ordinaire

La Ville soutient à titre préliminaire qu'en lui demandant d'autoriser la vente des biens *et* l'attribution du produit de l'opération, ATCO a reconnu le pouvoir de la Commission d'imposer, comme condition de l'autorisation, une certaine attribution du produit de la vente projetée. À mon avis, l'argument ne tient pas. D'abord, la demande d'autorisation ne peut à elle seule être considérée comme une reconnaissance de la compétence de la Commission. De toute manière, une telle reconnaissance ne serait pas déterminante quant au droit applicable. De plus, sachant que, par le passé, la Commission avait jugé être investie du pouvoir d'attribuer le produit de la vente et avait exercé ce pouvoir, on peut présumer qu'ATCO lui a demandé d'autoriser l'attribution du produit de la vente pour le cas où elle rejetterait sa prétention relative à la compétence. En fait, il appert des décisions antérieures de la Commission d'autoriser ou non une opération que les entreprises de services publics contestent systématiquement son pouvoir d'attribuer le gain net en résultant (voir, p. ex., *Re TransAlta Utilities Corp.*, Alta. E.U.B., Décision 2000-41; *Re ATCO Gas-North*, Alta. E.U.B., Décision 2001-65; *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 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)).

L'analyse exige au départ qu'on se penche sur le sens ordinaire des dispositions au cœur du litige, savoir le sous-al. 26(2)d)(i) de la GUA, le par. 15(1) et l'al. 15(3)d) de l'AEUBA et l'art. 37 de la

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;

. . .

PUBA. Pour faciliter leur consultation, en voici le texte :

[TRADUCTION]

GUA

26. . . .

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

. . .

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

. . .

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

AEUBA

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB [Energy Resources Conservation Board] et à la PUB [Public Utilities Board].

. . .

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

. . .

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

. . .

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.

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).

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.

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"

PUBA

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Certaines de ces dispositions figurent également dans les deux autres lois (voir, p. ex., le par. 85(1) et le sous-al. 101(2)d)(i) de la PUBA; le par. 22(1) de la GUA; texte en annexe).

Nul ne conteste que le par. 26(2) de la GUA interdit entre autres au propriétaire d'un service public d'aliéner ses biens, notamment par vente, location ou constitution d'hypothèque, sans l'autorisation de la Commission, sauf dans le cours normal des activités de l'entreprise. Comme l'a fait valoir ATCO, la Commission a le pouvoir d'autoriser l'opération, sans plus. L'article 26 ne fait aucune mention des raisons pour lesquelles l'autorisation peut être accordée ou refusée ni de la faculté d'autoriser l'opération à certaines conditions, encore moins du pouvoir d'attribuer le profit net réalisé. Je signale au passage que le pouvoir conféré au par. 26(2) suffit à dissiper la crainte de la Commission que le service public soit tenté de vendre ses biens à fort profit, au détriment des clients, si le bénéfice tiré de la vente lui revient entièrement.

Il est intéressant de noter que le par. 26(2) ne s'applique pas à tous les types de vente (ainsi que de location, de constitution d'hypothèque, d'aliénation, de grèvement ou de fusion). En effet, il prévoit une exception pour la vente effectuée dans le cours normal des activités de l'entreprise. Si le régime législatif conférait à la Commission le pouvoir d'attribuer le produit de la vente des biens d'un service public, comme on le prétend en l'espèce, il va de soi que le par. 26(2) s'appliquerait à toute vente de biens ou, à tout le moins, ne prévoirait une exception que pour la vente n'excédant pas un certain montant. Il appert que l'attribution du produit de la vente aux clients n'est pas l'un de ses objets.

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

D'ailleurs, en ce qui concerne les biens non affectés au service public et étrangers à la prestation du service, l'application de cette disposition, à supposer qu'elle s'applique, est nécessairement limitée (surtout lorsque la vente satisfait au critère de l'« absence de préjudice »). Le paragraphe 26(2) ne peut avoir qu'un seul objet, soit garantir que le bien n'est pas affecté au service public, de manière que son aliénation ne nuise ni à la prestation du service ni à sa qualité.

Par conséquent, la simple lecture du par. 26(2) de la GUA permet de conclure que la Commission n'a pas le pouvoir d'attribuer le produit de la vente d'un bien.

La Ville ne fonde pas son argumentation que sur le par. 26(2); elle fait aussi valoir que le par. 15(3) de l'AEUBA, qui autorise la Commission à assortir ses ordonnances des conditions qu'elle estime nécessaires dans l'intérêt public, confère un pouvoir exprès à la Commission. De plus, elle invoque le pouvoir général que prévoit l'art. 37 de la PUBA pour soutenir que la Commission peut, dans les domaines de sa compétence, rendre toute ordonnance qui n'est pas incompatible avec une disposition législative applicable. Or, considérer ces deux dispositions isolément comme le préconise la Ville fait perdre de vue leur véritable portée : R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4e éd. 2002), p. 21; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735; *Marche*, par. 59-60; *Bristol-Myers Squibb Co. c. Canada (Procureur général)*, [2005] 1 R.C.S. 533, 2005 CSC 26, par. 105. En eux-mêmes, le par. 15(3) et l'art. 37 sont vagues et sujets à diverses interprétations. Il serait absurde d'accorder à la Commission le pouvoir discrétionnaire absolu d'assortir ses ordonnances des conditions de son choix. De plus, la notion d'« intérêt public » à laquelle renvoie le par. 15(3) est très large et élastique; la Commission ne peut se voir accorder le pouvoir discrétionnaire absolu d'en circonscrire les limites.

Même si, à l'issue de la première étape du processus d'interprétation législative, je suis enclin à

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.

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

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.

conclure que la loi est silencieuse en ce qui concerne le pouvoir de la Commission de décider du sort du produit de la vente, je poursuis l'analyse car on peut néanmoins soutenir que les dispositions sont jusqu'à un certain point ambiguës et incohérentes.

48 Notre Cour a affirmé maintes fois que le sens grammatical et ordinaire d'une disposition n'est pas déterminant et ne met pas fin à l'analyse. Il faut tenir compte du contexte global de la disposition, même si, à première vue, le sens de son libellé peut paraître évident (voir *Chieu c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 84, 2002 CSC 3, par. 34; Sullivan, p. 20-21). Je vais donc examiner l'objet et l'esprit des lois habilitantes, l'intention du législateur et les normes juridiques pertinentes.

2.3.3 Pouvoir implicite : contexte global

49 Les dispositions en cause figurent dans des lois qui font elles-mêmes partie d'un cadre législatif plus large dont on ne peut faire abstraction :

> Œuvre d'un législateur rationnel et logique, la loi est censée former un système : chaque élément contribue au sens de l'ensemble et l'ensemble, au sens de chacun des éléments : « chaque disposition légale doit être envisagée, relativement aux autres, comme la fraction d'un ensemble complet » . . .
>
> (P.-A. Côté, *Interprétation des lois* (3e éd. 1999), p. 388)

Comme dans le cadre de toute interprétation législative, appelée à circonscrire les pouvoirs d'un organisme administratif, une cour de justice doit tenir compte du contexte qui colore les mots et du cadre législatif. L'objectif ultime consiste à dégager l'intention manifeste du législateur et l'objet véritable de la loi tout en préservant l'harmonie, la cohérence et l'uniformité des lois en cause (*Bell ExpressVu*, par. 27; voir également l'*Interpretation Act*, R.S.A. 2000, ch. I-8, art. 10, à l'annexe). « L'interprétation législative est [. . .] l'art de découvrir l'esprit du législateur qui imprègne les textes législatifs » : *Bristol-Myers Squibb Co.*, par. 102.

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.

Le pouvoir discrétionnaire que le par. 15(3) de l'AEUBA et l'art. 37 de la PUBA confèrent à la Commission n'est donc pas absolu. Comme le dit ATCO, la Commission doit l'exercer en respectant le cadre législatif et les principes généralement applicables en matière de réglementation, dont le législateur est présumé avoir tenu compte en adoptant ces lois (voir Sullivan, p. 154-155). Dans le même ordre d'idées, le passage suivant de l'arrêt *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722, p. 1756, se révèle pertinent :

> Les pouvoirs d'un tribunal administratif doivent évidemment être énoncés dans sa loi habilitante, mais ils peuvent également découler implicitement du texte de la loi, de son économie et de son objet. Bien que les tribunaux doivent s'abstenir de trop élargir les pouvoirs de ces organismes de réglementation par législation judiciaire, ils doivent également éviter de les rendre stériles en interprétant les lois habilitantes de façon trop formaliste.

Il incombe à notre Cour de déterminer l'intention du législateur et d'y donner effet (*Bell ExpressVu*, par. 62) sans franchir la ligne qui sépare l'interprétation judiciaire de la formulation législative (voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, par. 26; *Bristol-Myers Squibb Co.*, par. 174). Cela dit, cette règle permet l'application de « la doctrine de la compétence par déduction nécessaire » : sont compris dans les pouvoirs conférés par la loi habilitante non seulement ceux qui y sont expressément énoncés, mais aussi, par déduction, tous ceux qui sont de fait nécessaires à la réalisation de l'objectif du régime législatif : voir Brown, p. 2-16.2; *Bell Canada*, p. 1756. Par le passé, les cours de justice canadiennes ont appliqué la doctrine de manière à investir les organismes administratifs de la compétence nécessaire à l'exécution de leur mandat légal :

> [TRADUCTION] Lorsque l'objet de la législation est de créer un vaste cadre réglementaire, le tribunal administratif doit posséder les pouvoirs qui, par nécessité pratique et déduction nécessaire, découlent du pouvoir réglementaire qui lui est expressément conféré.

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).

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.

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*

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.

Pursuant to *The Public Utilities Act*, the first public utility board was established as a

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 141 D.L.R. (3d) 641 (H.C. Ont.), p. 658-659, conf. par (1983), 42 O.R. (2d) 731 (C.A.) (voir également *Interprovincial Pipe Line Ltd. c. Office national de l'énergie*, [1978] 1 C.F. 601 (C.A.); *Ligue de la radiodiffusion canadienne c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1983] 1 C.F. 182 (C.A.), conf. par [1985] 1 R.C.S. 174).

52 Voici quelles sont selon moi les prétentions de la Ville : (1) en acquittant leurs factures, les clients acquièrent un droit sur les biens du propriétaire du service public et ont donc droit à une partie du profit tiré de leur vente; (2) le pouvoir de la Commission d'autoriser ou non la vente des biens d'un service public emporte, par nécessité, celui d'assujettir l'autorisation à une certaine répartition du produit de la vente. La doctrine de la compétence par déduction nécessaire est au cœur de la deuxième prétention de la Ville. Je ne peux faire droit ni à l'une ni à l'autre de ces prétentions qui, à mon avis, sont diamétralement contraires au droit applicable, comme le révèle ci-après l'examen du contexte global.

53 Après un bref rappel historique, je me pencherai sur la principale fonction de la Commission, l'établissement des tarifs, puis sur les pouvoirs accessoires qui peuvent être déduits du contexte.

2.3.3.1 *Historique et contexte général*

54 Les services publics sont réglementés en Alberta depuis la création en 1915 de l'organisme appelé Board of Public Utility Commissioners en vertu de la loi intitulée *The Public Utilities Act*, S.A. 1915, ch. 6, inspirée d'une loi américaine similaire : H. R. Milner, « Public Utility Rate Control in Alberta » (1930), 8 *R. du B. can.* 101, p. 101. Bien qu'il faille aborder avec circonspection la jurisprudence et la doctrine américaines dans ce domaine — les régimes politiques des États-Unis et du Canada étant fort différents, tout comme leurs régimes de droit constitutionnel —, elles éclairent la question.

55 Suivant *The Public Utilities Act*, la première commission des services publics, composée de

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

trois membres, surveillait de manière générale tous les services publics (art. 21), enquêtait sur les tarifs (art. 23), rendait des ordonnances concernant l'équipement (art. 24) et exigeait que chacun des services publics lui remette la liste complète de ses tarifs (art. 23). Signalons pour les besoins du présent pourvoi que la loi de 1915 exigeait également d'un service public qu'il obtienne de l'organisme l'autorisation de vendre un bien en dehors du cours normal de ses activités (al. 29g)).

La Commission a été créée en février 1995 par le fusionnement de l'Energy Resources Conservation Board et de la Public Utilities Board (voir Institut canadien du droit des ressources, *Canada Energy Law Service : Alberta* (éd. feuilles mobiles), p. 30-3101). Dès lors, toutes les affaires qui étaient du ressort des organismes fusionnés relevaient de sa compétence exclusive. La Commission a tous les pouvoirs, les droits et les privilèges des organismes auxquels elle a succédé (AEUBA, art. 13, par. 15(1); GUA, art. 59).

Outre les pouvoirs prévus dans la loi de 1915, qui sont pratiquement identiques à ceux que confère actuellement la PUBA, la Commission est aujourd'hui investie des pouvoirs exprès suivants :

1. rendre une ordonnance concernant l'amélioration du service ou du produit (PUBA, al. 80b));

2. autoriser l'entreprise de services publics à émettre des actions, des obligations ou d'autres titres d'emprunt (GUA, al. 26(2)a); PUBA, al. 101(2)a));

3. autoriser l'entreprise de services publics à aliéner ou à grever ses biens, concessions, privilèges ou droits, notamment en les louant ou en les hypothéquant (GUA, sous-al. 26(2)d)(i); PUBA, sous-al. 101(2)d)(i));

4. autoriser la fusion ou le regroupement des biens, concessions, privilèges ou droits de l'entreprise de services publics (GUA, sous-al. 26(2)d)(ii); PUBA, sous-al. 101(2)d)(ii));

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)).

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.

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.

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

5. autoriser la vente d'actions de l'entreprise de services publics à une société ou l'inscription dans ses registres de toute cession d'actions à une société lorsque la vente ou la cession ferait en sorte que cette société détienne plus de 50 pour 100 des actions en circulation du propriétaire de l'entreprise de services publics (GUA, par. 27(1); PUBA, par. 102(1)).

58 Il appert donc de cette énumération qu'une entreprise de services publics a une marge de manœuvre très limitée. Il n'est fait mention ni du pouvoir d'attribuer le produit de la vente ni du pouvoir discrétionnaire de porter atteinte au droit de propriété.

59 Même lorsque le législateur a décidé de créer la Commission en 1995, il n'a pas jugé opportun de modifier la PUBA ou la GUA pour donner au nouvel organisme le pouvoir d'attribuer le produit d'une vente. Pourtant, la question suscitait déjà la controverse (voir, p. ex., *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, et *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116). Selon un principe bien établi, le législateur est présumé connaître parfaitement le droit existant, qu'il s'agisse de la common law ou du droit d'origine législative (voir Sullivan, p. 154-155). Il est également censé être au fait de toutes les circonstances entourant l'adoption de la nouvelle loi.

60 Bien que la Commission puisse sembler posséder toute une gamme d'attributions et de fonctions, il ressort de l'AEUBA, de la PUBA et de la GUA que son principal mandat, à l'égard des entreprises de services publics, est l'établissement de tarifs. Son pouvoir de surveiller les finances et le fonctionnement de ces entreprises est certes vaste mais, en pratique, il est accessoire à sa fonction première (voir Milner, p. 102; Brown, p. 2-16.6). S'exprimant au nom des juges majoritaires dans *Atco Ltd.*, le juge Estey a abondé dans ce sens (p. 576) :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par

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. This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board. [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. On the utilities side, we regulate rates and terms of service of investor-owned natural gas, electric, and water utility services, as well as the major intra-Alberta gas transmission system, to ensure that customers receive safe and reliable service at just and reasonable rates. [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

les entreprises de services publics. Un régime de réglementation aussi vaste doit, pour être efficace, comprendre le droit de contrôler les réunions ou, pour reprendre l'expression du législateur, « l'union » des entreprises et installations existantes. Cela a sans aucun doute un rapport direct avec la fonction de fixation des tarifs qui constitue un des pouvoirs les plus importants attribués à la Commission. [Je souligne.]

Voici d'ailleurs comment la Commission décrit elle-même ses fonctions sur son site Internet (http://www.eub.gov.ab.ca/BBS/eubinfo/default.htm) :

[TRADUCTION] La Commission réglemente l'exploitation sûre, responsable et efficiente des ressources énergétiques de l'Alberta — pétrole, gaz naturel, sables bitumineux, charbon et électricité — ainsi que les pipelines et les lignes de transport servant à l'acheminement vers les marchés. En ce qui a trait aux services publics, elle réglemente les tarifs des services de gaz naturel, d'électricité et d'eau appartenant au privé et le niveau de service y afférent, ainsi que les principaux réseaux de transport de gaz en Alberta, afin que les clients obtiennent des services sûrs et fiables à un prix juste et raisonnable. [Je souligne.]

Le processus par lequel la Commission fixe les tarifs est donc fondamental et son examen s'impose pour statuer sur la première prétention de la Ville.

2.3.3.2 *Établissement des tarifs*

La réglementation tarifaire a plusieurs objectifs — viabilité, équité et efficacité — qui expliquent le mode de fixation des tarifs :

[TRADUCTION] . . . l'entreprise réglementée doit être en mesure de financer ses activités et tout investissement nécessaire à la poursuite de ses activités. [. . .] L'équité est liée à la redistribution de la richesse dans la société. L'objectif de la viabilité suppose déjà que les actionnaires ne doivent pas réaliser un « trop faible » rendement (défini comme la gratification requise pour assurer l'investissement continu dans l'entreprise), alors que celui de l'équité implique qu'ils ne doivent pas obtenir un rendement « trop élevé ».

(R. Green et M. Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities : A Manual for Regulators* (1999), p. 5)

Ces objectifs sont à l'origine d'un arrangement économique et social appelé « pacte

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).

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.

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

réglementaire » qui garantit à tous les clients l'accès au service public à un prix raisonnable, sans plus, et qui, je l'explique plus loin, ne transmet aucun droit de propriété aux clients. Le pacte réglementaire accorde en fait aux entreprises réglementées le droit exclusif de vendre leurs services dans une région donnée à des tarifs leur permettant de réaliser un juste rendement au bénéfice de leurs actionnaires. En contrepartie de ce monopole, elles ont l'obligation d'offrir un service adéquat et fiable à tous les clients d'un territoire donné et voient leurs tarifs et certaines de leurs activités assujettis à la réglementation (voir Black, p. 356-357; Milner, p. 101; *Atco Ltd.*, p. 576; *Northwestern Utilities Ltd. c. City of Edmonton*, [1929] R.C.S. 186 (« *Northwestern 1929* »), p. 192-193).

64 Par conséquent, lorsqu'il s'agit d'interpréter les vastes pouvoirs de la Commission, on ne peut faire abstraction de ce subtil compromis servant de toile de fond à l'interprétation contextuelle. L'objet de la législation est de protéger le client *et* l'investisseur (Milner, p. 101). Le pacte ne supprime pas le caractère privé de l'entreprise. La Commission a essentiellement pour mandat d'établir une tarification qui accroît les avantages financiers des consommateurs et des investisseurs.

65 Elle tient son pouvoir de fixer les tarifs à la fois de la GUA (art. 16 et 17 et art. 36 à 45) et de la PUBA (art. 89 à 95). Il lui incombe de fixer des [TRADUCTION] « tarifs [. . .] justes et raisonnables » (PUBA, al. 89a); GUA, al. 36a)). Pour le faire, elle doit [TRADUCTION] « établi[r] une base tarifaire pour les biens du propriétaire » et « fixe[r] un juste rendement par rapport à cette base tarifaire » (GUA, par. 37(1)). Dans *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684 (« *Northwestern 1979* »), p. 691, notre Cour a décrit le processus comme suit :

> La PUB approuve ou fixe pour les services publics des tarifs destinés à couvrir les dépenses et à permettre à l'entreprise d'obtenir un taux de rendement ou profit convenable. Le processus s'accomplit en deux étapes. Dans la première étape, la PUB établit une base de tarification en calculant le montant des fonds investis par la compagnie en terrains, usines et équipements, plus le montant alloué au fonds de roulement, sommes dont

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:

il faut établir la nécessité dans l'exploitation de l'entreprise. C'est également à cette première étape qu'est calculé le revenu nécessaire pour couvrir les dépenses d'exploitation raisonnables et procurer un rendement convenable sur la base de tarification. Le total des dépenses d'exploitation et du rendement donne un montant appelé le revenu nécessaire. Dans une deuxième étape, les tarifs sont établis de façon à pouvoir produire, dans des conditions météorologiques normales, « le revenu nécessaire prévu ». Ces tarifs restent en vigueur tant qu'ils ne sont pas modifiés à la suite d'une nouvelle requête ou d'une plainte, ou sur intervention de la Commission. C'est également à cette seconde étape que les tarifs provisoires sont confirmés ou réduits et, dans ce dernier cas, qu'un remboursement est ordonné.

(Voir également *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (C. div. Ont.), p. 701-702.)

Pour établir la base tarifaire, la Commission tient donc compte (GUA, par. 37(2)) :

[TRADUCTION]

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

Le fait que l'on donne au service public la possibilité de tirer un profit de la prestation du service et de bénéficier d'un juste rendement de son actif ne peut ni ne devrait l'empêcher d'encaisser le bénéfice résultant de la vente d'un élément d'actif. L'entreprise n'est d'ailleurs pas non plus à l'abri de la perte pouvant en découler. Il ressort du libellé des dispositions précitées que les biens appartiennent à l'entreprise de services publics. Droit de propriété sur les biens et droit au profit ou à la perte lors de leur réalisation vont de pair. L'investisseur s'attend à toucher le produit net, une fois tous les frais payés, soit l'équivalent de la valeur actualisée de l'investissement initial. Le versement aux clients d'une partie du produit net restant, à l'issue d'une nouvelle répartition, sape le processus d'investissement : MacAvoy et Sidak, p. 244. À vrai dire, les

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.

opérations de spéculation seraient encore plus fréquentes si le service public et ses actionnaires ne touchaient pas le profit éventuel, car les investisseurs s'attendraient à obtenir une meilleure prime de la seule manière alors possible, le rendement de la mise de fonds initiale; en outre, ils seraient moins disposés à courir un risque.

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).

68 La Ville a-t-elle raison alors de prétendre que les clients ont un droit de propriété sur le service public? Absolument pas. Sinon, les principes fondamentaux du droit des sociétés seraient dénaturés. En acquittant sa facture, le client paie pour le service réglementé un montant équivalant au coût du service et des ressources nécessaires. Il ne se porte pas implicitement acquéreur des biens des investisseurs. Le paiement n'emporte pas l'acquisition d'un droit de propriété ou de possession sur les biens. Le client acquitte le prix du service, à l'exclusion du coût de possession des biens eux-mêmes : [TRADUCTION] « Le client d'un service public n'en est pas le propriétaire puisqu'il n'a pas droit au reliquat des biens » : MacAvoy et Sidak, p. 245 (voir également p. 237). Le client n'a rien investi. Les actionnaires, eux, ont investi des fonds et assument tous les risques car ils touchent le profit restant. Le client court seulement le [TRADUCTION] « risque que le prix change par suite de la modification (autorisée) du coût du service, ce qui n'arrive que périodiquement lors de la révision des tarifs par l'organisme de réglementation » (MacAvoy et Sidak, p. 245).

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 . . . .

69 Je suis d'accord avec ce qu'affirme ATCO à ce sujet au par. 38 de son mémoire :

> [TRADUCTION] Les biens en cause appartiennent au propriétaire du service public tout comme ses autres biens. Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

Comme l'a si bien dit le juge Wittmann, de la Cour d'appel :

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the

> [TRADUCTION] Le client d'un service public paie un service, mais n'obtient aucun droit de propriété sur les

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 they have paid only for the use of those assets. [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,

biens de cette entreprise. Lorsque le tarif établi correspond au prix du service pour la période considérée, le client n'acquiert à l'égard des biens non amortissables aucun droit fondé sur l'equity ou issu de la loi lorsqu'il n'a payé que pour l'utilisation de ces biens. [Je souligne; par. 64.]

Je suis entièrement d'accord. La Commission s'est méprise en confondant le droit des clients à un service sûr et efficace avec le droit sur les biens affectés à la prestation de ce service et dont l'entreprise est l'unique propriétaire. Alors que l'entreprise a été rémunérée pour le service fourni, les clients n'ont versé aucune contrepartie en échange du profit tiré de la vente des biens. L'argument voulant que les biens achetés soient pris en compte dans l'établissement de la base tarifaire ne doit pas embrouiller la question de savoir qui est le véritable titulaire du droit de propriété sur les biens et qui supporte les risques y afférents. Les biens comptent effectivement parmi les facteurs considérés pour fixer les tarifs, et un service public ne peut vendre un bien affecté à la prestation du service pour réaliser un profit et, ce faisant, diminuer la qualité du service ou majorer son prix. Même si les biens du service public sont pris en compte dans l'établissement de la base tarifaire, les actionnaires sont les seuls touchés lorsque la vente donne lieu à un profit ou à une perte. L'entreprise absorbe les pertes et les gains, l'appréciation ou la dépréciation des biens, eu égard à la conjoncture économique et aux défaillances techniques imprévues, mais elle continue de fournir un service fiable sur le plan de la qualité et du prix. Le client peut courir le risque que l'entreprise manque à ses obligations, mais cela ne lui donne pas droit au reliquat des biens. Sans m'appuyer indûment sur la jurisprudence américaine, je signale qu'aux États-Unis, l'arrêt de principe en la matière est *Duquesne Light Co. c. Barasch*, 488 U.S. 299 (1989), qui s'appuie sur le même principe que celui appliqué dans l'arrêt *Market St. Ry. Co. c. Railroad Commission of State of California*, 324 U.S. 548 (1945).

De plus, il faut reconnaître qu'une entreprise de services publics n'est pas une société d'État, une association d'assistance mutuelle, une coopérative ou une société mutuelle même si elle sert « l'intérêt public » en fournissant à la collectivité un service

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.

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*

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

nécessaire (en l'occurrence, la distribution du gaz naturel). Son capital ne provient pas des pouvoirs publics ou des clients, mais d'investisseurs privés qui escomptent un rendement aussi élevé que celui offert par d'autres placements présentant les mêmes caractéristiques d'attractivité, de stabilité et de certitude (voir *Northwestern 1929*, p. 192). Les actionnaires s'attendent donc nécessairement à toucher le gain ou à subir la perte résultant de l'aliénation d'un élément d'actif de l'entreprise, comme un terrain ou un bâtiment.

71 Il appert de l'analyse qui précède portant sur le droit de propriété que la Commission ne pouvait effectuer un remboursement tacite en attribuant aux clients le profit tiré de la vente des biens au motif que les tarifs avaient été excessifs dans le passé. C'est pourquoi la première prétention de la Ville doit être rejetée. La Commission a tenté de remédier à une supposée rétribution excessive de l'entreprise de services publics par ses clients. Or, aucune des lois applicables ne lui confère le pouvoir d'effectuer un tel remboursement à partir d'une telle perception erronée. La jurisprudence des différentes provinces confirme que les organismes de réglementation n'ont pas le pouvoir de modifier les tarifs rétroactivement (*Northwestern 1979*, p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (C.A. Alb.), p. 715, autorisation d'appel refusée, [1981] 2 R.C.S. vii; *Re Dow Chemical Canada Inc.* (C.A.), p. 734-735). Qui plus est, on ne peut même pas dire qu'il y a eu paiement excessif : la tarification est un processus conjectural où clients et actionnaires assument ensemble leur part du risque lié aux activités de l'entreprise de services publics (voir MacAvoy et Sidak, p. 238-239).

2.3.3.3 *Le pouvoir d'imposer des conditions*

72 La Ville soutient en second lieu que le pouvoir d'attribuer le produit de la vente des biens d'un service public est nécessairement accessoire aux pouvoirs exprès que confèrent à la Commission l'AEUBA, la GUA et la PUBA. Elle fait valoir que la Commission a nécessairement ce pouvoir lorsqu'elle exerce celui — discrétionnaire — d'autoriser ou non la vente d'éléments d'actifs, puisqu'elle

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

peut assortir de toute condition l'ordonnance autorisant la vente. Je ne suis pas d'accord.

La Ville semble tenir pour acquis que la doctrine de la compétence par déduction nécessaire s'applique tout autant aux pouvoirs « définis largement » qu'à ceux qui sont « biens circonscrits ». Ce ne saurait être le cas. Dans sa décision *Re Consumers' Gas Co.*, E.B.R.O. 410-II/411-II/412-II, 23 mars 1987, par. 4.73, la Commission de l'énergie de l'Ontario a énuméré les situations dans lesquelles s'applique la doctrine de la compétence par déduction nécessaire :

[TRADUCTION]

* la compétence alléguée est nécessaire à la réalisation des objectifs du régime législatif et essentielle à l'exécution du mandat de la Commission;
* la loi habilitante ne confère pas expressément le pouvoir de réaliser l'objectif législatif;
* le mandat de la Commission est suffisamment large pour donner à penser que l'intention du législateur était de lui conférer une compétence tacite;
* la Commission n'a pas à exercer la compétence alléguée en s'appuyant sur des pouvoirs expressément conférés, démontrant ainsi l'absence de nécessité;
* le législateur n'a pas envisagé la question et ne s'est pas prononcé contre l'octroi du pouvoir à la Commission.

(Voir également Brown, p. 2-16.3.)

Il est donc clair que la doctrine de la compétence par déduction nécessaire sera moins utile dans le cas de pouvoirs largement définis que dans celui de pouvoirs bien circonscrits. Les premiers seront nécessairement interprétés de manière à ne s'appliquer qu'à ce qui est rationnellement lié à l'objet de la réglementation. C'est ce qu'explique la professeure Sullivan, à la p. 228 :

[TRADUCTION] En pratique, toutefois, l'analyse téléologique rend les pouvoirs conférés aux organismes administratifs presque infiniment élastiques. Un pouvoir bien circonscrit peut englober, par « déduction nécessaire », tout ce qui est requis pour que le responsable

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.]

ou l'organisme puisse accomplir l'objet de son octroi. À l'inverse, on considère qu'un pouvoir largement défini vise uniquement ce qui est rationnellement lié à son objet. Il s'ensuit qu'un pouvoir a une portée qui augmente ou diminue au besoin, en fonction de son objet. [Je souligne.]

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).

75 En l'espèce, l'art. 15 de l'AEUBA, qui permet à la Commission d'imposer des conditions supplémentaires dans le cadre d'une ordonnance, paraît à première vue conférer un pouvoir dont la portée est infiniment élastique. J'estime cependant que la Ville ne saurait y avoir recours pour accroître les pouvoirs que le par. 26(2) de la GUA confère à la Commission. Notre Cour doit interpréter le par. 15(3) de l'AEUBA conformément à l'objet du par. 26(2).

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.

76 Dans leur article, MacAvoy et Sidak avancent trois raisons principales d'exiger qu'une vente soit autorisée par la Commission (p. 234-236) :

1. éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients;

2. garantir que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou d'autres intéressés;

3. éviter précisément que les investisseurs ne soient favorisés.

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

77 Par conséquent, pour qu'un organisme de réglementation ait le pouvoir d'attribuer le produit d'une vente, la preuve doit établir que ce pouvoir lui est nécessaire dans les faits pour atteindre les objectifs de la loi, ce qui n'est pas le cas en l'espèce (voir l'arrêt *Loi sur l'Office national de l'énergie (Can.) (Re)*, [1986] 3 C.F. 275 (C.A.)). Pour satisfaire aux trois exigences susmentionnées, il n'est pas nécessaire que la Commission détermine qui touchera le produit de la vente. Le volet intérêt public ne peut à lui seul lui conférer le pouvoir d'attribuer la totalité du profit tiré de la vente de biens. En fait, il n'est pas nécessaire à l'accomplissement de son mandat qu'elle puisse ordonner à l'entreprise de services

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

publics de céder la plus grande partie du produit de la vente en contrepartie de l'autorisation accordée. La Commission dispose, dans les limites de sa compétence, d'autres moyens que l'appropriation du produit de la vente, le plus évident étant le refus d'autoriser une vente qui, à son avis, nuira à la qualité ou à la quantité des services offerts ou occasionnera des frais d'exploitation supplémentaires. Ce qui ne veut pas dire qu'elle ne peut jamais assujettir son autorisation à une condition. Par exemple, elle pourrait autoriser la vente à la condition que l'entreprise prenne des engagements en ce qui concerne le remplacement des biens en cause et leur rentabilité. Elle pourrait aussi exiger le réinvestissement d'une partie du produit de la vente dans l'entreprise afin de préserver un système d'exploitation moderne assurant une croissance optimale.

J'estime que permettre la confiscation du gain net tiré de la vente sous prétexte de protéger les clients et d'agir dans l'« intérêt public » c'est se méprendre grandement sur le pouvoir de la Commission d'autoriser ou non une vente et faire totalement abstraction des fondements économiques de la tarification exposés précédemment. S'approprier ainsi un produit net extraordinaire pour le compte des clients serait d'un opportunisme très poussé qui, en fin de compte, se traduirait par une hausse du coût du capital pour l'entreprise (MacAvoy et Sidak, p. 246). Au risque de me répéter, une entreprise de services publics est avant tout une entreprise privée dont l'objectif est de réaliser des profits. Cela n'est pas contraire au régime législatif, même si le pacte réglementaire modifie les principes économiques habituellement applicables, les lois habilitantes prévoyant explicitement différentes limitations. Aucune des trois lois pertinentes en l'espèce ne confère à la Commission le pouvoir d'attribuer le produit de la vente d'un bien et d'empiéter de la sorte sur le droit de propriété de l'entreprise de services publics.

Il est bien établi qu'une disposition législative susceptible d'avoir un effet confiscatoire doit être interprétée avec prudence afin de ne pas dépouiller les parties intéressées de leurs droits lorsque ce

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.

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*

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?*

In light of my conclusion with regard to jurisdiction, it is not necessary to determine whether

n'est pas l'intention manifeste du législateur (voir Sullivan, p. 400-403; Côté, p. 607-613; *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64, par. 26; *Leiriao c. Val-Bélair (Ville)*, [1991] 3 R.C.S. 349, p. 357; *Banque Hongkong du Canada c. Wheeler Holdings Ltd.*, [1993] 1 R.C.S. 167, p. 197). Non seulement il n'est pas nécessaire, pour s'acquitter de sa mission, que la Commission ait le pouvoir d'attribuer à une partie le produit de la vente qu'elle autorise, mais toute conclusion contraire permettrait d'interpréter un pouvoir largement défini d'une façon qui empiète sur la liberté économique de l'entreprise de services publics, dépouillant cette dernière de ses droits, ce qui irait à l'encontre des principes d'interprétation susmentionnés.

80 Si l'assemblée législative albertaine souhaite que les clients bénéficient des avantages financiers découlant de la vente des biens d'un service public, elle peut le prévoir expressément dans la loi, à l'instar de certains États américains (le Connecticut, par exemple).

2.4 *Autres considérations*

81 Dans le cadre du pacte réglementaire, les clients sont protégés par la procédure d'établissement des tarifs à l'issue de laquelle la Commission doit rendre une décision pondérée. Il appert du dossier que la Ville n'a pas saisi la Commission d'une demande d'approbation du tarif général en réponse à celle présentée par ATCO afin d'obtenir l'autorisation de vendre des biens. Néanmoins, si elle l'avait fait, la Commission aurait pu, de son propre chef, convoquer les parties intéressées à une audience afin de fixer de nouveaux tarifs justes et raisonnables tenant dûment compte de la situation financière nouvelle devant résulter de la vente (PUBA, al. 89a); GUA, art. 24, al. 36a), par. 37(3), art. 40) (texte en annexe).

2.5 *À supposer que la Commission ait eu le pouvoir de répartir le produit de la vente, a-t-elle exercé ce pouvoir de manière raisonnable?*

82 Vu ma conclusion touchant à la compétence, il n'est pas nécessaire de déterminer si la Commission

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

a exercé son pouvoir discrétionnaire de façon raisonnable en répartissant le produit de la vente comme elle l'a fait. Toutefois, vu les motifs de mon collègue le juge Binnie, je me penche très brièvement sur la question. Le règlement du pourvoi aurait été le même si j'avais conclu que la Commission avait ce pouvoir, car j'estime que la décision qu'elle a rendue sur son fondement ne satisfaisait pas à la norme de la raisonnabilité.

Je ne vois pas très bien comment on pourrait conclure que la répartition était raisonnable, la Commission ayant supposé à tort que les clients avaient acquis un droit de propriété sur les biens de l'entreprise du fait de la prise en compte de ceux-ci dans l'établissement des tarifs et ayant en outre conclu explicitement que la vente des biens ne causerait aucun préjudice aux clients. À mon avis, une cour de justice appelée à contrôler la décision au fond doit se livrer à une analyse en deux étapes. Premièrement, elle doit déterminer si l'ordonnance était justifiée au vu de l'obligation de la Commission de *protéger les clients* (c.-à-d. l'ordonnance était-elle *nécessaire dans l'intérêt public*?). Deuxièmement, dans l'affirmative, elle doit déterminer si la Commission a bien appliqué la *formule TransAlta* (voir le par. 12 des présents motifs), qui renvoie à la différence entre la valeur comptable nette des biens et leur coût historique, d'une part, et à l'appréciation des biens, d'autre part. Pour les besoins de l'analyse, je ne vois dans la deuxième étape qu'une opération mathématique, rien de plus. Je ne crois pas que la *formule TransAlta* oriente la décision de la Commission *d'attribuer ou non* une partie du produit de la vente aux clients. Elle ne préside qu'à la détermination de *ce qui sera attribué et des modalités d'attribution* (lorsqu'elle a décidé qu'il y avait lieu d'attribuer le produit de la vente). Il importe également de signaler que nul ne conteste que seule la valeur comptable figurant dans les états financiers de l'entreprise de services publics doit être utilisée pour le calcul.

Je le répète, la Commission n'était même pas justifiée, à mon sens, d'exercer le pouvoir d'attribuer le produit de la vente. Suivant son raisonnement même, elle ne doit exercer son pouvoir discrétionnaire d'agir dans l'intérêt public que lorsque les

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.

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

clients subiraient ou seraient susceptibles de subir un préjudice. Or sa conclusion à ce sujet est claire : aucun préjudice ou risque de préjudice n'était associé à l'opération projetée :

> [TRADUCTION] Comme les mêmes services seront offerts à partir d'autres installations, et vu l'acceptation de ce transfert par les clients, la Commission est convaincue que la vente ne devrait pas avoir de répercussions sur le niveau de service. Quoi qu'il en soit, elle considère que le niveau de service offert pourra au besoin faire l'objet d'un examen et d'une mesure corrective dans le cadre d'une procédure ultérieure.

(Décision 2002-037, par. 54)

Après avoir déclaré que, tout bien considéré, les clients ne seraient pas lésés, la Commission a statué au vu des éléments de preuve présentés qu'ils réaliseraient apparemment des économies. Aucun droit légitime des clients ne pouvait ni ne devait être protégé par un refus d'autorisation ou un octroi assorti de la condition de répartir le produit de la vente d'une certaine manière. Même si la Commission avait conclu à la possibilité que la vente ait un effet préjudiciable, comment pouvait-elle, à ce stade, attribuer le produit de la vente en fonction d'une perte éventuelle indéterminée? La mauvaise foi présumée d'ATCO qui paraît sous-tendre la détermination de la Commission à protéger le public contre un risque éventuel, en l'absence de tout fondement factuel, me préoccupe également. De toute manière, je l'ai déjà dit, cette détermination à protéger l'intérêt public est également difficile à concilier avec le pouvoir exprès de la Commission de prévenir tout préjudice causé aux clients en refusant d'autoriser la vente des biens d'un service public. Je rappelle que la Commission jouit d'un pouvoir discrétionnaire considérable dans l'établissement des tarifs futurs afin de protéger l'intérêt public.

Par conséquent, je suis d'avis que la Commission n'a pas cerné d'intérêt public à protéger et qu'aucun élément ne justifiait donc l'exercice de son pouvoir discrétionnaire d'attribuer le produit de la vente. Indépendamment de ma conclusion au sujet de la compétence de la Commission, je conclus que sa décision d'exercer son pouvoir discrétionnaire

85

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

de protéger l'intérêt public ne satisfaisait pas à la norme de la raisonnabilité.

3. Conclusion

Le rôle de notre Cour dans le présent pourvoi a été d'interpréter les lois habilitantes en tenant compte comme il se doit du contexte, de l'intention du législateur et de l'objectif législatif. Aller plus loin et conclure à l'issue d'une interprétation large que l'organisme administratif jouit de pouvoirs *non nécessaires* n'est pas conforme aux règles d'interprétation législative. Une telle approche est particulièrement dangereuse lorsqu'un droit de propriété est en jeu.

La Commission n'avait pas le pouvoir d'attribuer le produit de la vente d'un bien du service public; sa décision ne satisfaisait pas à la norme de la décision correcte. Par conséquent, je suis d'avis de rejeter le pourvoi de la Ville et d'accueillir le pourvoi incident d'ATCO, avec dépens dans les deux instances. Je suis également d'avis d'annuler la décision de la Commission et de lui renvoyer l'affaire en lui enjoignant d'autoriser la vente des biens d'ATCO et de reconnaître son droit au produit de la vente.

Version française des motifs de la juge en chef McLachlin et des juges Binnie et Fish rendus par

LE JUGE BINNIE (dissident) — L'intimée, ATCO Gas and Pipelines Ltd. (« ATCO »), fait partie d'une grande société qui, directement et par l'entremise de diverses filiales, exploite à la fois des entreprises réglementées et des entreprises non réglementées. L'Alberta Energy and Utilities Board (« Commission ») estime qu'il n'est pas dans l'intérêt public d'encourager les entreprises de services publics à jumeler leurs activités dans les deux secteurs. Plus particulièrement, elle a adopté des politiques afin de dissuader les entreprises de services publics de faire de leur secteur réglementé un lieu de spéculation foncière et d'augmenter ainsi le rendement de leurs investissements indépendamment du cadre réglementaire. En attribuant une partie du profit à l'entreprise de services publics (et à ses actionnaires), la Commission récompense la diligence avec laquelle elle se départit de biens qui ne sont

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.

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

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

plus productifs ou qui pourraient l'être davantage s'ils étaient employés autrement. Toutefois, en portant une partie du profit au crédit de la base tarifaire de l'entreprise (c.-à-d. en la déduisant d'autres coûts), la Commission tente d'empêcher les entreprises de services publics de céder à la tentation d'infléchir les décisions afférentes à leurs activités réglementées pour favoriser la réalisation de profits indus. De son point de vue, un tel compromis est nécessaire dans l'intérêt du public, celui-ci conférant à ATCO un monopole dans un secteur d'activité. Dans la recherche de ce compromis, la Commission a autorisé ATCO à vendre un terrain et un entrepôt situés au centre-ville de Calgary, mais refusé qu'elle conserve, au bénéfice de ses actionnaires, la totalité du profit découlant de l'appréciation du terrain dont le coût d'acquisition était pris en compte, depuis 1922, pour la tarification du gaz naturel. La Commission a ordonné que le profit tiré de la vente soit attribué à raison d'un tiers à ATCO et que les deux tiers servent à réduire ses coûts, contribuant à contenir toute hausse des tarifs et favorisant ainsi la clientèle.

89 J'ai lu avec intérêt les motifs de mon collègue le juge Bastarache, mais, en toute déférence, je ne suis pas d'accord avec ses conclusions. Comme nous le verrons, le par. 15(3) de l'*Alberta Energy and Utilities Board Act*, R.S.A. 2000, ch. A-17 (« AEUBA »), confère à la Commission le pouvoir d'assujettir la vente aux [TRADUCTION] « conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Il appartenait à la Commission de décider de la nécessité d'imposer des conditions dans l'intérêt public. La Cour d'appel de l'Alberta a infirmé la décision de la Commission. En toute déférence, j'estime que la Commission était mieux placée que la Cour d'appel ou que notre Cour pour juger de la nécessité de protéger l'intérêt public dans ce domaine. J'accueillerais le pourvoi et rétablirais la décision de la Commission.

I. Analyse

90 La thèse d'ATCO se résume à ce qu'elle affirme au début de son mémoire :

[TRADUCTION] À défaut de tout droit de propriété et de tout préjudice causé à la clientèle par le

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.

dessaisissement, rien ne justifiait qu'on puise dans les poches de l'entreprise. En fait, le présent pourvoi doit être réglé au regard du droit de propriété.

(Mémoire de l'intimée, par. 2)

Pour les motifs qui suivent, je ne crois pas que le litige ressortisse au droit de propriété. ATCO a choisi d'investir dans un secteur réglementé, celui de la distribution du gaz, où le rendement est établi par la Commission, et non par le marché. À mon avis, la question en litige est essentiellement de savoir si la Cour d'appel de l'Alberta était justifiée de restreindre les conditions que la Commission pouvait « juge[r] nécessaires dans l'intérêt public ».

A. *Les pouvoirs légaux de la Commission*

La première question qui se pose est celle de la compétence. D'où la Commission tient-elle le pouvoir de rendre l'ordonnance que conteste ATCO? La réponse de la Commission comporte trois volets. Le paragraphe 22(1) de la *Gas Utilities Act*, R.S.A. 2000, ch. G-5 (« GUA »), prévoit entre autres que [TRADUCTION] « [l]a Commission assure la surveillance générale des services de gaz et de leurs propriétaires . . . ». Selon la Commission, cette disposition lui confère le vaste pouvoir d'établir des politiques qui débordent le cadre du règlement de demandes au cas par cas (approbation de tarifs, etc.). Élément plus pertinent encore, le sous-al. 26(2)d)(i) de la même loi interdit à l'entreprise réglementée de vendre ses biens, de les louer ou de les grever par ailleurs sans l'autorisation de la Commission. (Voir dans le même sens le sous-al. 101(2)d)(i) de la *Public Utilities Board Act*, R.S.A. 2000, ch. P-45.) Tous conviennent que cette limitation s'applique à la vente projetée par ATCO du terrain et de l'entrepôt situés au centre-ville de Calgary et que si les circonstances l'avaient justifié, la Commission aurait pu simplement refuser son autorisation. En l'espèce, la Commission a décidé d'autoriser la vente et de l'assujettir à certaines conditions. Elle a statué que le pouvoir plus large de refuser d'autoriser la vente englobait celui, plus restreint, de l'autoriser en l'assujettissant à certaines conditions :

[TRADUCTION] Dans certaines circonstances, la Commission a clairement le pouvoir d'empêcher une

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.

ATCO argues in the alternative that the Board engaged in impermissible "retroactive rate

entreprise de services publics de se départir d'un bien. Il s'ensuit donc qu'elle peut autoriser une aliénation et l'assortir de conditions susceptibles de bien protéger les intérêts du consommateur.

(Décision 2002-037, [2002] A.E.U.B.D. No. 52 (QL), par. 47)

Il n'est toutefois pas nécessaire qu'elle s'appuie sur un tel pouvoir implicite pour établir des conditions. Je le répète, le par. 15(3) de l'AEUBA confère explicitement à la Commission le pouvoir de [TRADUCTION] « rendre toute autre ordonnance et [d']imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public ». Dans *Atco Ltd. c. Calgary Power Ltd.*, [1982] 2 R.C.S. 557, p. 576, le juge Estey a dit au nom des juges majoritaires :

> Il ressort des pouvoirs que le législateur a accordé[s] à la Commission dans les deux lois mentionnées ci-dessus, qu'il a investi la Commission du mandat très général de veiller aux intérêts du public quant à la nature et à la qualité des services rendus à la collectivité par les entreprises de services publics. [Je souligne.]

Le paragraphe 15(3) dispose que les conditions fixées sont celles que *la Commission* juge nécessaires. Évidemment, son pouvoir discrétionnaire n'est pas illimité. Elle doit l'exercer de bonne foi et aux fins auxquelles il est conféré : *S.C.F.P. c. Ontario (Ministre du Travail)*, [2003] 1 R.C.S. 539, 2003 CSC 29. ATCO prétend que la Commission a même outrepassé un aussi large pouvoir. Voici un extrait de son mémoire :

> [TRADUCTION] Nul droit issu de la loi ou de l'equity n'est conféré ou transmis au client à l'égard d'un bien du fait de son affectation à un service public. Faute d'un tel droit, une appropriation, comme celle ordonnée par la Commission, a un effet confiscatoire . . .

(Mémoire de l'intimée, par. 38)

À mon avis, toutefois, la Commission devait déterminer la hauteur du profit qu'ATCO était admise à tirer de son investissement dans une entreprise réglementée.

Subsidiairement, ATCO soutient que la Commission s'est indûment livrée à une

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.

« tarification rétroactive ». Or, l'Alberta a opté pour la tarification selon le « coût historique » et personne ne laisse entendre que, depuis plus de 80 ans, la Commission applique à tort cette méthode qui prend en compte l'investissement d'ATCO pour l'établissement de sa base tarifaire. La Commission a proposé de tenir compte d'une partie du profit escompté pour fixer les tarifs ultérieurs. L'ordonnance a un effet prospectif, et non rétroactif. La fixation du rendement futur et la surveillance générale [TRADUCTION] « des services de gaz et de leurs propriétaires » relevaient sans conteste du mandat légal de la Commission.

B. *The Board's Decision*

B. *La décision de la Commission*

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

ATCO soutient que la décision de la Commission doit être considérée isolément, sans égard aux attributions de l'organisme en matière de tarification. Toutefois, je ne crois pas que l'audience tenue pour l'application de l'art. 26 puisse être ainsi dissociée des attributions générales de la Commission à titre d'organisme de réglementation. Dans son mémoire, ATCO fait valoir ce qui suit :

> 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)

> [TRADUCTION] . . . la demande d'[ATCO] n'avait rien à voir avec l'approbation de tarifs et la Commission n'était pas engagée dans un processus de tarification (à supposer que cela ait pu la justifier, ce qui est nié).
>
> (Mémoire de l'intimée, par. 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:

Il semble que la Commission ait entendu la demande d'autorisation fondée sur l'art. 26 indépendamment d'une demande d'approbation de tarifs en raison, premièrement, de la manière dont ATCO avait engagé l'instance et, deuxièmement, de l'approbation de cette démarche par la Cour d'appel de l'Alberta dans *TransAlta Utilities Corp. c. Public Utilities Board (Alta.)* (1986), 68 A.R. 171 (« *TransAlta (1986)* »). Il s'agit de l'arrêt de principe albertain en ce qui concerne l'attribution du profit réalisé lors de l'aliénation d'un bien affecté à un service public, et la Cour d'appel y a énoncé la *formule TransAlta* que la Commission a appliquée en l'espèce. Voici ce qu'a dit le juge Kerans à ce sujet (p. 174) :

> I observe parenthetically that I now appreciate that it suits the convenience of everybody involved to resolve

> [TRADUCTION] Je signale en passant que je comprends maintenant que toutes les parties ont intérêt à ce que

issues of this sort, if possible, before a general rate hearing so as to lessen the burden on that already complex procedure.

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.

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)

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.

les questions de cette nature soient, si possible, résolues avant l'audition de la demande générale de majoration tarifaire de manière à ne pas alourdir cette procédure déjà complexe.

96 Fort de ces propos de la Cour d'appel de l'Alberta, j'accorderais peu d'importance à l'argument procédural d'ATCO. Nous le verrons, la décision de la Commission est directement liée à la tarification générale, les deux tiers du profit étant déduits des coûts à partir desquels sont ultimement déterminés les besoins en revenus d'ATCO. Je l'ai déjà dit, le profit tiré de la vente des biens d'ATCO situés à Calgary constituera une rentrée courante (et non historique), et si la décision de la Commission est confirmée, les deux tiers du profit tiré de l'opération seront pris en compte pour la tarification ultérieure (et non de manière rétroactive).

97 L'audience tenue pour l'application de l'art. 26 s'est déroulée en deux étapes. La Commission a d'abord décidé qu'elle ne refusait pas d'autoriser la vente projetée vu l'« absence de préjudice », un critère qu'elle avait élaboré au fil des ans, mais qui n'était pas prévu dans les lois (décision 2001-78). Cependant, elle a lié son autorisation à l'examen subséquent des conséquences financières. Comme elle l'a elle-même fait remarquer :

> [TRADUCTION] Dans la décision 2001-78, la Commission a autorisé la vente parce qu'il avait été établi que les clients ne s'opposaient pas à l'opération, qu'ils ne subiraient pas une diminution de service et que la vente ne risquait pas de leur infliger un préjudice financier *qui ne pourrait faire l'objet d'un examen dans le cadre d'une procédure ultérieure.* Elle a donc conclu à l'absence de préjudice et décidé que la vente pouvait avoir lieu. [Soulignements et italiques ajoutés.]

(Décision 2002-037, par. 13)

98 ATCO fait abstraction de ce qui figure en italique dans cet extrait. Elle soutient que la Commission était *functus officio* après la première étape de l'audience. Or, elle avait elle-même consenti au déroulement de la procédure en deux étapes, et la deuxième partie de l'audience a effectivement été consacrée à sa demande d'attribution du profit tiré de la vente.

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

Au cours de la deuxième étape de l'audition de la demande fondée sur l'art. 26, la Commission a attribué un tiers du profit net à ATCO et deux tiers à la base tarifaire (au bénéfice des clients). Elle a exposé les raisons pour lesquelles elle jugeait cette répartition nécessaire à la protection de l'intérêt public. Elle a expliqué qu'il fallait mettre en balance les intérêts des actionnaires et ceux des clients dans le cadre de ce qu'elle a appelé [TRADUCTION] « le pacte réglementaire » (décision 2002-037, par. 44). Selon la Commission :

a) il faut mettre en balance les intérêts des clients et ceux des propriétaires de l'entreprise de services publics;

b) les décisions visant l'entreprise doivent tenir compte des intérêts des deux parties;

c) attribuer aux clients la totalité du profit tiré de la vente n'inciterait pas l'entreprise à accroître son efficacité et à réduire ses coûts;

d) en attribuer la totalité à l'entreprise pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est accrue et leur aliénation pour des motifs étrangers à l'intérêt véritable de l'entreprise réglementée.

Pour les besoins du présent pourvoi, il importe de rappeler les considérations de principe invoquées par la Commission :

> [TRADUCTION] Il serait avantageux pour les clients de leur attribuer la totalité du profit net tiré de la vente du terrain et des bâtiments, mais cela pourrait dissuader la société de soumettre son fonctionnement à une analyse continue afin de trouver des moyens d'améliorer son rendement et de réduire ses coûts de manière constante.
>
> À l'inverse, attribuer à l'entreprise réglementée la totalité du profit net pourrait encourager la spéculation à l'égard de biens non amortissables ou l'identification des biens dont la valeur s'est déjà accrue et leur aliénation.
>
> La Commission croit qu'une certaine mise en balance des intérêts des deux parties permettra la

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.]

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*

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.

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).

réalisation optimale des objectifs de l'entreprise dans son propre intérêt et dans celui de ses clients. Par conséquent, elle estime équitable en l'espèce et conforme à ses décisions antérieures de partager selon la formule TransAlta le profit net tiré de la vente du terrain et des bâtiments. [Je souligne; par. 112-114.]

101 On a informé notre Cour que les deux tiers du profit attribués aux clients seraient déduits des coûts considérés pour l'établissement de la base tarifaire d'ATCO, puis amortis sur un certain nombre d'années.

C. *La norme de contrôle*

102 L'approche actuelle de notre Cour à l'égard de cette question épineuse a récemment été précisée par la juge en chef McLachlin dans l'arrêt *Dr Q c. College of Physicians and Surgeons of British Columbia*, [2003] 1 R.C.S. 226, 2003 CSC 19, par. 26 :

> Selon l'analyse pragmatique et fonctionnelle, la norme de contrôle est déterminée en fonction de quatre facteurs contextuels — la présence ou l'absence dans la loi d'une clause privative ou d'un droit d'appel; l'expertise du tribunal relativement à celle de la cour de révision sur la question en litige; l'objet de la loi et de la disposition particulière; la nature de la question — de droit, de fait ou mixte de fait et de droit. Les facteurs peuvent se chevaucher. L'objectif global est de cerner l'intention du législateur, sans perdre de vue le rôle constitutionnel des tribunaux judiciaires dans le maintien de la légalité.

103 Je n'entends pas reprendre les propos de mon collègue le juge Bastarache à ce sujet. Nous convenons que la norme applicable en matière de compétence est celle de la décision correcte. Nous convenons également qu'en ce qui a trait à l'*exercice* de sa compétence par la Commission, une déférence accrue s'impose. Il ne peut être interjeté appel d'une décision de la Commission que sur une question de droit ou de compétence. La Commission en sait bien davantage qu'une cour de justice sur les services de gaz et les limites qui doivent leur être imposées « dans l'intérêt public » lorsqu'ils effectuent des opérations relatives à des biens dont le coût est inclus dans la base tarifaire. De plus, il est difficile d'imaginer un pouvoir discrétionnaire plus vaste que celui

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.)

— conféré à la Commission — d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » (al. 15(3)d) de l'AEUBA). L'élément subjectif de ce pouvoir (« qu'elle juge nécessaires »), l'expertise du décideur et la nature de la décision (« dans l'intérêt public ») appellent à mon avis la plus grande déférence et l'application de la norme de la décision manifestement déraisonnable.

En ce qui a trait à l'élément « qu'elle juge nécessaires », le juge Martland a dit ce qui suit dans l'arrêt *Calgary Power Ltd. c. Copithorne*, [1959] R.C.S. 24, p. 34 :

> [TRADUCTION] En l'espèce, il n'appartient pas à une cour de justice de déterminer si les terrains de l'intimé étaient ou non « nécessaires », mais bien si le ministre a « estimé » qu'ils l'étaient.

Voir également D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (éd. feuilles mobiles), vol. 1, par. 14:2622 : « *"Objective" and "Subjective" Grants of Discretion* ».

Comme l'a dit le juge Sopinka dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 335, l'expertise que possède un organisme de réglementation est « de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale ». Il a ajouté :

> Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada* [*c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722], on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.

(Cette opinion incidente a été citée avec approbation dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 592.)

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.]

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.]

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:

106 L'exercice d'un pouvoir de réglementation « dans l'intérêt public » exige nécessairement la conciliation d'intérêts économiques divergents. Il est depuis longtemps établi que la question de savoir ce qui est « dans l'intérêt public » n'est pas véritablement une question de droit ou de fait, mais relève plutôt de l'opinion. Dans *TransAlta (1986)*, la Cour d'appel de l'Alberta a fait (au par. 24) un parallèle entre la portée des mots « intérêt public » et celle de l'expression bien connue « la commodité et les besoins du public » en citant l'arrêt *Memorial Gardens Association (Canada) Ltd. c. Colwood Cemetery Co.*, [1958] R.C.S. 353, où notre Cour avait dit ce qui suit à la p. 357 :

> [TRADUCTION] [L]a question de savoir si la commodité et les besoins du public nécessitent l'accomplissement de certains actes n'est pas une question de fait. C'est avant tout l'expression d'une opinion. Il faut évidemment que la décision de la Commission se fonde sur des faits mis en preuve, mais cette décision ne peut être prise sans que la discrétion administrative y joue un rôle important. En conférant à la Commission ce pouvoir discrétionnaire, la Législature a délégué à cet organisme la responsabilité de décider, dans l'intérêt du public . . . [Je souligne.]

107 Dans cet extrait, notre Cour reprenait l'opinion incidente du juge Rand dans l'arrêt *Union Gas Co. of Canada Ltd. c. Sydenham Gas and Petroleum Co.*, [1957] R.C.S. 185, p. 190 :

> [TRADUCTION] On a prétendu, et la Cour a semblé d'accord, que l'appréciation de la commodité et des besoins du public est elle-même une question de fait, mais je ne puis souscrire à cette opinion : il ne s'agit pas de déterminer si objectivement telle situation existe. La décision consiste à exprimer une opinion, en l'espèce, l'opinion du Comité et du Comité seulement. [Je souligne.]

108 Évidemment, même un pouvoir aussi vaste n'est pas absolu. Mais reconnaître qu'il puisse faire l'objet d'abus n'implique pas qu'il doive être restreint. Je suis d'accord sur ce point avec l'avis exprimé par le juge Reid (coauteur de R. F. Reid et H. David, *Administrative Law and Practice* (2e éd. 1978), et coéditeur de P. Anisman et R. F. Reid, *Administrative Law Issues and Practice* (1995)), dans la décision *Re C.T.C. Dealer Holdings Ltd. and Ontario Securities Commission* (1987), 59 O.R. (2d) 79 (C. div.), p. 97, au sujet des pouvoirs de la Commission des valeurs mobilières de l'Ontario :

. . . 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

[TRADUCTION] . . . lorsque la Commission a agi de bonne foi en se souciant clairement et véritablement de l'intérêt public et en fondant son opinion sur des éléments de preuve, le risque que l'étendue de son pouvoir discrétionnaire puisse un jour l'inciter à l'exercer abusivement et à se placer ainsi au-dessus de la loi ne fait pas de l'existence de ce pouvoir une mauvaise chose en soi et n'exige pas l'annulation de la décision de la Commission.

(Notre Cour a fait mention, apparemment avec approbation, de la décision *C.T.C. Dealer Holdings* dans l'arrêt *Comité pour le traitement égal des actionnaires minoritaires de la Société Asbestos ltée c. Ontario (Commission des valeurs mobilières)*, [2001] 2 R.C.S. 132, 2001 CSC 37, par. 42.)

La norme du « manifestement déraisonnable » appelle un degré élevé de déférence judiciaire :

La méthode de la décision correcte signifie qu'il n'y a qu'une seule réponse appropriée. La méthode du caractère manifestement déraisonnable signifie que de nombreuses réponses appropriées étaient possibles, sauf celle donnée par le décideur.

(*S.C.F.P.*, par. 164)

Cela dit, il importe peu à mon sens que la norme applicable soit celle du manifestement déraisonnable (comme je le pense) ou celle du raisonnable *simpliciter* (comme le croit mon collègue). Nous le verrons, la décision de la Commission se situe dans les limites des opinions exprimées par les organismes de réglementation. Même si une norme moins déférente s'appliquait aux conditions imposées par la Commission, je ne verrais aucune raison d'intervenir.

D. *La Commission avait-elle le pouvoir d'assortir son autorisation des conditions en cause « dans l'intérêt public »?*

ATCO prétend que la Commission n'avait pas le pouvoir d'imposer des conditions ayant un effet « confiscatoire ». Or, en s'exprimant ainsi, elle présume de la question en litige. La bonne démarche n'est pas de supposer qu'ATCO avait droit au profit net tiré de la vente, puis de se demander si la Commission pouvait le confisquer. L'investissement de 83 000 $ d'ATCO a graduellement été pris en

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.

compte dans sa base tarifaire réglementaire puisque l'acquisition du terrain s'est échelonnée de 1922 à 1965. Dans un secteur réglementé, le rendement juste et équitable est déterminé par l'organisme de réglementation compétent et non par le marché spéculatif et aléatoire de l'immobilier.

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.

112 Je ne crois pas que l'allégation d'effet « confiscatoire » apporte quoi que ce soit au débat juridique. La loi interdit à ATCO de se départir de ses biens sans l'autorisation de la Commission et investit cette dernière du pouvoir d'assortir son autorisation de conditions. Ce n'est donc pas l'*existence* de la compétence qui est en litige, mais plutôt la manière dont la Commission l'a *exercée* en imposant des conditions et, plus particulièrement, en répartissant le profit net tiré de la vente.

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

E. *La Commission a-t-elle exercé sa compétence irrégulièrement en imposant les conditions qu'elle jugeait « nécessaires dans l'intérêt public »?*

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.

113 Il y a évidemment de nombreuses façons de concevoir « l'intérêt public ». Celle de la Commission tient essentiellement (et de manière inhérente) à son opinion et à son pouvoir discrétionnaire. Même si le cadre législatif de la réglementation des services publics varie d'un ressort à l'autre et qu'aux États-Unis, la pratique doit être interprétée à la lumière de la protection constitutionnelle du droit de propriété, la Commission s'est vu conférer par le législateur albertain un pouvoir plus étendu que celui accordé à la plupart des organismes apparentés. ATCO reconnaît que sa prétention fondée sur le « droit de propriété » ne saurait tenir face à l'intention contraire du législateur, mais elle affirme qu'une telle intention ne ressort pas des lois.

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

114 La plupart des organismes de réglementation, sinon tous, sont appelés à décider de l'attribution du profit tiré d'un bien dont le coût historique est inclus dans la base tarifaire, mais qui n'est plus nécessaire pour fournir le service. Lorsqu'elle formule ses politiques, la Commission peut tenir compte (et elle tient compte) d'une foule de précédents provenant de nombreux ressorts. Trouver le bon

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:

compromis dans la répartition du profit entre les clients et les investisseurs est une préoccupation commune aux organismes apparentés à la Commission :

> [TRADUCTION] D'abord, cela permet d'éviter que l'entreprise de services publics ne diminue qualitativement ou quantitativement le service réglementé et ne cause de la sorte un préjudice aux clients. Deuxièmement, elle garantit que l'entreprise maximisera l'ensemble des avantages financiers tirés de ses activités, et non seulement ceux destinés à certains groupes d'intérêt ou à d'autres intéressés. Troisièmement, elle vise précisément à ce que les investisseurs ne soient pas favorisés au détriment des clients touchés par l'opération.

(P. W. MacAvoy et J. G. Sidak, « The Efficient Allocation of Proceeds from a Utility's Sale of Assets » (2001), 22 *Energy L.J.* 233, p. 234)

Ce n'est pas d'hier que les organismes de réglementation canadiens examinent de près les opérations de spéculation foncière auxquelles se livrent les services publics qui leur sont assujettis. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 341-I, 30 juin 1976, la Commission de l'énergie de l'Ontario s'est demandé comment devait être considéré le profit de 2 millions de dollars, après impôt, tiré de la vente d'un terrain par une entreprise de services publics. Elle a dit :

> [TRADUCTION] Consumers' n'a pas acquis le bien-fonds (Station B) à des fins de spéculation, mais bien pour les besoins d'un service public. Même si cet investissement n'était pas amortissable, des intérêts et un risque lié à leur taux devaient être absorbés par les revenus et, jusqu'à ce que l'usine de production de gaz ne devienne obsolescente, l'aliénation du bien-fonds n'était pas possible. Par conséquent, si la commission permettait que seuls les actionnaires bénéficient du profit tiré de la vente d'un terrain, elle encouragerait la spéculation sur les biens des services publics. À son avis, ces gains en capital doivent être partagés entre les actionnaires et les clients. [Je souligne; par. 326.]

Certains organismes de réglementation américains jugent également opportun de déduire le profit, en tout ou en partie, de coûts pris en compte dans la base tarifaire. Dans *Re Boston Gas Co.*, 49 P.U.R. 4th 1 (Mass. D.P.U. 1982), l'organisme de réglementation a attribué aux clients le profit tiré de la vente d'un terrain :

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.]

[TRADUCTION] La société et ses actionnaires ont touché un rendement sur l'utilisation de ces parcelles de terrain le temps que leur coût a été inclus dans la base tarifaire, et ils n'ont droit à aucun rendement supplémentaire découlant de leur vente. Conclure le contraire équivaudrait à dire qu'une entreprise de services publics peut tirer avantage d'un bien non amortissable et que même si elle a obtenu de ses clients un rendement raisonnable à l'égard de ce bien, elle peut toucher en sus un profit inattendu en le vendant. Nous estimons que, dans le cas d'une installation en service, il s'agirait d'une situation risques/avantages inhabituelle pour une entreprise réglementée. [Je souligne; p. 26.]

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

117 Au Canada, d'autres organismes de réglementation que la Commission craignent que la perspective de vendre des terrains à profit n'infléchisse les décisions des entreprises de services publics en ce qui concerne leurs activités réglementées. Dans la décision *Re Consumers' Gas Co.*, E.B.R.O. 465, 1er mars 1991, la Commission de l'énergie de l'Ontario a statué que le profit de 1,9 million de dollars réalisé lors de la vente d'un terrain devait être réparti également entre les actionnaires et les clients :

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]

[TRADUCTION] . . . attribuer 100 p. 100 du profit tiré de la vente d'un terrain soit aux actionnaires de l'entreprise, soit à ses clients, pourrait diminuer l'attention accordée aux préoccupations légitimes de la partie exclue. Par exemple, le moment de l'acquisition d'un terrain et l'intensité des négociations la précédant pourraient être déterminés de façon à favoriser le bénéficiaire ultime de l'opération, ou à en faire fi. [par. 3.3.8]

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:

118 Le principe appliqué par la Commission, soit le partage du profit entre les investisseurs et les clients, est également conforme à la décision *Re Natural Resource Gas Ltd.*, RP-2002-0147, EB-2002-0446, 27 juin 2003, dans laquelle la Commission de l'énergie de l'Ontario, après s'être penchée sur la question du profit tiré de la vente d'un terrain et de bâtiments, a de nouveau conclu :

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]

[TRADUCTION] La Commission juge raisonnable, dans les circonstances, de répartir les gains en capital à parts égales entre l'entreprise et ses clients. Pour arriver à cette conclusion, elle a tenu compte du caractère non récurrent de l'opération. [par. 45]

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.*

119 Dans *TransAlta (1986)*, p. 175-176, le juge Kerans a signalé que le sort réservé à de tels gains variait considérablement d'un organisme de

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

réglementation à l'autre, mentionnant à titre d'exemple la décision *Re Boston Gas Co.*, précitée. Dans cette affaire, la Commission avait assimilé à un « revenu » au sens de la *Hydro and Electric Energy Act*, R.S.A. 1980, ch. H-13, le profit réalisé par TransAlta lors de la vente d'un terrain et de bâtiments appartenant à sa « concession » d'Edmonton. (La décision ne portait donc pas sur le pouvoir de la Commission d'imposer les conditions qu'« elle juge nécessaires dans l'intérêt public ».) Le juge Kerans a précisé (p. 176) :

> [TRADUCTION] Pour les motifs exposés ci-après, je ne suis pas d'accord avec la décision de la Commission, mais il serait absurde de ne pas reconnaître que [le mot « revenu »] puisse raisonnablement avoir le sens qu'elle lui prête.

Il a ajouté que [TRADUCTION] « l'indemnisation visait, à toutes fins utiles, à compenser la perte d'une concession » (p. 180), de sorte que, dans « ces circonstances exceptionnelles » (p. 179), le gain ne pouvait en droit être qualifié de revenu suivant la norme de la décision correcte. Dans l'arrêt *Yukon Energy Corp. c. Utilities Board* (1996), 74 B.C.A.C. 58 (C.A.Y.), par. 85, le juge Goldie a lui aussi relevé la diversité de la pratique réglementaire à l'égard du « gain tiré d'une vente ».

Les décisions récentes d'organismes de réglementation des États-Unis révèlent que le sort réservé au gain réalisé lors de la vente d'un terrain non amorti y est aussi très variable et comprend tant la solution préconisée par ATCO que celle retenue par la Commission :

> [TRADUCTION] Certains ressorts ont conclu que, sur le plan de l'équité, seuls les actionnaires doivent bénéficier du gain tiré d'un terrain qui s'est apprécié, car en général, les clients des entreprises de services publics paient les taxes foncières et non le coût d'acquisition et les charges d'amortissement. Suivant ce raisonnement, les clients n'assument aucun risque de perte et n'acquièrent aucun droit sur le bien, y compris en equity.
>
> D'autres estiment que les clients ont droit à une partie des profits résultant de la vente d'un terrain affecté à un service public. Les ressorts qui ont opté pour une répartition équitable conviennent que l'examen des décisions des organismes de réglementation et des cours de

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.]

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

justice sur la question ne permet pas de dégager l'exigence générale que le profit soit attribué aux seuls actionnaires, mais seulement une interdiction générale de le répartir lorsque le coût du terrain n'a jamais été inclus dans la base tarifaire.

(P. S. Cross, « Rate Treatment of Gain on Sale of Land : Ratepayer Indifference, A New Standard? » (1990), 126 *Pub. Util. Fort.* 44, p. 44)

La décision *Re Arizona Public Service Co.*, 91 P.U.R. 4th 337 (Ariz. C.C. 1988), illustre le point de vue américain favorable à la solution retenue par la Commission dans la présente affaire (p. 361) :

[TRADUCTION] Les principes généraux qui peuvent être dégagés des décisions rendues dans d'autres ressorts, s'il en est, sont les suivants : (1) les actionnaires d'une entreprise de services publics n'ont pas *automatiquement* droit au gain réalisé lors de toute vente d'un bien affecté au service public; (2) les clients n'ont pas droit à la totalité ou à une partie du profit tiré lors de la vente d'un bien qui n'a jamais été pris en compte pour l'établissement des tarifs. [En italique dans l'original.]

121 La composition de l'actif dont le coût est pris en compte dans la base tarifaire varie au gré des acquisitions et des aliénations, mais l'entreprise, elle, demeure. La démarche de la Commission en l'espèce est tout à fait compatible avec le principe de la « pérennité de l'entreprise » appliqué notamment dans *Re Southern California Water Co.*, 43 C.P.U.C. 2d 596 (1992). Dans cette affaire, Southern California Water avait sollicité l'autorisation de vendre un vieil établissement, et la commission devait décider de l'attribution du profit tiré de l'opération. La commission a conclu :

[TRADUCTION] Partant du principe de la « pérennité de l'entreprise », le profit tiré de l'opération doit être affecté à l'exploitation du service public, et non attribué à court terme aux actionnaires ou aux clients directement.

Ce principe n'est ni nouveau ni absolu. Il a clairement été énoncé dans la décision de principe que la commission a rendue en 1989 concernant le gain réalisé lors d'une vente (D.89-07-016, 32 Cal. P.U.C.2d 233 (*Redding*)). En termes simples, lorsqu'une entreprise de services publics réalise un profit en vendant un bien qu'elle remplace par un autre ou par un titre de créance,

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.

sans que son obligation de servir la clientèle ne soit supprimée ou réduite, le profit doit être affecté à l'exploitation de l'entreprise. [p. 604]

À mon avis, ni les lois de l'Alberta ni la pratique réglementaire dans cette province et dans d'autres ressorts ne commandaient une décision en particulier. La Commission aurait pu accueillir la demande d'ATCO et lui attribuer la totalité du profit. Mais la solution qu'elle a retenue n'outrepassait aucunement sa compétence légale et ne justifie pas une intervention judiciaire.

F. *L'argumentation d'ATCO*

Les principaux arguments d'ATCO ont pour la plupart été abordés, mais, par souci de clarté, je les rappellerai. ATCO ne conteste pas vraiment le pouvoir de la Commission d'assortir de conditions la vente d'un terrain. Elle soutient plutôt que la Commission a violé en l'espèce un certain nombre de garanties et nous demande de restreindre sa marge de manœuvre.

Premièrement, ATCO prétend que les clients n'acquièrent aucun droit de propriété sur les biens de l'entreprise. C'est elle, et non ses clients, qui a initialement acheté le bien en question et qui en est devenue propriétaire, ce qui lui donnait droit à tout profit tiré de sa vente. Selon elle, attribuer le profit aux clients équivaut à confisquer l'actif de l'entreprise.

Deuxièmement, ATCO prétend que son droit à la totalité du profit n'a rien à voir avec le « pacte réglementaire ». Ses clients ont payé un prix que, d'une année à l'autre, la Commission a jugé raisonnable en contrepartie d'un service sûr et fiable. C'est ce qu'ils ont obtenu et c'est tout ce à quoi ils avaient droit. En leur attribuant une partie du profit, la Commission s'est indûment livrée à une tarification « rétroactive ».

Troisièmement, une entreprise de services publics ne peut *amortir* un terrain dans sa base tarifaire, de sorte que les clients n'ont pas défrayé ATCO de quelque partie du coût historique du terrain en question, encore moins en fonction de sa valeur actuelle. Le traitement réservé au profit tiré de la vente d'un bien amorti ne s'applique donc pas.

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.

Quatrièmement, ATCO reproche à la solution de la Commission de créer une disparité. Les clients se voient attribuer une partie du profit résultant de l'appréciation d'un terrain sans pour autant être tenus, advenant une contraction du marché, d'assumer une partie des pertes subies lors de son aliénation. 127

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.

À mon avis, ce sont toutes des prétentions qui devaient être dûment formulées devant la Commission (et qui l'ont été). Certaines décisions d'organismes de réglementation étayent la thèse d'ATCO, d'autres appuient celle de ses clients. Il appartenait à la Commission de décider, au vu des circonstances, quelles conditions étaient nécessaires dans l'intérêt public. Comme je vais m'efforcer de le démontrer, la solution adoptée par la Commission en l'espèce s'inscrivait parmi celles pour lesquelles elle pouvait raisonnablement opter. 128

1. The Confiscation Issue

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

1. La question de l'effet confiscatoire

Dans son mémoire, ATCO affirme que [TRADUCTION] « [l]es biens appartenaient au propriétaire du service public et que la répartition projetée par la Commission ne peut avoir qu'un effet confiscatoire » (mémoire de l'intimée, par. 6). Cet argument ne tient pas compte de la différence manifeste entre un investissement dans une entreprise non réglementée et un investissement dans un service public réglementé, le taux de rendement étant, dans ce dernier cas, fixé par un organisme de réglementation, et non par le marché. Dans la décision *Re Southern California Gas Co.*, 118 P.U.R. 4th 81 (C.P.U.C. 1990) (« *SoCalGas* »), l'organisme de réglementation a fait remarquer : 129

> [TRADUCTION] Dans le secteur privé, qui exclut donc les services publics, l'investisseur n'est pas assuré d'un rendement raisonnable sur un tel investissement irrécupérable. Bien que les actionnaires et les détenteurs d'obligations fournissent le capital initial, les clients paient au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du bien, de sorte que la personne qui investit dans un service public ne risque pas d'avoir à supporter ces coûts. Les clients paient également un rendement raisonnable pendant que le bien (terrain

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

compris) est inclus dans la base tarifaire, ils indemnisent l'entreprise de la dépréciation d'un bien amortissable selon la méthode de la prise en charge par amortissement et ils courent le risque de payer l'amortissement et un rendement pour un bien inclus dans la base tarifaire qui est mis hors service prématurément. [p. 103]

(La Commission ne fait évidemment pas main basse sur le produit de la vente. Pour les besoins de la tarification, un montant *équivalant* aux deux tiers du profit est en fait pris en compte pour établir la base tarifaire actuelle d'ATCO. Le profit est donc réparti de manière abstraite entre les intéressés concurrents.)

L'argument d'ATCO est fréquemment invoqué aux États-Unis sur le fondement de la protection constitutionnelle du « droit de propriété », laquelle n'a toutefois pas empêché que tout ou partie du profit en cause soit attribué aux clients de services publics américains. L'un des arrêts de principe aux États-Unis est *Democratic Central Committee of the District of Columbia c. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C. Cir. 1973). Dans cette affaire, des parcelles de terrain affectées au transport en commun étaient devenues superflues lorsque l'entreprise avait remplacé ses trolleybus par des autobus. L'organisme de réglementation a attribué aux actionnaires le profit tiré de la vente des terrains dont la valeur s'était appréciée, mais la cour d'appel a infirmé la décision en tenant un raisonnement directement applicable à l'effet « confiscatoire » allégué par ATCO :

[TRADUCTION] Nous ne voyons aucun obstacle, constitutionnel ou autre, à la reconnaissance d'un principe de tarification permettant aux clients de bénéficier de l'appréciation d'un bien survenue pendant son affectation au service public. Nous croyons que la doctrine fondant essentiellement les décisions contraires n'est plus pertinente. Un principe juridique et économique fondamental — parfois formulé en termes exprès, parfois implicite —, sous-tend ces décisions, savoir qu'un bien affecté à un service public demeure la propriété des seuls investisseurs de l'entreprise et que son appréciation est un élément indissociable et inviolable de ce droit de propriété. La notion de propriété privée qui imprègne notre jurisprudence a naturellement mené à l'application de ce principe, lequel a obtenu un certain appui dans les premières décisions en matière de tarification. S'il est encore valable, ce principe étaye la

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

prétention de l'investisseur. Après mûre réflexion, nous pensons que ses fondements se sont depuis longtemps effrités et que la conclusion qu'il semblait dicter ne vaut plus. [p. 800]

Ces « décisions » qui ne sont « plus pertinente[s] » englobent sans doute *Board of Public Utility Commissioners c. New York Telephone Co.*, 271 U.S. 23 (1976), une décision invoquée par ATCO en l'espèce et dans laquelle la Cour suprême des États-Unis a dit :

> [TRADUCTION] Les clients paient un service, et non le bien servant à sa prestation. Leurs paiements ne sont pas affectés à l'amortissement ou aux autres frais d'exploitation, non plus qu'au capital de l'entreprise. En acquittant leurs factures, les clients n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service ou sur les fonds de l'entreprise. Les biens acquis avec les sommes reçues en contrepartie des services appartiennent à l'entreprise, tout comme ceux achetés avec les fonds obtenus par l'émission d'actions et d'obligations. [p. 32]

Dans cette affaire, ayant conclu tardivement que l'amortissement autorisé pour New York Telephone Company les années précédentes était trop élevé, l'organisme de réglementation avait tenté de corriger la situation pendant l'exercice en cours en rajustant rétroactivement la base tarifaire. La cour a statué que l'organisme n'avait pas le pouvoir de réviser une tarification antérieure. Les avantages financiers découlant des erreurs commises par l'organisme étaient désormais acquis à l'entreprise. Le contexte n'est pas le même en l'espèce. Nul ne prétend que la tarification antérieure établie par la Commission en fonction du coût historique était erronée. En 2001, lorsqu'elle a été saisie de l'affaire, la Commission avait le pouvoir d'autoriser ou non la vente projetée. L'opération n'avait pas encore été conclue. La réalisation d'un profit par ATCO n'était qu'une possibilité. Comme on l'a expliqué dans *Re Arizona Public Service Co.* :

> [TRADUCTION] Dans *New York Telephone*, le tribunal devait déterminer si l'organisme de réglementation de l'État en question pouvait affecter à la réduction des tarifs l'excédent accumulé aux fins d'amortissement les années précédentes et ainsi fixer des tarifs qui ne produisaient pas un rendement raisonnable. [. . .] [L]a Cour a simplement repris un truisme en l'expliquant : les

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]

tarifs doivent être établis de façon que les revenus permettent d'acquitter les charges (raisonnables) d'exploitation courantes et que les investisseurs de l'entreprise obtiennent un rendement raisonnable. Lorsque, pour une raison ou une autre, les tarifs fixés produisent trop de revenus ou pas assez, on ne peut revenir en arrière. On augmente les tarifs ou on les réduit pour tenir compte de la situation actuelle; leur fixation ne vise pas la restitution de profits excessifs antérieurs ou la compensation de pertes d'exploitation antérieures. En l'espèce, il s'agit plutôt de déterminer si, pour l'établissement des tarifs, le revenu provenant de la fourniture d'un service public pendant une année de référence peut comprendre le produit de la vente de biens de l'entreprise de services publics. La décision *New York Telephone* de la Cour suprême des États-Unis ne porte pas sur cette question. [Je souligne; p. 361.]

Plus récemment, dans la décision *SoCalGas*, la commission californienne de surveillance des services publics s'est penchée sur la question de l'attribution du profit tiré d'une aliénation. Comme dans la présente affaire, l'entreprise de services publics (SoCalGas) souhaitait vendre un terrain et des bâtiments situés (dans ce cas) au centre-ville de Los Angeles. La commission a réparti le profit entre les actionnaires et les clients de l'entreprise et a conclu :

> [TRADUCTION] Nous croyons que la question de savoir à qui appartient le bien affecté au service public est devenue un faux problème en l'espèce et que la propriété ne permet pas à elle seule de déterminer qui a droit au profit lorsque ce bien cesse d'être inclus dans la base tarifaire et est vendu. [p. 100]

ATCO soutient dans son mémoire que les clients [TRADUCTION] « n'acquièrent aucun droit, suivant la loi ou l'equity, sur les biens utilisés pour fournir le service, non plus que sur les fonds de l'entreprise » (par. 2). À cet égard, voici ce qu'a conclu l'organisme de réglementation dans *SoCalGas* :

> [TRADUCTION] Personne ne prétend sérieusement que les clients acquièrent un droit de propriété sur les biens affectés au service public; la DRA [Division of Ratepayer Advocates] soutient que le profit tiré de leur vente doit être retranché des besoins en revenus ultérieurs non pas parce que les clients sont propriétaires de ces biens, mais parce qu'ils en ont payé les coûts et assumé les risques pendant leur affectation au service public et leur inclusion dans la base tarifaire. [p. 100]

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.

Cette considération liée aux « risques » vaut également en Alberta. Pendant les 80 dernières années, le marché albertain de l'immobilier a connu des fluctuations considérables, mais durant toute cette période, que la conjoncture ait été favorable ou non, les clients ont garanti à ATCO un rendement juste et équitable pour le terrain et les bâtiments *considérés en l'espèce.*

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

133 L'approche suivant laquelle le partage des risques emporte le partage du gain net a également été retenue dans *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]

> [TRADUCTION] Même si les actionnaires et les détenteurs d'obligations ont fourni le capital initial, les clients ont payé au fil des ans, par le truchement de la base tarifaire, les taxes, les frais d'entretien et les autres coûts liés à la possession du terrain et des bâtiments et ils ont assuré à l'entreprise un rendement raisonnable selon la valeur non amortie du terrain et des bâtiments pendant la période où leur coût a été inclus dans la base tarifaire. [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.

Autrement dit, même aux États-Unis où le droit de propriété est protégé par la Constitution, la thèse de l'effet « confiscatoire » avancée par ATCO est rejetée au motif qu'elle est simpliste.

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.

134 Je ne prétends pas que l'attribution du profit en l'espèce convient nécessairement en toute circonstance. D'autres organismes de réglementation ont jugé que l'intérêt public commande une attribution différente. La Commission tranche au cas par cas. Je dis simplement que la mesure retenue ne peut être qualifiée de « confiscatoire » dans quelque acception de ce terme et qu'elle fait partie des solutions jugées acceptables dans des ressorts comparables en ce qui concerne l'attribution du profit tiré de la vente d'un terrain dont l'entreprise de services publics a elle-même inclus le coût historique dans sa base tarifaire. La déférence s'impose en l'espèce et, à mon avis, la décision de la Commission n'aurait pas dû être annulée.

2. The Regulatory Compact

2. Le pacte réglementaire

The Board referred in its decision to the "regulatory compact" which is a loose expression suggesting that in exchange for a statutory monopoly

135 Dans sa décision, la Commission renvoie au « pacte réglementaire », notion aux contours flous selon laquelle, en contrepartie d'un monopole

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) ratemaking 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

conféré par la loi et d'un revenu calculé suivant la méthode du coût d'achat majoré, l'entreprise de services publics accepte de voir son rendement limité de même que sa liberté de se départir des biens dont le coût est pris en compte pour établir sa base tarifaire. C'est ce qui ressort de l'arrêt *Washington Metropolitan Area Transit* de la Cour d'appel des États-Unis (circuit du district de Columbia) :

> [TRADUCTION] Le processus de tarification consiste essentiellement à « mettre en balance l'intérêt de l'investisseur et celui du consommateur ». L'intérêt de l'investisseur est de protéger son investissement et d'avoir une possibilité raisonnable de toucher un rendement acceptable. L'intérêt du consommateur réside dans la protection gouvernementale contre la tarification déraisonnable de services fournis dans un contexte monopolistique. Pour ce qui est de l'appréciation d'un bien, l'équilibre optimal est atteint lorsque les intérêts de l'un et de l'autre sont respectés le plus possible. [p. 806]

ATCO estime que la manière dont la Commission a attribué le profit contrevient au pacte réglementaire non seulement en raison de son effet confiscatoire, mais aussi parce qu'il s'agit d'une « tarification rétroactive ». Dans l'arrêt *Northwestern Utilities Ltd. c. Ville d'Edmonton*, [1979] 1 R.C.S. 684, le juge Estey a dit ce qui suit à la p. 691 :

> Il ressort clairement de plusieurs dispositions de *The Gas Utilities Act* que la Commission n'agit que pour l'avenir et ne peut fixer des tarifs qui permettraient à l'entreprise de recouvrer des dépenses engagées antérieurement et que les tarifs précédents n'avaient pas suffi à compenser.

Je le répète, la Commission était appelée à se prononcer sur une rentrée projetée et elle a décidé que les deux tiers devraient être pris en compte dans la tarification ultérieure (et non antérieure), ce qui est conforme à la pratique réglementaire. Par exemple, dans la décision *New York Water Service Corp. c. Public Service Commission*, 208 N.Y.S.2d 857 (1960), l'organisme de réglementation a statué que le profit réalisé lors de la vente d'un terrain devrait servir à réduire les tarifs pour les 17 années suivantes :

> [TRADUCTION] Lorsqu'un terrain est vendu à profit, le gain doit être ajouté à l'amortissement cumulé, c.-à-d.

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).

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 rate-base. 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]

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

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.

« porté à son crédit », de manière à réduire proportionnellement la base tarifaire et, par conséquent, le rendement. [p. 864]

L'ordonnance a été confirmée par la Cour suprême de l'État de New York (section d'appel).

Plus récemment, dans la décision *Re Compliance with the Energy Policy Act of 1992*, 62 C.P.U.C. 2d 517 (1995), l'organisme de réglementation a dit : 138

[TRADUCTION] . . . nous avons jugé approprié de déduire la plus grande partie du profit des coûts futurs liés au siège de l'entreprise parce que les clients avaient assumé les risques et les charges pendant l'inclusion du bien dans la base tarifaire. Nous avons également jugé équitable d'attribuer une partie du profit aux actionnaires afin d'inciter raisonnablement l'entreprise à obtenir le meilleur prix de vente possible et d'indemniser les actionnaires des risques inhérents à la possession du bien. [p. 529]

Toutes ces décisions mettent l'accent sur la mise en balance des intérêts des actionnaires et des clients, ce qui est tout à fait compatible avec la théorie du « pacte réglementaire » qui sous-tend la décision de la Commission en l'espèce. 139

3. Le terrain en tant que bien non amortissable

La Cour d'appel de l'Alberta a établi une distinction entre le profit tiré de la vente d'un terrain, dont le coût historique n'est pas amorti (et qui n'est donc pas graduellement remboursé par le truchement de la base tarifaire), et le profit tiré de la vente d'un bien amorti, comme un bâtiment, pour lequel la base tarifaire opère un certain remboursement du capital et qui, en ce sens, « a été payé » par les clients. Elle a conclu que la Commission avait eu raison d'inclure dans la base tarifaire l'équivalent de l'amortissement consenti pour les bâtiments (l'objet du pourvoi incident d'ATCO). Ainsi, en l'espèce, alors que la valeur du terrain était encore reportée dans les comptes d'ATCO au coût historique de 83 720 $, les bâtiments, payés initialement 596 591 $, avaient été amortis dans les tarifs exigés des consommateurs et leur valeur comptable nette s'établissait à 141 525 $. 140

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 rate-making 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

Il ressort de la pratique réglementaire que de nombreux organismes de réglementation (et non tous) refusent de faire une distinction (à cette fin) entre les biens amortissables et les biens non amortissables. Dans la décision *Re Boston Gas Co.* (citée dans *TransAlta (1986)*, p. 176), par exemple, l'organisme a conclu :

> [TRADUCTION] . . . les clients de l'entreprise ont versé un rendement et payé tous les autres coûts afférents à l'utilisation du terrain. Le fait qu'il s'agit d'un bien non amortissable — son utilisation ne diminuant habituellement pas sa valeur d'usage — n'a rien à voir avec la question de savoir qui a droit au produit de sa vente. [p. 26]

Dans *SoCalGas*, l'organisme de réglementation a également refusé de faire une distinction entre le profit réalisé lors de la vente d'un bien amortissable et celui issu de la vente d'un bien non amortissable, affirmant à la p. 107, qu'[TRADUCTION] « [i]l ne voyait pas pourquoi des ventes de terrains devraient être traitées différemment » et ajoutant :

> [TRADUCTION] En somme, les clients s'engagent à verser un rendement selon la valeur comptable, que le bien soit amorti ou non pour les besoins de la tarification, et ce, tant que le bien est employé et susceptible de l'être. L'amortissement tient simplement compte du fait que certains biens, contrairement à d'autres, se détériorent durant leur affectation au service public. Fondamentalement, la relation entre l'entreprise et ses clients demeure la même qu'il s'agisse de biens amortissables ou non. [Je souligne; p. 107.]

Dans *Re California Water Service Co.*, 66 C.P.U.C. 2d 100 (1996), l'organisme de réglementation a fait la remarque suivante :

> [TRADUCTION] Dans nos décisions, nous concluons généralement qu'il n'y a pas lieu de traiter différemment le profit réalisé lors de la vente d'un bien non amortissable, comme un terrain nu, et celui issu de la vente d'un bien amortissable dont le coût a été inclus dans la base tarifaire ou d'un terrain détenu pour usage ultérieur. [p. 105]

Encore une fois, je ne dis pas que l'organisme de réglementation *doit* systématiquement écarter toute distinction entre un bien amortissable et un bien non amortissable. Je dis simplement que la distinction n'est pas aussi déterminante que le

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.

prétend ATCO. En Alberta, la Commission peut autoriser une vente à la condition que le produit qui en est tiré soit réparti comme elle le juge nécessaire dans l'intérêt public. La limitation du pouvoir discrétionnaire de la Commission, alléguée par ATCO sur le fondement de différents points de vue doctrinaux, n'est pas compatible avec les termes généraux employés par le législateur albertain et doit être rejetée.

4. Lack of Reciprocity

4. L'absence de réciprocité

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.)

145 ATCO soutient que les clients ne devraient pas tirer avantage d'un marché haussier, car c'est elle, et non eux, qui subirait la perte si la valeur du terrain diminuait. Toutefois, la documentation présentée à notre Cour donne à penser que la Commission tient compte des profits *et* des pertes. Dans les décisions mentionnées ci-après, elle énonce et rappelle, puis rappelle encore, le « principe général » :

> [TRADUCTION] . . . la Commission estime que les profits ou les pertes (soit la différence entre la valeur comptable nette et le produit de la vente) résultant de la vente de biens affectés à un service public doivent être attribués aux clients de l'entreprise de services publics, et non à son propriétaire. [Je souligne.]

(Voir *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84116, 12 octobre 1984, p. 17; *Re TransAlta Utilities Corp.*, Alta. P.U.B., Décision n^{o} E84115, 12 octobre 1984, p. 12; *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Décision n^{o} E84113, 12 octobre 1984, p. 23.)

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:

146 Dans *Re Alberta Government Telephones*, Alta. P.U.B., Décision n^{o} E84081, 29 juin 1984, la Commission a examiné un certain nombre de décisions d'organismes de réglementation (y compris *Re Boston Gas Co.*, précitée) portant sur le profit tiré d'une vente et a dit ce qui suit au sujet de ses propres décisions (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.

> [TRADUCTION] La Commission est consciente de n'avoir pas appliqué une formule ou une règle uniforme permettant de déterminer automatiquement la procédure comptable à suivre à l'égard du profit ou de la perte résultant de l'aliénation d'un bien affecté à un service public. Il en est ainsi parce qu'elle décide de ce qui est juste et raisonnable en fonction du fond ou des faits de chaque affaire.

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".

III. 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.

La prétention selon laquelle ATCO assume seule le risque que la valeur d'un terrain *diminue* ne tient pas compte du fait que s'il y a contraction du marché, l'entreprise de services publics continue de bénéficier d'un rendement fondé sur le coût historique même si la valeur marchande a considérablement diminué. Comme il a été signalé dans *SoCalGas* :

> [TRADUCTION] Si la valeur du terrain devenait inférieure à son coût historique, on pourrait prétendre que le rendement constant versé au fil des ans [par les clients] pour le terrain a en fait surindemnisé les investisseurs. Le rapport entre les risques et les avantages est tout aussi symétrique pour un terrain que pour un bien amortissable lorsque leur coût est pris en compte pour l'établissement de la base tarifaire. [p. 107]

II. Conclusion

En résumé, le par. 15(3) de l'AEUBA conférait à la Commission le pouvoir d'[TRADUCTION] « imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public » en statuant sur la demande d'autorisation de la vente du terrain et des bâtiments en cause. Dans l'exercice de ce pouvoir, et vu la [TRADUCTION] « surveillance générale des services de gaz et de leurs propriétaires » qui lui incombait (GUA, par. 22(1)), la Commission a attribué le gain comme elle l'a fait pour les considérations d'intérêt public énoncées dans sa décision. Le pouvoir aurait peut-être été exercé différemment par un autre organisme de réglementation ou dans un autre ressort, mais il reste que la Commission était autorisée à répartir le gain tiré de la vente d'un bien qu'ATCO souhaitait soustraire à la base tarifaire. Il ne nous appartient pas de déterminer quelles conditions sont « nécessaires dans l'intérêt public » et de substituer notre opinion à celle de la Commission.

III. Dispositif

Je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Alberta et de rétablir la décision de la Commission, avec dépens payables à la ville de Calgary dans toutes les cours. Le pourvoi incident d'ATCO devrait être rejeté avec dépens.

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

ANNEXE

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

[TRADUCTION]

Compétence

13 La Commission connaît de toute question dont peut connaître l'ERCB ou la PUB suivant un texte législatif ou le droit par ailleurs applicable, et sa compétence est exclusive.

Pouvoirs de la Commission

15(1) Dans l'exercice de ses fonctions, la Commission jouit des pouvoirs, des droits et des privilèges qu'un texte législatif ou le droit par ailleurs applicable confère à l'ERCB et à la PUB.

(2) La Commission peut agir d'office à l'égard de tout renvoi, demande, plainte, directive ou requête auquel l'ERCB, la PUB ou la Commission peut donner suite.

(3) Sans limiter la portée du paragraphe (1), la Commission peut prendre les mesures suivantes, en totalité ou en partie :

a) rendre toute ordonnance que l'ERCB ou la PUB peut rendre suivant un texte législatif;

b) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que l'ERCB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

c) avec l'approbation du lieutenant-gouverneur en conseil, rendre toute ordonnance que la PUB peut, avec l'approbation du lieutenant-gouverneur en conseil, rendre en vertu d'un texte législatif;

d) à l'égard d'une ordonnance rendue par elle, l'ERCB ou la PUB en application des alinéas a) à c), rendre toute autre ordonnance et imposer les conditions supplémentaires qu'elle juge nécessaires dans l'intérêt public;

e) rendre une ordonnance accordant en tout ou en partie la réparation demandée;

f) lorsqu'elle l'estime juste et convenable, accorder en partie la réparation demandée ou en accorder

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.

une autre en sus ou en lieu et place comme si tel était l'objet de la demande.

Appel

26(1) Sous réserve du paragraphe (2), les décisions de la Commission sont susceptibles d'appel devant la Cour d'appel sur une question de droit ou de compétence.

(2) L'autorisation d'appel ne peut être obtenue d'un juge de la Cour d'appel que sur demande présentée

a) dans les 30 jours qui suivent l'ordonnance, la décision ou la directive en cause ou

b) dans le délai supplémentaire que le juge estime justifié d'accorder dans les circonstances.

. . .

Immunité de contrôle

27 Sous réserve de l'article 26, toute mesure, ordonnance ou décision de la Commission ou de la personne exerçant ses pouvoirs ou ses fonctions est définitive et ne peut être contestée, révisée ou restreinte dans le cadre d'une instance judiciaire, y compris une demande de contrôle judiciaire.

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

[TRADUCTION]

Surveillance

22(1) La Commission assure la surveillance générale des services de gaz et de leurs propriétaires et peut, en ce qui concerne notamment le matériel, les appareils, les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne application d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

(2) La Commission mène toute enquête nécessaire à l'obtention de renseignements complets sur la façon dont le propriétaire d'un service de gaz se conforme à la loi ou sur tout ce qui est par ailleurs de son ressort suivant la présente loi.

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,

Enquêtes

24(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à un service de gaz.

. . .

Services de gaz désignés

26(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires de services de gaz assujettis au présent article et à l'article 27.

(2) Le propriétaire d'un service de gaz désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

27(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'un service de gaz désigné en application du paragraphe 26(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire du service de gaz.

. . .

Pouvoirs de la Commission

36 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement et d'autres tarifs spéciaux opposables au propriétaire d'un service de gaz et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'un service de gaz, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'un service de gaz, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) exiger que le propriétaire d'un service de gaz construise, entretienne et exploite,

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

conformément à la présente loi et à toute autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire du service de gaz justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension;

e) exiger que le propriétaire d'un service de gaz approvisionne en gaz certaines personnes, à certaines fins, en contrepartie de certains tarifs, prix et charges, et à certaines conditions, selon ce qu'elle détermine.

Base tarifaire

37(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire d'un service de gaz servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur d'acquisition pour le propriétaire du service de gaz, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'un service de gaz par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qu'elle estime pertinents.

Recettes excédentaires ou insuffisantes

40 Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'un service de gaz et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de

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

fixation des tarifs, des taux ou des charges, ou de leurs barèmes,

(ii) un exercice ultérieur,

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa b) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

d) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas b) ou c) et la période, y compris tout exercice ultérieur, au cours de laquelle il convient de le faire.

Pouvoirs généraux

59 Pour l'application de la présente loi, la Commission a, à l'égard des installations, des locaux, du matériel, des services, de l'organisation de la production, de la distribution et de la vente de gaz en Alberta, ainsi que du propriétaire d'un service de gaz et de son entreprise, les pouvoirs que lui confère la *Public Utilities Board Act* à l'égard d'une entreprise de services publics au sens de cette loi.

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

[TRADUCTION]

Compétence et pouvoirs

36(1) La Commission a la compétence et les pouvoirs nécessaires

(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

a) pour agir à l'égard des entreprises de services publics et de leurs propriétaires conformément à la présente loi;

b) pour agir à l'égard des entreprises de services publics et connaître de questions connexes touchant une région adjacente à une ville, conformément à la présente loi.

(2) Outre la compétence et les pouvoirs mentionnés au paragraphe (1), la Commission a la compétence et les pouvoirs nécessaires pour exercer les fonctions qui lui sont légalement dévolues.

(3) La Commission a et est réputée avoir toujours eu compétence pour fixer, sur demande, le prix et les conditions d'une acquisition effectuée par un conseil municipal sous le régime de l'article 47 de la *Municipal Government Act*

a) avant que le conseil n'exerce son droit d'acquisition suivant cet article, et sans qu'il soit tenu de procéder à l'acquisition ou

b) lorsque l'acquisition est soumise à son approbation suivant cet article, avant que la Commission n'entende la demande et ne statue sur elle.

Pouvoirs généraux

37 Dans les domaines de sa compétence, la Commission peut ordonner et exiger qu'une personne, y compris une administration municipale, immédiatement ou dans le délai qu'elle impartit et selon les modalités qu'elle détermine, à condition que ce ne soit pas incompatible avec la présente loi ou une autre conférant compétence, fasse ce qu'elle est tenue de faire ou susceptible d'être tenue de faire suivant la présente loi ou toute autre, générale ou spéciale, et elle peut interdire ou faire cesser tout ce qui contrevient à ces lois ou à ses règles, ses ordonnances ou ses directives.

Enquêtes sur les services publics et les tarifs

80 Lorsqu'il lui est démontré à l'audition d'une demande présentée par le propriétaire d'une entreprise de services publics ou par une municipalité ou une personne ayant un intérêt actuel ou éventuel dans l'objet de la demande, qu'il y a lieu de croire que les taux établis par le propriétaire d'une entreprise de services publics excèdent ce qui est juste et raisonnable eu égard à la nature et à la qualité du service ou du produit en cause, la Commission

a) peut enquêter comme elle le juge utile sur toute question liée à la nature et à la qualité du

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.

service ou du produit en cause, ou à l'exécution du service et aux taux ou charges y afférents;

b) peut, en ce qui concerne l'amélioration du service ou du produit et les taux et charges y afférents, rendre toute ordonnance qu'elle estime juste et raisonnable;

c) peut écarter ou modifier, comme elle l'estime raisonnable, les taux ou les charges qu'elle juge excessifs, injustes ou déraisonnables, ou indûment discriminatoires envers une personne, y compris une municipalité, sous réserve toutefois des dispositions qu'elle considère justes et raisonnables d'un contrat liant le propriétaire de l'entreprise de services publics et une municipalité au moment de la demande.

Surveillance

85(1) La Commission assure la surveillance générale des entreprises de services publics et de leurs propriétaires et peut, en ce qui concerne notamment les extensions d'ouvrages ou de systèmes et l'établissement de rapports, rendre les ordonnances nécessaires à la protection de l'intérêt public ou à la bonne exécution d'un contrat, de statuts constitutifs ou d'une concession comportant l'emploi de biens publics ou l'exercice de droits publics.

. . .

Enquêtes

87(1) La Commission peut, d'office ou à la demande d'un intéressé, faire enquête sur toute question relative à une entreprise de services publics.

(2) Lorsqu'elle estime nécessaire d'enquêter sur une entreprise de services publics ou sur les activités de son propriétaire, la Commission a accès aux livres, documents et dossiers relatifs à l'entreprise qui sont en la possession du propriétaire, d'une municipalité, d'un organisme public ou d'un ministère, et elle peut les utiliser.

(3) La personne qui exerce un pouvoir direct ou indirect sur l'entreprise d'un propriétaire de services publics en Alberta et toute société dont cette personne est actionnaire majoritaire est tenue de donner à la Commission ou à son représentant l'accès aux livres, documents et dossiers relatifs à l'entreprise du propriétaire ou de communiquer tout renseignement y afférent exigé par la Commission.

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

Établissement des tarifs

89 La Commission peut, d'office ou à la demande d'un intéressé, par ordonnance écrite, après avoir donné un avis aux personnes intéressées et les avoir entendues,

a) fixer des tarifs individuels ou conjoints, des taux ou des charges justes et raisonnables, ou leurs barèmes, ainsi que des tarifs d'abonnement, des tarifs au mille ou au kilomètre et d'autres tarifs spéciaux opposables au propriétaire de l'entreprise de services publics et applicables par lui;

b) établir des taux et des méthodes valables et acceptables de dépréciation, d'amortissement et d'épuisement pour les biens du propriétaire d'une entreprise de services publics, qui doit s'y conformer dans la tenue des comptes y afférents;

c) à l'intention du propriétaire d'une entreprise de services publics, établir des normes, des classifications, des règles, des pratiques ou des mesures justes et raisonnables et déterminer les services justes et raisonnables devant être fournis;

d) abrogé;

e) exiger qu'un propriétaire d'entreprise de services publics construise, entretienne et exploite, conformément à toute autre disposition de la présente loi ou d'une autre s'y rapportant, une extension raisonnable de ses installations lorsqu'elle juge que cette extension est raisonnable et réalisable, que les prévisions de rentabilité justifient sa construction et son entretien et que la situation financière du propriétaire de l'entreprise de services publics justifie raisonnablement les dépenses initiales requises pour construire et exploiter l'extension.

Base tarifaire

90(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services public et applicables par lui, la Commission établit une base tarifaire pour les biens du propriétaire de l'entreprise de services publics servant ou devant servir à la fourniture du service au public en Alberta et, ce faisant, elle établit un juste rendement.

(2) Pour établir la base tarifaire, la Commission tient compte :

a) du coût du bien lors de son affectation initiale à l'utilisation publique et de sa juste valeur

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

d'acquisition pour le propriétaire de l'entreprise de services publics, moins la dépréciation, l'amortissement et l'épuisement;

b) du capital nécessaire.

(3) Pour établir le juste rendement auquel a droit le propriétaire d'une entreprise de services publics par rapport à la base tarifaire, la Commission tient compte de tous les facteurs qui, selon elle, sont pertinents.

Prise en compte des recettes et des dépenses

91(1) Pour fixer des tarifs, des taux ou des charges justes et raisonnables, ou leurs barèmes, opposables au propriétaire d'une entreprise de services publics et applicables par lui, la Commission

a) peut tenir compte de toutes les recettes et les dépenses du propriétaire qu'elle estime afférentes à l'une des périodes suivantes, à l'exclusion de toute attribution à une partie de cette période :

(i) la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation des tarifs, des taux ou des charges, ou de leurs barèmes;

(ii) un exercice ultérieur;

(iii) deux exercices ou plus visés aux sous-alinéas (i) et (ii), s'ils sont consécutifs;

b) tient compte de l'incidence de la *Small Power Research and Development Act* sur les recettes et les dépenses du propriétaire relatives à la production, au transport et à la distribution d'électricité;

c) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire qui, selon elle, se rattache à la totalité de l'exercice du propriétaire au cours duquel est engagée une procédure de fixation de tarifs, de taux et de charges, ou de leurs barèmes, qu'elle estime justes et raisonnables;

d) peut prendre en considération la partie de l'excédent ou du déficit du propriétaire subséquent au début de la procédure visée à l'alinéa c) qui, selon elle, est attribuable à un retard injustifié dans le déroulement de la procédure;

(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,

e) approuve par ordonnance ce qu'il convient de faire de tout excédent ou déficit visé aux alinéas c) ou d) et la période (y compris tout exercice ultérieur) au cours de laquelle il convient de le faire.

Services de gaz désignés

101(1) Le lieutenant-gouverneur en conseil peut, par règlement, désigner les propriétaires d'entreprises de services publics assujettis au présent article et à l'article 102.

(2) Le propriétaire d'une entreprise de services publics désigné en application du paragraphe (1) ne peut

a) émettre

(i) d'actions,

(ii) d'obligations ou d'autres titres d'emprunt dont le terme est supérieur à un an,

que si, au préalable, il convainc la Commission que l'émission projetée est conforme à la loi et obtient d'elle l'autorisation d'y procéder et une ordonnance le confirmant;

b) capitaliser

(i) son droit d'exister en tant que personne morale,

(ii) un droit, une concession ou un privilège en sus du montant réellement versé en contrepartie à l'État ou à une municipalité, à l'exclusion d'une taxe ou d'une charge annuelle,

(iii) un contrat de fusion ou de regroupement;

c) sans l'autorisation de la Commission, capitaliser un bail;

d) sans l'autorisation de la Commission,

(i) aliéner ou grever ses biens, concessions, privilèges ou droits, en tout ou en partie, notamment en les vendant, en les louant ou en les hypothéquant,

(ii) fusionner ou regrouper ses biens, concessions, privilèges ou droits, en tout ou en partie;

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.

Appeal dismissed with costs and cross-appeal allowed with costs, McLachlin C.J. *and* Binnie *and* Fish JJ. *dissenting.*

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.

tout grèvement, vente, location, constitution d'hypothèque, aliénation, regroupement ou fusion intervenant en contravention de la présente disposition est nul, sauf s'il intervient dans le cours normal des activités de l'entreprise.

. . .

Incessibilité des actions

102(1) Sauf ordonnance de la Commission l'y autorisant, le propriétaire d'une entreprise de services publics désignée en application du paragraphe 101(1) s'abstient de vendre tout ou partie des actions de son capital-actions à une société, indépendamment du mode de constitution de celle-ci, ou d'effectuer ou d'autoriser une inscription dans ses registres constatant une telle cession, lorsque la vente ou la cession, à elle seule ou de pair avec une opération antérieure, ferait en sorte que la société détienne plus de 50 % des actions en circulation du propriétaire de l'entreprise de services publics.

. . .

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

[TRADUCTION]

Principe et interprétation

10 Tout texte est réputé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

Pourvoi rejeté avec dépens et pourvoi incident accueilli avec dépens, la juge en chef McLachlin *et les juges* Binnie *et* Fish *sont dissidents.*

Procureurs de l'appelante/intimée au pourvoi incident : McLennan Ross, Calgary.

Procureurs de l'intimée/appelante au pourvoi incident : Bennett Jones, Calgary.

Procureur de l'intervenante Alberta Energy and Utilities Board : J. Richard McKee, Calgary.

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.

Procureur de l'intervenante la Commission de l'énergie de l'Ontario : Commission de l'énergie de l'Ontario, Toronto.

Procureurs de l'intervenante Enbridge Gas Distribution Inc. : Fraser Milner Casgrain, Toronto.

Procureurs de l'intervenante Union Gas Limited : Torys, Toronto.

CA019726
Vancouver Registry

Court of Appeal for British Columbia

IN THE MATTER OF THE UTILITIES COMMISSION ACT S.B.C. 1980, C.60 AS AMENDED AND IN THE MATTER OF AN APPLICATION BY BRITISH COLUMBIA HYDRO AND POWER AUTHORITY TO AMEND ITS ELECTRIC TARIFF RATE SCHEDULES (THE "APPLICATION")

BETWEEN:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

APPLICANT
(APPELLANT)

AND:

THE BRITISH COLUMBIA UTILITIES COMMISSION, BRITISH COLUMBIA ENERGY COALITION, CONSUMER'S ASSOCIATION OF CANADA (B.C. BRANCH) ET AL, COUNCIL OF FOREST INDUSTRIES, WEST KOOTENAY POWER LTD., B.C. GAS UTILITY LTD., ISCA MANAGEMENT LTD., and RICK BERRY

RESPONDENTS

Before: The Honourable Mr. Justice Goldie
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

Chris Sanderson, J. Christian and
A.M. Dobson-Mack — Counsel for the Appellant

Mark M. Moseley — Counsel for the Respondent
The British Columbia Utilities Commission

Carol Reardon — Counsel for the Respondent
Intervenor, British Columbia Energy Coalition

Michael P. Doherty — Counsel for the Respondent
Intervenor, Consumer's Association of Canada
(B.C. Branch) et al

D.W. Bursey — Counsel for the Respondent
Intervenor, Council of Forest Industries et al

Place and Date of Hearing:	Vancouver, British Columbia February 15, 1996
Place and Date of Judgment:	Vancouver, British Columbia February 23, 1996

Written Reasons by:
The Honourable Mr. Justice Goldie

Concurred in by:
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

Court of Appeal for British Columbia

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

v.

THE BRITISH COLUMBIA UTILITIES COMMISSION, BRITISH COLUMBIA ENERGY COALITION, CONSUMER'S ASSOCIATION OF CANADA (B.C. BRANCH) ET AL, COUNCIL OF FOREST INDUSTRIES, WEST KOOTENAY POWER LTD., B.C. GAS UTILITY LTD., ISCA MANAGEMENT LTD., and RICK BERRY

Reasons for Judgment of Mr. Justice Goldie:

1 This is an appeal, by leave, from Order G-89-94 of the British Columbia Utilities Commission (the "Commission") with reasons for the decision attached. I refer to these reasons as the "Decision" and to Order G-89-94 as the "Order".

2 After a public hearing the Commission released the Decision on 24 November 1994. Notice of an application for leave to appeal to this Court was filed by B.C. Hydro on 22 December 1994. Leave was granted 15 December 1995, the day the application was heard. The delay occurred when the Commission acceded to B.C. Hydro's application that it reconsider the Order and Decision. The reasons denying reconsideration were released on 17 October 1995. These proceedings accounted for much of the delay between the filing of the notice of application for leave to appeal and the granting of leave.

3 The issue, as stated by the appellant British Columbia Hydro and Power Authority ("B.C. Hydro"), is whether the Commission exceeded its jurisdiction in respect of certain directions in the Decision given the force of a Commission order. While it is common ground the standard of review in respect of jurisdiction is that the Commission must be correct in its interpretation of its constituent statute, the respondents contend the Commission acted within its jurisdiction and the appeal should be dismissed as no palpable and overriding error has been demonstrated that would permit this Court's intervention.

Background - General

4 B.C. Hydro is a publicly owned utility generating, transmitting and distributing electrical energy. With few exceptions its service area is province wide. Its rates are subject to approval by the Commission under the provisions of the ***Utilities Commission Act***, S.B.C. 1980, c. 60 as amended (the "***Utilities Act***"). Under s.3.1 of the ***Utilities Act*** the Lieutenant Governor in Council may issue a direction to the Commission specifying the factors, criteria and guidelines the Commission is to observe in respect of B.C. Hydro. Such a direction, Special Direction No. 8, was in force at the time material to this appeal.

5 By virtue of the ***Hydro and Power Authority Act***, R.S.B.C. 1979, c. 188 as amended (the "***Authority Act***"), B.C. Hydro is for all its purposes an agent of the Queen in Right of the Province; is deemed to have been granted an energy operation certificate for the purposes of the ***Utilities Act*** in respect of its works existing on 11 September 1980; and is not bound by any statute or statutory provision of the Province except what is made applicable to it by Order in Council. The Minister of Finance is its fiscal agent. The ***Utilities Act*** is among those ordered to be applicable to B.C. Hydro except sections dealing with one aspect of reserve funds; one enforcement provision and those requiring Commission approval of security issues and property disposition.

6 Section 5 of the ***Authority Act*** provides that the directors of B.C. Hydro, appointed by the Lieutenant Governor in Council, shall manage its affairs. The powers of B.C. Hydro include the generation, manufacture, distribution and supply of power and the development of power sites and power plants. The exercise of these powers is subject to the approval of the Lieutenant Governor in Council. A further distinction between B.C. Hydro and investor-owned utilities is that B.C. Hydro's sole "shareholder" and not its directors determines when and in what amounts "dividends" will be paid.

7 Under s-s.4 of s.141 of the ***Utilities Act***, which came into force 11 September 1980, the rates of B.C. Hydro then in effect became its lawful, enforceable and collectible rates.

8 Prior to 30 June 1995 Part 2 of the ***Utilities Act*** provided an approval process of generating and transmission facilities by the Lieutenant Governor in Council which could, at the latter's discretion, bypass the Commission. In this event the Commission might be called upon to approve rates reflecting the capital costs of large scale projects without the opportunity to pass upon the adequacy of the information justifying the construction of such projects as contemplated by the requirement under s.51(1) of the ***Utilities Act*** requiring a certificate of public convenience and necessity prior to embarking upon construction. This provision is of some importance and I set it out here:

> **51.** (1) Except as otherwise provided, no person shall, after this section comes into force, begin the construction or operation of a public utility plant or system, or an extension of either, without first obtaining from the commission a certificate that public convenience and necessity require or will require the construction or operation.

9 This prospect has been removed by amendments, primarily to Part 2 of the ***Utilities Act***, and with it any justification for concern over multi million dollar additions to the property devoted to public service without prior regulatory scrutiny.

Background - "Integrated Resource Plan Guidelines"

10 In February, 1993 the Commission issued a 12-page document, to which I will refer as the "Guidelines", entitled "Integrated Resource Planning ("IRP") Guidelines". The following is the Definition section of the Guidelines:

> **II DEFINITION**
>
> IRP is a utility planning process which requires consideration of all known resources for meeting the demand for a utility's product, including those which focus on traditional supply sources and those which focus on conservation and the management of demand[1]. The process results in the selection of that mix of resources which yields the preferred[2] outcome of expected impacts and risks for society over the long run. The IRP process plays a role in defining and assessing costs, as these can be expected to include not just costs and benefits as they appear in the market but also other monetizable and non-monetizable social and environmental effects. The IRP process is associated with efforts to augment traditional regulatory review of completed utility plans with cooperative mechanisms of consensus seeking in the preparation and evaluation of utility plans. The IRP process also provides a framework that helps to focus public hearings on utility rates and energy project applications.
>
> 1 Referred to as Demand-Side Management (DSM)
>
> 2 The term "preferred" is chosen to imply that society has used some process to elicit social preferences in selecting among energy resource options. Unfortunately, there is rarely agreement on the best process for eliciting social preferences. Candidate processes in a democracy include public ownership with direction from cabinet or a ministry, regulation by a public tribunal, referendum, and various alternate dispute resolution methods (e.g. consensus seeking stakeholder collaboratives).

11 In the Purpose section the Commission stated the Guidelines were:

> ... intended to provide general guidance regarding BCUC expectations of the process and methods utilities follow in developing an IRP. It is expected that the general rather than detailed nature of the proposed guidelines will allow utilities to formulate plans which reflect their specific circumstances.

12 The Commission's identification of the objectives of this process was stated in these words:

> 1. Identification of the objectives of the plan
>
> Objectives include but are not limited to: adequate and reliable service; economic efficiency; preservation of the financial integrity of the utility; equal consideration of DSM and supply resources; minimization of risks; consideration of environmental impacts; consideration of other social principles of ratemaking[3], coherency with government regulations and stated policies.

Footnote 3 provides in part:

> ... The general implication is that because of social and environmental objectives, the rates charged by utilities may be allowed to diverge from those that would result from a rate determination based exclusively on financial least cost. The social principles to be addressed may be identified by the utility, intervenors, or government.

13 In Part III of the Guidelines defining the relationship between regulated utilities and the Commission under the Integrated Resource Plan Process the following sentences occur:

> IRP does not change the fundamental regulatory relationship between the utilities and the BCUC. Thus IRP guidelines issued by the BCUC do not mandate a specific outcome to the planning process nor do they mandate specific investment decisions. ... Under IRP,

> utility management continues to have full responsibility for making decisions and for accepting the consequences of those decisions. ... Consistency with IRP guidelines and the filed IRP plan will be an additional factor that the BCUC will consider in judging the prudency of investments and rate applications, although inconsistency may be warranted by changed circumstances or new evidence.

14 We are not called upon to determine whether the Guidelines, as defined above, are an appropriate exercise of the Commission's regulatory powers under the ***Utilities Act*** nor is there an appeal from any part of the Order disposing of B.C. Hydro's application to vary its rates.

15 What is objected to is the manner in which the Commission has purported to give the Guidelines the force of a Commission order. It is convenient at this point to set out the substantive part of Order G-89-94:

> **NOW THEREFORE** the Commission, for reasons stated in the Decision, orders as follows;
>
> 1. The applied for 2.8 percent increase in rates is denied and the interim increase authorized by Order No. G-18-94 effective April 1, 1994 is to be refunded, with interest calculated at the average prime rate of the principal bank with which B.C. Hydro conducts its business. B.C. Hydro is to provide the Commission with a detailed reconciliation schedule verifying the refund.
>
> 2. Rate design changes required by the Decision are to be implemented.
>
> 3. An Integrated Resource Plan and Action Plan are to be filed for approval by June 30, 1995.

> 4. The Commission will accept, subject to timely filing by B.C. Hydro, amended Electric Tariff Rate Schedules which conform to the terms of the Commission's Decision. B.C. Hydro will provide all customers, by way of an information notice and media publication, with the Executive Summary of the Commission's Decision.
>
> 4.(sic) B.C. Hydro will comply with all other directions contained in the Decision accompanying this Order.
>
> (emphasis added)

16 I shall refer to the directions identified in the last paragraph as the "Directions". And it is paragraph 4 (sic) of the Order that is in issue here. Counsel for B.C. Hydro says there are 15 Directions related to the Guidelines covered by this paragraph.

17 The principal relief sought, as stated in B.C. Hydro's factum, includes a declaration "... that the IRP related aspects of Order G-89-94 and of the November Decision are void and of no effect".

18 In my view, the Direction best illustrating the issue raised by B.C. Hydro is that which requires it to establish what is called a collaborative committee (the "Committee") together with those Directions determining the part this Committee is to play in B.C. Hydro's performance of its statutory obligation under s.44 of the ***Utilities Act*** to provide service to the public.

Discussion

19 Mr. Moseley on behalf of the Commission asserted it was doing no more than obtaining information it was entitled to, in a format it could by law determine, all at a time it was authorized to stipulate.

20 There can be little doubt, from the nature of B.C. Hydro's business, the magnitude of financial resources required and the variety of other resources directly or indirectly committed or affected that virtually every person in the Province will have an interest in the management of that business.

21 The Direction in question follows a finding that B.C. Hydro had not complied with the Guidelines "... which require an explicit decision-making process which includes public involvement." B.C. Hydro had in place a public consultation program but this was considered inadequate as being "after the fact" rather than participatory in the planning process. The membership of the Committee was determined by the Commission, apparently on the principle that the planning process is enhanced by the participation of interest groups. This appears from the following observation in the Decision:

> Determination of the appropriate trade-offs between resources requires that the values the public attaches to these costs and benefits must be determined and factored into the decision in an explicit and transparent way.

> The Commission has made it clear that such values are best determined through the direct participation of representative interest groups.
>
> Exclusive reliance on the B.C. Hydro staff, managers and Board of Directors for resource selection is also unacceptable for another reason. A closed, in-house process has the appearance of, and real potential for, bias in decision making that favors the interests of the bureaucracy within the Utility.

The Committee as constituted following the Order and Decision consisted of two representatives of B.C. Hydro and 11 representing a variety of interests. Each of the 11 spoke for his or her group. Some were regional, others represented classes of customers. One or two represented people who wished to do business with B.C. Hydro.

22 Seven Directions state in detail what B.C. Hydro is to provide the Committee. One includes the following:

> Finally, the Commission directs B.C. Hydro to institute with the IRP consultative committee a multi-attribute trade-off analysis for the purposes of portfolio development and selection.

This process is defined in the Commission's glossary of terms:

> **Multi-Attribute Analysis** - A method which allows for comparison of options in terms of all attributes which are of relevance to the decision maker(s). In IRP, common attributes are financial cost, environmental impact, social impact and risk.

23 This requires B.C. Hydro to appraise future projects which it may never implement because of, for instance, financial constraints

imposed by the Minister of Finance or by virtue of a special direction under s.3.1 of the ***Utilities Act***.

24 There is evidence supporting the following assertion in the appellant's factum:

> The bulk of the IRP Directives can be characterized as requiring BCH to put BCH's resource planning initiatives and analyses to the Consultative Committee and be guided by the views and information provided by the members of the Consultative Committee in undertaking its resource planning responsibilities.

25 It cannot be seriously questioned that the Commission requires compliance with its Guidelines: at p.66 of the reasons the Commission concludes a direction denying recovery of a portion of B.C. Hydro's Resource Planning Unit expenditures with these words:

> Should the Utility continue to fail to implement the Commission's directions respecting IRP, the Commission will consider the circumstances and may invoke its powers under Part 9 of the Act.

26 Part 9 of the ***Utilities Act***, to which I will later refer, includes a list of offences under the ***Utilities Act***.

27 B.C. Hydro filed with the Commission on 8 November 1996 what it called its integrated electricity plan which it asserted complied with the Directions in the Decision. The Commission has ordered a public hearing into the integrated electricity plan in February 1996.

28 I restate the question before us. It is whether there is statutory authority for the Commission's imposition of the Guidelines to the extent required by the relevant Directions in the Decision on what is essentially an internal process for which the directors of B.C. Hydro have the ultimate responsibility, both in respect of the process and for the selection of the product of the process.

29 Mr. Sanderson's first point on behalf of B.C. Hydro is that nowhere in the ***Utilities Act*** is reference made to planning. In answer, Mr. Mosely referred us to s.51(3) which requires a public utility to file annually with the Commission a statement in a prescribed form "... of the extensions to its facilities that it plans to construct". This describes a result at the conclusion of the relevant planning process. In the context of s.51(2) it refers to the construction of facilities for which separate certificates of public convenience and necessity may not be required.

30 In my view, s.51(3) has little relevance to the case at bar. It appears B.C. Hydro routinely files the statement referred to. The amounts in question may be in the aggregate substantial but one would expect many of the expenditures for individual components would not be, as they would relate to the routine reinforcement of transformation and distribution facilities required to meet load growth or to maintain the reliability and adequacy of service.

31 Section 28 of the ***Utilities Act*** is also relied upon by the respondents. In full, it provides:

> **General supervision of public utilities**
>
> **28.** (1) The commission has general supervision of all public utilities and may make orders about equipment, appliances, safety devices, extension of works or systems, filing of rate schedules, reporting and other matters it considers necessary or advisable for the safety, convenience or service of the public or for the proper carrying out of this Act or of a contract, charter or franchise involving use of public property or rights.
>
> (2) Subject to this Act, the commission may make regulations requiring a public utility to conduct its operations in a way that does not unnecessarily interfere with, or cause unnecessary damage or inconvenience to, the public.

32 Two observations can be made of this section: the first is that the class of matters referred to in s-s.(1) relates to the existing service provided the public as distinct from future service. The second is that s-s.(2) also refers to present service, that is to say, the conduct of operations in relation to the public. Neither of these subsections refers to the utility's plans for the future.

33 Section 29 of the ***Utilities Act*** has some relevance to the contention that the IRP process comprises in one bundle the exercise of individual powers granted the Commission. It directs the Commission to make examinations and conduct inquiries necessary to keep itself informed about, amongst other things, the conduct of

public utility business. It does not authorize the Commission to direct how that business is conducted.

34 The Commission is supplied with B.C. Hydro's load forecasts as is apparent from its comments in the Decision. These dictate the response a utility must make to meet its statutory obligation to provide service as well as to maintain compliance with the terms of existing certificates of public convenience and necessity. It is within this part of the process that the Commission has decided, in its words, to make the IRP the "... driving force behind the establishment of a utility action plan approved by senior management."

35 It appears reasonable to assume the purpose of the Guidelines is to look beyond a simplistic view of utility planning as one limited to selecting the resources needed to meet anticipated demand and in doing so, to reject an equally simplistic view of regulation as ensuring that service is provided at the least cost to the consumer. It has been evident for some years now that environmental considerations are important in the formulation of the opinion represented by the phrase "public convenience and necessity". To the same effect, conservation and management of energy use is now recognized in what is known as demand side management. The wisdom of all this does not appear to be an issue.

36 The Commission's order directs when and how these factors are to be taken into account in the sequence of B.C. Hydro's planning processes.

37 The Commission in its factum asserts the IRP process is designed to accomplish two objectives:

1. It provides information to the Commission as to the resource selection choice being made by a utility; and
2. Following a review of the IRP plan for the Commission "... it provides guidance to utility management in the form of an advance indication as to the approach the Commission is likely to apply when it subsequently assesses the prudency of the expenditures made by the utility."

38 It will be noted the first objective refers to choices being made while the second refers to expenditures already made.

39 This dichotomy between present planning and past expenditures is said by the Commission to require regulatory control at the planning stage to avoid the dilemma of disallowing substantial incurred expenditures at the rate review stage. The examples given by the Commission in its reconsideration reasons were a nuclear plant and a large hydro electric dam.

40 Section 51 of the ***Utilities Act*** avoids this Hobson's choice. It does so by requiring a certificate of public convenience and necessity before the utility begins construction. It is not suggested the Commission has been demonstrably ineffectual in discharging its responsibilities at the certification stage.

41 Other provisions in the Act relied upon by the Commission are as follows:

1. Section 49 which requires a utility to furnish information to the Commission and answer its questions. This does not require that the utility create information for the purpose of a consultative committee nor to respond to the requests of a consultative committee - both of which have been directed by the Commission.
2. Sections 64-66 which deal with the Commission's jurisdiction over rates. To the extent these are relevant I have dealt with them in my comment on s.51 of the ***Utilities Act***.

42 I am of the view no section of the ***Utilities Act*** expressly enables the Commission to impose by order its chosen form of controlling planning at the stage selected by it.

43 In this I rely upon the literal meaning of each of the sections in the Act which have appeared to me to have any relevant significance.

44 These are, however, to be construed in relation to the ***Utilities Act*** as a whole. I refer to what Mr. Justice Beetz said in ***UES, Local 298 v. Bibeault***, [1988] 2 S.C.R. 1048 at 1088 as the initial stage in a pragmatic or functional analysis:

> At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

45 The premise of such an analysis is that it focuses on jurisdiction: did the legislature intend the question in issue to be answered by the courts or by the tribunal? It is a matter of statutory interpretation with the emphasis on purpose.

46 In this light the ***Utilities Act*** is a current example of the means adopted in North America, firstly in the United States, to achieve a balance in the public interest between monopoly, where monopoly is accepted as necessary, and protection to the consumer provided by competition. The grant of monopoly through certification of public convenience and necessity was accompanied by the correlative

burden on the monopoly of supplying service at approved rates to all within the area from which competition was excluded.

47 It is self-evident this process cannot be undertaken on a day to day basis by legislature or government. Hence, the creation of public utilities commissions. In the United States a constitutionally acceptable formula was evolved to protect the grantee of a certificate of public convenience and necessity from rates so low they constituted piece-meal confiscation of property without due compensation. The form this took was adopted in Canada. A brief historical sketch, relevant to this province, is found in the concurring judgment of Mr. Justice Locke in ***British Columbia Electric Railway Co. Ltd. v. The Public Utilities Commission***, [1960] S.C.R. 837 at 842-845. The ***Utilities Act*** contains many expressions linking it with its legislative antecedents.

48 The certification process is at the heart of the regulatory function delegated to the Commission by the legislature. In ***Memorial Gardens Association Ltd. v. Colwood Cemetery Co.***, [1958] S.C.R. 353 Mr. Justice Abbott, after referring to the American origin of the phrase, said at 357:

> As this Court held in the *Union Gas* case, *supra*, the 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, the need and desirability of additional cemetery facilities, and in reaching that decision the degree of need and of desirability is left to the discretion of the Commission.

49 The other function the legislature has entrusted to the regulatory tribunal is the supervision of the utility's use of property dedicated to service as a result of the certification process. Unless so certified, or exempted from certification by the Commission, such property is not part of the appraised value of the utility company under s.62(1) which is the basis for fixing a rate under s.66. In respect of such property the supervisory powers of the Commission, principally found in Part 3 of the ***Utilities Act***, enable it to oversee the statutory obligation in s.44 to furnish service imposed upon every public utility, namely:

> **44.** Every public utility shall maintain its property and equipment in a condition to enable it to furnish, and it shall furnish, a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

50 It is not without some significance that the Commission found in the Decision the following:

> From the evidence, the Commission recognizes that B.C. Hydro is generally maintaining a safe, secure and highly reliable generation, transmission and distribution service. Given this high level of reliability, the Commission has focused on cost control as an issue at this time.

51 The ***Utilities Act*** runs to over 140 sections. The administration of the jurisdiction conferred upon the Commission is amply delineated by express terms. There is no need to imply terms for this purpose.

52 I have already described the reason for the existence of the tribunal. The expertise or skills of its members vary. Experience has demonstrated skills associated with accounting, economics, finance and engineering have been frequently utilized. Unlike labour relations tribunals where past experience in the field of labour relations is a virtual prerequisite, past experience in the regulatory field is not necessary. A similar observation may be made with respect to securities commissions. Both labour relations tribunals and securities commissions are expressly conferred with policy making powers. None such are conferred on the Commission.

53 In considering the nature of the problem before the tribunal I will first deal with the ***Utilities Act*** as a law of general application. I will then consider whether the provisions of the ***Utilities Act*** which relate only to B.C. Hydro affect my conclusions.

54 I earlier referred to the characterization of the issue. Counsel for the Commission contended it merely related to the enforcement of the information gathering power conferred on the Commission.

55 I am unable to agree with that characterization as in my opinion the IRP process is specific to the planning phase of the utility's response to its statutory obligations and its enforcement by order is an exercise of management as it relates neither to the certification process as such nor to the supervision of the utility's use of its property devoted to the provision of service.

56 It is only under s.112 of the ***Utilities Act*** that the Commission is authorized to assume the management of a public utility. Otherwise the management of a public utility remains the responsibility of those who by statute or the incorporating instruments are charged with that responsibility.

57 One of the primary responsibilities and functions of the directors of a corporation is the formulation of plans for its future. In the case of a public utility these plans must of necessity extend many years into the future and be constantly revised to meet changing conditions. In the case at bar the effect of the Commission's directions is to place a group, whose interests are disparate, in a superior position in the sequence of planning and to require the directors to justify a deviation from the product of the IRP process in the exercise of their responsibilities.

58 Taken as a whole the ***Utilities Act***, viewed in the purposive sense required, does not reflect any intention on the part of the legislature to confer upon the Commission a jurisdiction so to determine, punishable on default by sanctions, the manner in which the directors of a public utility manage its affairs.

59 When the ***Utilities Act*** is examined in light of the provisions applicable to B.C. Hydro alone, this conclusion is reinforced. I have mentioned s.3.1. This authorizes the Lieutenant Governor in Council to issue a direction to the Commission specifying "factors, criteria and guidelines" to be used or not used by the Commission in regulating and fixing rates for B.C. Hydro. There is no comparable mandatory power conferred on the Commission to issue such directions to B.C. Hydro. From my examination of the ***Utilities Act*** this is the only reference to guidelines. A further important exclusion from the jurisdiction of the Commission is its approval of the issue of securities under s.57. Moreover, under s.59 B.C. Hydro may dispose of its property without obtaining the Commission's approval.

60 I have mentioned sanctions and the Commission's threat to resort to Part 9 of the ***Utilities Act***. Part 9 lists as an offence on the part of individual officers, directors and managers of utility in the failure to comply with a Commission order.

61 Tested in terms of general principles I am of the view the observations of the Ontario Court of Appeal in ***Ainsley Financial Corporation et al v. Ontario Securities Commission et al*** (1994), 21 O.R. (3d) 104, (Ont.C.A.) are relevant. In that case the Ontario Securities Commission ("OSC") issued a draft policy statement, subsequently adopted with minor modifications after the action in question had been commenced.

62 This policy statement purported to be a guide to those engaged in the marketing and selling of penny stocks as to business practices the OSC regarded as appropriate. As was set out in greater detail in ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557, major securities commissions such as the OSC have a policy role in the regulation of capital markets in the public interest as well as an adjudicative function in applying sanctions in specific cases. The following headnote from ***Ainsley*** is, I think, relevant to the point before us.

> The validity of the policy statement turned on its proper characterization. If the statement was a non-binding statement or guideline intended to inform and guide those subject to regulation, the statement was valid and within the authority of the OSC; guidelines of this nature do not require specific statutory authority and such guidelines are not invalid merely because they regulate in the sense that they affect the conduct of those at whom they are directed. If, however, the statement imposed mandatory requirements enforceable by sanction, then the statement required statutory authority; a regulator cannot issue *de facto* laws disguised as guidelines.

63 The issue of non-mandatory guidelines is not a question before us. Here, I repeat, the Commission has explicitly purported to enforce the application of its directions with the threat of sanctions.

64 In my view, the appellant is entitled to a declaration that the Directions in the reasons for Decision for Order G-89-94 issued 24 November 1994 which ordered the application of the Integrated Resource Plan to British Columbia Hydro and Power Authority are beyond the statutory powers of the Commission and are accordingly unenforceable.

65 I would make no order as to costs.

"The Honourable Mr. Justice Goldie"

I AGREE: "The Honourable Madam Justice Prowse"

I AGREE: "The Honourable Madam Justice Newbury"

Pursuant to s.121 of the ***Utilities Commission Act***, the foregoing will be certified as the opinion of the Court to the Commission.

IN THE MATTER OF

AN APPLICATION BY

KINDER MORGAN, INC. AND

0731297 B.C. Ltd.

FOR THE ACQUISITION OF COMMON SHARES

OF TERASEN INC.

DECISION

November 10, 2005

Before:

R.H. Hobbs, Chair
L.A. Boychuk, Commissioner
R.W. Whitehead, Commissioner

TABLE OF CONTENTS

TABLE OF CONTENTS

1.0 INTRODUCTION

1.1 The Application

On August 17, 2005, Kinder Morgan, Inc. ("KMI" or "Kinder Morgan") and 0731297 B.C. Ltd. ("Subco") (collectively the "Kinder Morgan Companies") applied to the British Columbia Utilities Commission (the "Commission" or the "BCUC") pursuant to Section 54 of the *Utilities Commission Act* (the "Act" or the "UCA") for approval of the acquisition by the Kinder Morgan Companies of the common shares of Terasen Inc. ("Terasen") (Exhibit B-1). The acquisition of the shares of Terasen ("the Transaction") will cause KMI to have indirect control of Terasen Gas Inc. ("TGI"), Terasen Gas (Vancouver Island) Inc. ("TGVI"), Terasen Gas (Squamish) Inc. ("TGS "), Terasen Gas (Whistler) Inc. ("TGW"), and Terasen Multi-Utilities Services Inc. ("TMUS"). Each of TGI, TGVI, TGW and TMUS are wholly-owned subsidiaries of Terasen. TGI owns all of the outstanding shares of TGS and TGS is an indirect wholly-owned subsidiary of Terasen. Each of TGI, TGVI, TGS, TGW and TMUS (collectively, the "Terasen Utilities") are public utilities regulated by the Commission. Terasen also owns all of the outstanding shares of Terasen Pipelines (Trans Mountain) Inc. ("TM"). TM is not regulated by the BCUC, but rather by the National Energy Board. TM owns all of the outstanding shares of Terasen Pipelines (Jet Fuel) Inc. ("TPJF"). While the tolls of TPJF are regulated by the BCUC, TPJF is not a "public utility" as that term is defined in the UCA and the provisions of Section 54 of the UCA are not applicable to TPJF.

1.2 Corporate Background

1.2.1 Kinder Morgan, Inc.

KMI is a U.S. energy storage and transportation company. KMI operates either for itself or on behalf of Kinder Morgan Energy Partners, L.P. ("KMP"), over 30,000 miles of natural gas and petroleum products pipelines. KMI's businesses are conducted through the following business segments:

- An interstate natural gas pipeline system covering Illinois, Iowa, Wisconsin, Indiana, Missouri, Arkansas, Nebraska and Texas;
- Retail natural gas distribution systems in Colorado, Nebraska and Wyoming (as well as a small distribution system in Hermosillo, Mexico); and
- Power generation facilities in Michigan and Colorado.

KMI owns the general partner of, and has a significant limited partner interest in, KMP, a publicly traded pipeline limited partnership in the U.S. KMP's common units are listed on the New York Stock Exchange under the ticker symbol "KMP." KMP owns and/or operates a diverse group of assets used in the transportation, storage and processing of energy products throughout the U.S, including product pipelines (gasoline, diesel fuel, jet fuel and natural gas liquids); natural gas pipelines and storage facilities; CO_2 production and transportation; oil fields and a crude oil pipeline system; and liquid and bulk terminal facilities and rail transloading and materials handling facilities.

KMI also owns, directly or indirectly, all of the voting stock of Kinder Morgan Management, LLC ("KMR"). KMR's assets consist of a small amount of working capital and its limited partner interest in KMP.

KMP owns a 49.8 percent undivided joint venture co-ownership interest in the Cochin Pipeline System ("CPS"). The CPS is operated in Canada under the name Cochin Pipe Lines, Ltd. and in the U.S. under the name Dome Pipeline Corporation. The remaining 50.2 percent interest in CPS is indirectly owned by BP Canada, which in turn is ultimately controlled by BP p.l.c. By the terms of the joint venture, BP Canada is the operator of CPS. With the exception of this interest in the CPS, KMI and KMP do not own or control any assets or businesses in Canada.

For the fiscal year ended December 31, 2004, KMI reported the following consolidated financial results:

	(US$ million)
Total Assets	$10,117
Operating Revenues	$1,165
Operating Income	$398
Net Income	$522 (Note1)

(Note 1) Net Income is greater than Operating Income because KMI's interest in KMP is reflected as an equity investment on KMI's income statement below the operation income line.

As at July 22, 2005 KMI had approximately 122.5 million Common Shares outstanding (excluding shares held in treasury). The common shares of KMI are listed for trading on the New York Stock Exchange under the symbol "KMI". KMI's executive offices are located in Houston, Texas. Further information respecting KMI is contained in Schedules 2 through 4 of Exhibit B-1.

1.2.2 Terasen and the Terasen Utilities

Formerly known as BC Gas Inc. prior to a name change in 2003, Terasen is a non-regulated holding company created in 1993 to provide energy transportation and utility infrastructure management services. Terasen does not generate any taxable income (Exhibit B-9, Response to MEMPR IR No. 1, p. 13).

Terasen has two base businesses of natural gas distribution and petroleum transportation, and is also involved in water and utility services. The principal business segments of Terasen are:

(a) *Gas Distribution:* The natural gas distribution subsidiaries of Terasen (TGI, TGVI, and TGS) distribute natural gas throughout most of those parts of B.C. that have natural gas service. Propane is also distributed in Revelstoke (owned and operated by TGI) and Whistler, B.C. (owned and operated by TGW).

(b) *Petroleum Transportation:* Terasen is engaged in the petroleum transportation business through its subsidiary TM and the subsidiaries and affiliates of TM. TM operates four pipeline systems. The Trans Mountain system transports crude oil and refined petroleum products from Edmonton to Burnaby and transports crude oil to several refineries in Washington State. The Corridor system is a dual pipeline system that transports diluted bitumen and diluent between the Muskeg River mine near Fort McMurray and the upgrader of Shell Oil north of Edmonton. TM also owns a one third interest in the Express Pipeline System and the Platte Pipeline system which transport crude oil from Hardisty, Alberta to the Rocky Mountain region of the United States and on to Wood River, Illinois. Terasen Pipelines also operates the jet fuel pipeline to the Vancouver International Airport that is owned by TPJF.

(c) *Water and Utility Services:* Terasen's water and utility services operations include Terasen Waterworks (Supply) Inc., Terasen Water Inc., Terasen Utility Services Inc., Terasen Multi-Utility Services Inc. (or "TMUS"), Thornmark Utilities Corporation and Thornmark Waste Management Corporation in Alberta, Terasen's 50 percent interest in Fairbanks Sewer and Water Inc. in Alaska, and Terasen's 30 percent interest in CustomerWorks LP. Terasen Waterworks (Supply) Inc. is a wholesale distributor of pipes, fittings, valves, hydrants and other water and wastewater infrastructure products in Western Canada. Terasen Water Inc. designs and builds water and wastewater treatment systems for municipal and industrial applications. TMUS provides outsourced utility services including measurement services and water treatment and wastewater treatment system services. TMUS owns and operates the Panorama water utility that is regulated by the Comptroller of Water Rights pursuant to the British Columbia *Water Utility Act*. CustomerWorks LP provides billing and customer care services to utilities, municipalities and retail

energy companies. CustomerWorks provides services to TGI and will be providing services to TGVI.

For the fiscal year ended December 31, 2004, Terasen reported the following consolidated financial results:

	(Cdn $ million)
Total Assets	$4,971
Revenues	$1,957
Operating Income	$377
Net Earnings	$156

On December 31, 2004 Terasen had approximately 105.2 million common shares outstanding (excluding approximately 9.2 million shares that are outstanding and held by Trans Mountain Holdings Ltd.). Terasen's common shares are listed for trading on the Toronto Stock Exchange under the symbol "TER".

Terasen directly controls TGI, TGVI, TGW, and TMUS and indirectly controls TGS, all of which are public utilities regulated by the Commission. TMUS operations include activities that are subject to BCUC regulation as well as non-regulated activities. The regulated activities of TMUS relate to the sale and distribution of natural gas, propane, and electricity. Its non-BCUC regulated activities are associated with property management, waste water and water treatment.

TGI is the largest natural gas distributor in British Columbia. TGI [formerly 74280 B.C. Ltd. and later known as BC Gas Inc.] was originally a shelf company created by British Columbia Hydro and Power Authority ("BC Hydro") as a vehicle for the sale of its Lower Mainland natural gas assets. In 1988, TGI was sold to Inland Natural Gas Co. Ltd. ("Inland"), a private company operating in the interior of B.C. On or about 1990, Inland, Columbia Natural Gas Co. Ltd. and Fort Nelson Natural Gas Co. Ltd. were amalgamated with TGI, which was then acquired by Terasen in 1993 (Exhibit B-9, Response to MEMPR IR No. 1, p. 10). At the time of the sale of TGI, the government imposed restrictions on the new company. Specifically, it limited the number of directors who could live outside the province, the percentage of shares that could be owned by one entity (10 percent), the percentage of shares that could be owned by foreigners (20 percent) and the location of the company headquarters. These restrictions were removed in 2003 with Bill 85, the *BC Hydro Public Power Legacy and Heritage Act,* Section 6.

TGI owns and operates approximately 20,800 kilometres of natural gas transmission pipelines and distribution mains serving, as of December 31, 2004, approximately 790,000 residential, commercial and industrial customers

in more than 100 communities throughout British Columbia. This includes Revelstoke where TGI operates a propane distribution system serving approximately 1,500 customers. TGI's rates and terms of service are regulated by the BCUC. TGI has approximately 1,100 employees, with approximately 600 employees located at TGI's operating centre in Surrey and the others located in centres throughout the TGI service area. TGI accounts for 64 percent of Terasen's consolidated assets, 68 percent of its consolidated revenues, 61 percent of its consolidated operating income, and 46 percent of its consolidated net earnings (Exhibit B-1, p. 10).

TGVI owns and operates an integrated natural gas pipeline and distribution system that provides service to approximately 85,000 residential, commercial and industrial customers on the Sunshine Coast and Vancouver Island. TGVI, formerly Centra Gas British Columbia Inc., was acquired by Terasen from Westcoast Energy Inc. in 2002 (Exhibit B-9, Response to MEMPR IR No. 1, p. 10).

TGVI provides service through 615 km of high-pressure transmission pipeline, including three compressor stations, and approximately 3,250 km of distribution mains. TGVI's largest customers are the Vancouver Island Gas Joint Venture representing seven large pulp and paper mills and BC Hydro serving the Island Cogeneration Project near Campbell River. TGVI's transmission and distribution systems were originally constructed and operated with financial support provided by the provincial and federal governments. In 1995, the financial support arrangements were restructured. TGVI, the Government of British Columbia and Terasen are parties to the Vancouver Island Natural Gas Pipeline Agreement ("VINGPA"). Under the VINGPA, Terasen has agreed to cover up to $120 million of revenue deficiencies incurred by TGVI. The rates of TGVI were set by formula until December 31, 2002 and since then have been set by the Commission. The rates set by the Commission have enabled the balance of the accumulated revenue deficiencies of TGVI to decrease. As at December 31, 2004, the principal amount of the accumulated revenue deficiencies of TGVI was approximately $61 million. The Transaction has no effect on the VINGPA and it will continue to apply to Terasen and TGVI on the same basis as it has prior to the Transaction.

TGS owns and operates the natural gas distribution system in Squamish. TGS has been owned by Inland (now Terasen) since 1985 and is now a subsidiary of TGI (Exhibit B-9, Response to MEMPR IR No. , p. 10). TGS services approximately 2,900 residential, commercial and industrial customers. The rates of TGS are set by formula pursuant to the Squamish Rate Stabilization Agreement between the Province and TGS (the "Squamish RSA"). Natural gas is transported to TGS on the high-pressure pipeline of TGVI pursuant to a Transportation Service Agreement ("TSA") between TGVI and TGS. The tolls paid by TGS for transportation service on the TGVI pipeline are calculated under a formula set out in that TSA.

TGW operates a propane storage and distribution system in the Resort Municipality of Whistler ("RMOW"). The

system serves approximately 2,300 residential and commercial customers within the resort community. TGW, formerly Centra Gas Whistler Inc, was acquired by Terasen from Westcoast Energy Inc. in 2002 (Exhibit B-9, Response to MEMPR IR No. 1, p. 10).

TMUS provides propane, natural gas, water and electricity utility delivery and wastewater services to various communities within British Columbia. As of December 31, 2004, TMUS owned and operated systems in three resort communities (Sun Rivers, Sonoma Pines and Panorama Mountain Village) providing service to approximately 640 customers. The rates and terms of service for propane, natural gas and electricity are regulated by the BCUC.

Terasen or its affiliates provide various services to the Terasen Utilities under Service Agreements, which have been approved by the BCUC. These include the following:

(a) Corporate Services Contract between Terasen and TGI.;
(b) Shared Services Agreement between TGI and TGVI;
(c) Specified Committed Services between TGI. andTGS; and
(d) Shared Services Allocation between TGVI and TGW.

Further details regarding these Service Agreements are provided in the Application (Exhibit B-1, pp. 12-15). The Transaction will not affect existing Service Agreements, for the remaining term of those agreements. Future agreements will be subject to review by the BCUC.

1.3 Procedural Orders and Hearing Process

On August 19, 2005, the Commission issued Order No. G-76-05 with an accompanying Notice of Procedural Conference and Regulatory Agenda and Timetable (Exhibit A-1). As outlined in Order No. G-76-05, the Commission issued an Information Request to KMI on August 26, 2005 (Exhibit A-2). The KMI Response to the Commission's Information Request was received September 1, 2005 (Exhibit B-4). Registered Intervenors were required to file their Information Requests to KMI by September 12, 2005. KMI issued responses to these Information Requests by September 19, 2005.

Order No. G-76-05 established a Procedural Conference for September 9, 2005. The Procedural Conference was held to address matters such as whether the review should proceed by way of an oral or written public hearing, or some other process; steps and timetable associated with the regulatory review process; and other matters that would assist the Commission to efficiently review the Application.

In its responses to Commission Information Request No. 1 (Exhibit B-4), KMI provided evidence related to its ability to finance the acquisition of the shares of Terasen. The KMI response included a document (Exhibit B-5) filed on a confidential basis that contained two confidential Bank commitment letters provided to KMI. On September 8, 2005, the Commission issued a letter (Exhibit A-3) seeking submissions during the Procedural Conference regarding its use of Exhibit B-5 on a confidential basis. However, by letter dated September 13, 2005 (Exhibit B-7), KMI waived the confidentiality of the documents referred to in Exhibit A-3, eliminating the need for the Commission Panel to comment on the confidentiality issues raised in Exhibit A-3.

During the Procedural Conference, Intervenors such as Mr. Corky Evans, MLA for Nelson Creston and the Canadian Action Party were in support of a regulatory process that provided opportunities for oral submissions and cross-examination (T1: 46, 49) while other Intervenors, such as the Lower Mainland Large Gas Users Association ("LMLGUA"), Commercial Energy Consumers Association of BC ("CEC") and the BC Old Age Pensioners et al. ("BCOAPO"), did not take a position regarding whether or not an oral or written process should be established (T1: 26, 30). However, most Intervenors considered the October 18, 2005 timeline for a Commission Decision, as recommended by KMI, to be insufficient to review the Application. KMI argued that an oral process was not necessary because there is no significant dispute over the facts of the Application (T1: 65) and because the public has taken advantage of electronic communications to express their views to the Commission. According to KMI, therefore, both an oral hearing and town hall meetings were not necessary (T1: 66).

On September 14, 2005, the Commission issued Order No. G-86-05 establishing a written hearing process and a revised hearing timetable (Exhibit A-4). The Commission established October 14, 2005 as the deadline for written submissions and October 21, 2005 for responses from KMI. The Commission Panel also established November 2, 2005 as the date for a possible oral phase of submissions, subject to whether or not the Commission Panel had any questions arising from the written submissions. The Commission Panel indicated it would issue a final decision on or before November 10, 2005.

On October 3, 2005, the Commission also issued a letter to Registered Intervenors inviting them to include comments in their submissions regarding the issues to be considered in a determination under Section 54 of the UCA (Exhibit A-6). After reviewing all written submissions, the Commission issued a letter on October 24, 2005 advising that the Commission Panel did not have any questions arising from the written submissions, eliminating the need for an oral argument phase and closing the record for this Proceeding (Exhibit A-7).

During the Commission's written process, 36 parties registered as Intervenors, many of whom participated in two

rounds of information requests to and responses from KMI, following the initial round of Commission information requests, and many of whom also filed written submissions by the established deadline of October 14, 2004. As part of the record for this Proceeding, the Commission also received more than 8,000 letters of comment from individual citizens, businesses and other organizations concerning the Transaction. These comments are summarized in Section 3.2 of this Decision.

2.0 SUMMARY OF THE TRANSACTION

KMI, Subco, and Terasen entered into an agreement on August 1, 2005 (the "Combination Agreement") under which Subco, a direct wholly-owned subsidiary of KMI, will acquire all of the outstanding common shares of Terasen (the "Transaction"). The terms of the Transaction are set out in the Combination Agreement attached as Schedule 1 to the Application (Exhibit B-1).

The Transaction is to be completed by way of a plan of arrangement (the "Plan of Arrangement") pursuant to Section 288 of the *Business Corporations Act* (British Columbia) (the "BCA(BC)"). The effect of the Transaction is that upon its completion the Kinder Morgan Companies will have indirect control of the Terasen Utilities. Pursuant to the Plan of Arrangement, on its effective date, all of the Terasen common shares, other than those held by KMI and its affiliates and by dissenting shareholders, will be exchanged for:

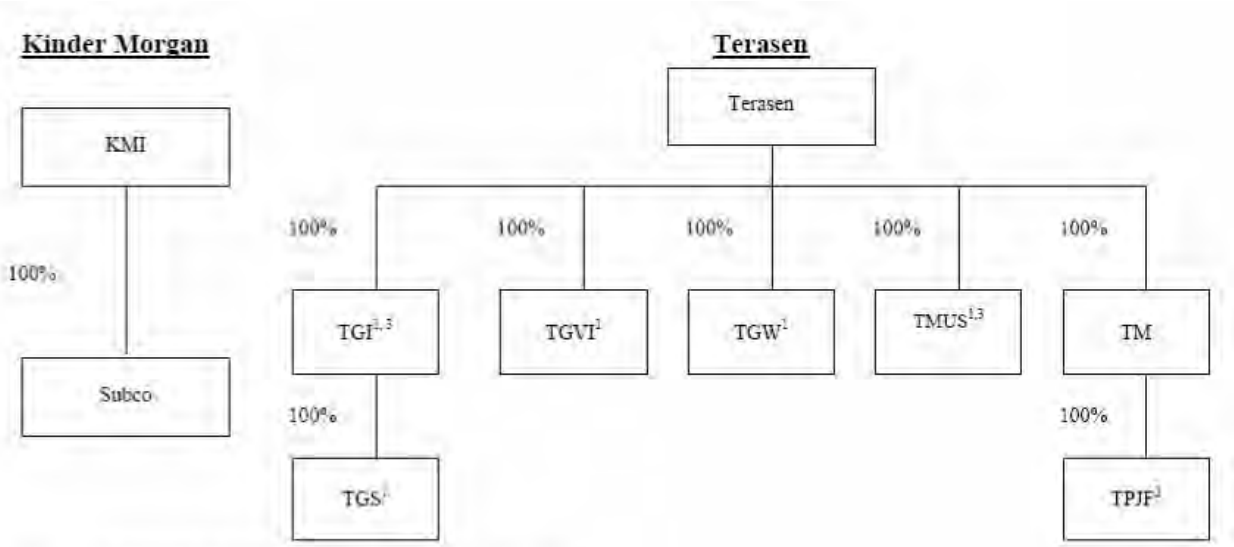
(a) Cdn $35.75 in cash,
(b) 0.3331 of a KMI common share for each Terasen common share; or
(c) Cdn $23.25 in cash plus 0.1165 of a KMI common share for each Terasen common share.

All elections will be subject to proration in the event that total cash elections exceed approximately 65 percent of the total consideration to be paid or total stock elections exceed approximately 35 percent.

Upon completion of the Transaction, all of the outstanding common shares of Terasen, other than Terasen common shares held by KMI and its affiliates and certain inter-corporate holdings, will be held by Subco, resulting in Terasen, and each of the Terasen Utilities, being an indirect wholly-owned subsidiary of KMI.

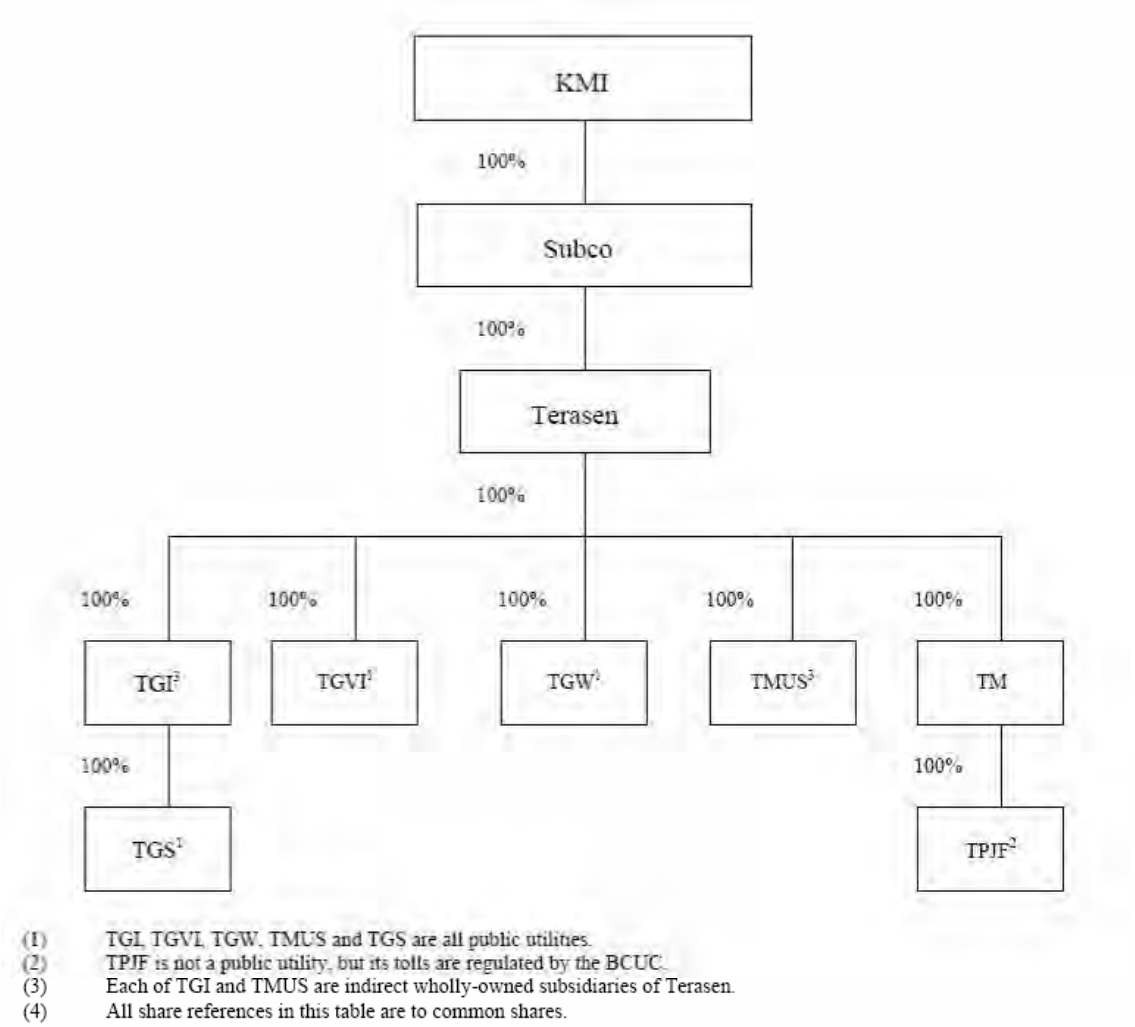
Figure 1 summarizes the current corporate organization chart of the relevant entities for each of KMI and Terasen (together with its subsidiaries regulated by the Commission) before giving effect to the Transaction. Figure 2 depicts the corporate organization of KMI and Terasen after giving effect to the Transaction. Following completion of the Transaction, KMI indicates that Subco will be amalgamated with Terasen Inc. and the surviving entity, which will likely adopt the Terasen name, will become a wholly owned subsidiary of KMI (Exhibit B-27, Response to Council of Canadians, Powell River Chapter IR No. 2, p. 11).

Figure 1 – Corporate Organization of Relevant Entities Prior to the Transaction



(1) TGI, TGVI, TGW, TMUS and TGS are all public utilities.
(2) TPJF is not a public utility, but its tolls are regulated by the BCUC.
(3) Each of TGI and TMUS are indirect wholly-owned subsidiaries of Terasen.
(4) All share references in this table are to common shares.

Figure 2 – Corporate Organization of Relevant Entities Following the Transaction



Completion of the Transaction is subject to certain conditions, including:

(i) approval of the Plan of Arrangement by not less than 75 percent of the votes cast by the Terasen shareholders (other than Trans Mountain Holdings Ltd., an affiliate of Terasen) at a special meeting to be held for the purpose of considering the Plan of Arrangement;

(ii) approval of the Plan of Arrangement by the Supreme Court of British Columbia;

(iii) the receipt of all necessary governmental and regulatory approvals and consents, including those required in Canada under the *Competition Act* (Canada),[1] the *Investment Canada Act*, the *Utilities Commission Act* (British Columbia) and the *Water Utility Act* (British Columbia), as well as exemption orders from provincial and territorial securities regulators with respect to the resale of KMI common shares by recipients under the Plan of Arrangement; and

[1] In its final submission, KMI notes that the Commissioner of Competition, acting through her designee, issued advance ruling certificate in respect of the Transaction and that KMI is thereby exempted from the obligations to file a notification and requires no further approvals under the Competition Act (Exhibit B-34).

(iv) various governmental and regulatory approvals and consents required by KMI and Terasen in the United States of America to give effect to the Transaction.

On October 18, 2005, Terasen shareholders approved the Transaction with 95.6 percent of votes cast in favour of the Transaction (Exhibit B-31).

3.0 PUBLIC CONSULTATION AND COMMENT

3.1 Applicant's Consultation Process

Leading up to and after submitting its Application, Terasen and KMI conducted consultations including:

(a) Direct contact with key stakeholders immediately following announcement of the Transaction to advise those stakeholders of the key aspects and impacts of the Transaction.

(b) Advisories to all customers with information regarding the Transaction and advice as to how to access the information in regard to the Transaction via the TGI and KMI websites.

(c) Posting information, including responses to questions on issues in respect of the Transaction, on the TGI and KMI websites for access by customers and stakeholders.

As part of Order No. G-76-05 (Exhibit A-1), KMI and the Terasen Utilities were also ordered to hold Public Workshops to review the Application in the Greater Vancouver area, Whistler, Victoria, Nanaimo, Kelowna, Cranbrook and Prince George during the week commencing August 29, 2005. These workshops are outlined in Exhibit B-3.

Schedule 5 of the Application provides a summary of the stakeholder consultation activities held beginning at the date of the announcement of the Transaction up to and including August 16, 2005. Exhibit B-6 provides an updated summary of all stakeholder consultation activities held between August 1, 2005 and September 2, 2005.

3.2 Public Comments to the Commission

As of October 14, 2005, the deadline established by the Commission Panel for written submissions, the Commission had received more than 8,000 letters of comment concerning the Application from individuals, businesses, communities, community organizations, and associations. About 650 letters of comment were form letters prepared by other parties. About 30 letters of comment included petitions opposing the Transaction with a combined total of approximately 1,000 signatures. About eight letters of comment were from municipal councils or regional districts requesting that the Commission hold public hearings in response to public concerns. The Union of B.C. Municipalities also submitted a resolution passed without any objection at a meeting on September 30, 2005 requesting that the Commission hold public hearings throughout the province to assess the benefits or detriments of the Transaction to the communities of B.C.

Virtually all of the letters of comment oppose the Transaction. A large number of letters express general anger over the Transaction, but offer no substantive reasons for their opposition. Some of these letters indicate a need for more information and time to consider the Transaction, and some also request public hearings and/or a referendum on the sale. The vast majority of letters express concern over foreign ownership in general and American ownership in particular. Opposition to foreign ownership seems to revolve around issues such as a perceived loss of control/sovereignty over resources (energy security), reduced quality of services, increased rates, and job losses in B.C. Many letters express a general anger and distrust towards the United States, particularly over recent trade disputes involving softwood lumber and livestock, and the position of the United States government on various environmental issues.

Some letters express specific concerns related to KMI's environmental and safety record, and the credibility of its senior management team. Many of these letters cite articles describing recent accidents within the Kinder Morgan Companies' infrastructure such as pipeline ruptures, explosions, fires and spills, as well as numerous fines and ongoing investigations related to safety and environmental practices. Concerns about the credibility of KMI highlight senior management's past involvement with Enron, the financial structure of the company, and personal ties with the current government of the United States.

The Commission Panel appreciates the input of so many citizens and has carefully reviewed and considered the concerns raised by the public. The Commission Panel is cognizant of the strong public opposition towards this Transaction, as exhibited by the number and tone of letters received. However, the Commission is also mindful that it must consider and adjudicate this Application within its statutory mandate and the relevant provisions of the UCA. The jurisdiction of the Commission with respect to this Application is discussed in Section 4 below.

The Commission Panel notes that much of the opposition to this Transaction appears to be based on misunderstandings about the existing ownership and structure of Terasen, the structure of the natural gas market in B.C., and the authority of this Commission over public utilities operating in B.C.

A significant number of letters of comment seem to assume that Terasen is a Crown Corporation. Terasen is in fact broadly owned by private shareholders and, while there were some restrictions initially placed on the ownership of Terasen shares by foreigners following the amalgamation of private and public assets in the late 1980's, the Government of B.C. removed these restrictions in 2003. KMI has advised, however, that the Transaction is subject to review under the *Investment Canada Act* and that the Transaction cannot be completed until the responsible federal Minister is satisfied that the investment is likely to be of net benefit to Canada (Exhibit B-28, Response to MEMPR IR No. 2, pp. 9-11). The Transaction has received overwhelming approval by existing shareholders (Exhibit B-31).

Many letters express concern about foreign ownership of B.C.'s natural gas resources. However, the Terasen Utilities do not own natural gas resources and they are not in the business of engaging in the exploration, development or production of natural gas resources in B.C. Rather, the Terasen Utilities own and operate transmission and distribution facilities. The Terasen Utilities buy natural gas solely for the purposes of serving customers in B.C. and resell it at cost pursuant to BCUC regulation (Exhibit B-9, Response to MEMPR IR No. 1, p. 8). Similarly, the business philosophy of KMI and KMP is to own assets that provide transportation, storage and delivery services and it is not KMI's or KMP's business philosophy or plan to own natural resources. The only natural resources which KMI or KMP owns are those that are incidental to its core business (Exhibit B-9, Response to MEMPR IR No. 1, pp. 8-9). The Transaction does not affect the ownership or use of natural gas by the Terasen Utilities or change the existing market for natural gas produced in B.C. Exports of natural gas continue to be regulated by the National Energy Board.

Finally, this Application is not about changing the services or rates of the Terasen Utilities. The Applicant has made various assurances that it will not attempt to recover from ratepayers any costs associated with the Transaction (e.g., Exhibit B-4, Response to Commission IR No. 1, p. 11, Exhibit B-26, Response to LMLGUA/CEC IR No. 2, p. 4), and that service levels will be maintained or enhanced (Exhibit B-34, p. 15). While useful, the Commission Panel need not rely on these assurances since the Transaction does not in any way alter the Commission's wide-ranging powers with respect to the regulation of rates and the services provided by the Terasen Utilities. In its deliberations, however, the Commission Panel has also considered whether or not conditions should be attached to any Decision that approves the Transaction in order to further protect the public interest.

4.0 LEGAL CONTEXT

4.1 General Authority of the BCUC

The British Columbia Utilities Commission, under the authority of the *Utilities Commission Act*, regulates the operations of public utilities, including the rates and other terms and conditions of service of utilities. The regulation of rates involves approval of revenue requirements (all costs, including capital and operating expenses, as well as capital structure and returns), as well as rate structures. Costs for services provided by public utilities must be just and reasonable. The Commission also regulates the construction of new facilities by public utilities through its authority to grant *Certificates of Public Convenience and Necessity*. Among other things, the Commission also has jurisdiction to regulate the following types of business transactions:

(a) the disposition of any public utility property other than in the ordinary course of the business of the public utility (UCA, Section 52);

(b) the issue of any debt and equity securities by a public utility, other than debt maturing within one year of issue, and any material change in the terms and conditions of any such outstanding debt and equity securities issued by the utility (UCA, Section 50);

(c) any consolidation, merger or amalgamation of a public utility with any other person (UCA, Section 53); and

(d) the subsequent acquisition by any person of a reviewable interest in the public utility (UCA, Section 54).

The Commission has developed various guidelines and procedures to assist it in regulating public utilities.

4.2 Applicable Section of the UCA to this Proceeding

TGI, TGVI, TGS, TGW and TMUS are public utilities regulated by the Commission. TPJF is a "pipeline" and a "company pipeline" as those terms are defined in the *Pipeline Act,* R.S.B.C. 1996, c. 364. Pursuant to the provisions of Part 7 of the *Pipeline Act* the tariffs of TPJF must be filed with the BCUC and TPJF may not charge a toll unless it is specified in a tariff filed with the BCUC. While the tolls of TPJF are regulated by the BCUC, TPJF is not a "public utility" as that term is defined in the UCA. Terasen Inc., which is the parent company of TGI (which owns TGS), TGVI, TGW, TMUS and TM (which owns TPJF), is not a "public utility" as defined in the UCA.

The Application was made pursuant to Section 54 of the UCA. Section 54 provides, in part, that:

> 54(7) A person must not acquire or acquire control of such numbers of any class of shares of a public utility as
>
> (a) in themselves, or
>
> (b) together with shares owned or controlled by the person and the person's associates,
>
> cause the person to have a reviewable interest in a public utility unless the person has obtained the Commission's approval.

Section 54(4) of the Act states that a person has a reviewable interest in a public utility if the person owns or controls, or if the person and the person's associates own or control, in the aggregate more than 20 percent of the voting shares outstanding of any class of shares of the utility. Section 54(9) of the UCA provides that the Commission may give its approval under Section 54 subject to such conditions and requirements it considers necessary and desirable in the public interest, and that the Commission must not give its approval under Section 54 "… unless it [the Commission] considers that the public utility and the users of the services of the public utility will not be detrimentally affected."

In their submissions, the LMLGUA and the CEC (Exhibit C18-5) and the Council of Canadians, Powell River Chapter (Exhibit C11-9), suggest that the Transaction is reviewable under Sections 52 and 53 of the UCA which deal with "restraints on disposition [of a utility's property]" and "consolidation, amalgamation and merger [of public utilities]", respectively. In making this argument, the LMLGUA/CEC rely in part on public statements made by Richard Kinder referring to "consolidation" of the KMI and Terasen businesses. Section 52 sets out the conditions under which the Commission may approve the disposition, merger, amalgamation or consolidation of property, franchises, licenses, permits, concessions, privileges or rights (i.e., the assets) of a public utility. Section 53 of the UCA sets out the conditions under which the Lieutenant Governor in Council ("LGIC") may approve the consolidation, amalgamation or merger of a public utility with another person after receiving a report from the Commission.

In its final submission, the BCOAPO acknowledges that the jurisdiction of the Commission in this matter does not extend to KMI's acquisition of Terasen but only to the indirect acquisition of the Terasen Utilities, and BCOAPO does not suggest the Application should be reviewed under any other section of the UCA (Exhibit C3-1).

In its response to Intervenor Submissions, KMI suggests that Intervenors have confused the use of vernacular terms such as "consolidation" with the legal term as used in the UCA (Exhibit B-34, p. 19). KMI maintains that the Transaction does not contemplate, and will not cause, the disposition, merger, amalgamation or consolidation of any assets of any public utility. Rather, the "amalgamation" that may occur in this Transaction is between Subco and Terasen, neither of which are public utilities. KMI maintains that the Terasen Utilities will continue as separate corporate entities owned by their parent corporation, Terasen or TGI (in the case of TGS), and that a share purchase (as contemplated in this Transaction) does not constitute an amalgamation, merger or consolidation.

The Commission Panel agrees with KMI that the Transaction does not involve the disposition of property as contemplated by Section 52, nor the consolidation, amalgamation or merger of a utility with another person as contemplated by Section 53. The Commission Panel notes that the Terasen Utilities would continue as separate corporate entities following completion of the Transaction, and finds that the Application is appropriately brought and considered under Section 54 of the UCA as a Transaction involving a "reviewable interest" within the context of that provision.

4.3 Issues Applicable under Section 54 of the UCA

4.3.1 Previous Commission Decisions

In its Application, KMI recommends criteria for reviewing the Transaction that are drawn from other relevant decisions by the Commission. In earlier decisions, the Commission has determined that the focus of its review of any acquisition of, or acquisition of control of, a public utility under Section 54 should be on the effect of the acquisition upon the public utility, the customers of that utility and the regulation of the public utility by the Commission in the public interest. Specifically, in its June 30, 1987 Decision regarding the acquisition of West Kootenay Power and Light Company by Utilicorp United Ltd. (Order No. G-31-87) the Commission characterized its interpretation of the requirements of Section 54 [then Section 61] of the UCA as follows.

> "The Commission interprets the provisions of Section 61 [now Section 54] of the Act as requiring that the proposed acquisition not detract from [the utility's] ability to provide ongoing service of the quality that its customers have the right to expect and at rates which are fair to those customers and to the utility itself. The Commission concludes that it is the intent of these sections, regardless of ownership, to preserve the authority of the Commission to regulate [the utility] effectively and in the public interest." (Utilicorp Decision, p. 7).

In its more recent Decision regarding the Fortis Pacific Holdings Inc. ("Fortis") acquisition of Aquila Networks Canada (British Columbia) Ltd. (Aquila B.C.) [previously West Kootenay Power] dated April 30, 2004 (Order No. G-39-04), the Commission also identified specific criteria to assist in determining whether the public utility and the users of the services of the public utility will be detrimentally affected by a proposed acquisition. The criteria are that:

(a) the utility's current and future ability to raise equity and debt financing not be reduced or impaired;

(b) there be no violation of existing covenants that will be detrimental to the customers;

(c) the conduct of the utility's business, including the level of service, either now or in the future, will be maintained or enhanced;

(d) the application is in compliance with appropriate enactments and/or regulations;

(e) the structural integrity of the assets will be maintained in such a manner as to not impair utility service; and

(f) the public interest will be preserved.

4.3.2 Views of the Parties

On October 3, 2005, the Commission issued a letter to Registered Intervenors in this Proceeding inviting submissions with respect to the issues to be considered and determined under Section 54 of the UCA and, specifically, requesting comments on the criteria outlined above (Exhibit A-6).

Terasen (Exhibit C2-2) submits that these criteria are generally consistent with those applied by the Commission in reviews of other applications under Section 54 of the UCA including Terasen's acquisition of Centra Gas (2002), Duke Energy's acquisition of Westcoast Energy and (indirectly) Pacific Northern Gas (2001), Pacific Northern Gas' acquisition of Northland Utilities (1993), Utilicorp's acquisition of West Kootenay Power (1987), and Fort Nelson Gas' acquisition of the Fort Nelson gas distribution utility (1985).

Where they explicitly comment on theses issues, other Intervenors agree that the criteria outlined above are generally applicable to approval of an application under Section 54 (e.g., LMLGUA/CEC, Exhibit C18-5; Inland Industrials, Exhibit C9-2; BCOAPO, Exhibit C1-3; COPE Local 378, Exhibit C5-3). Intervenors such as the LMLGUA/CEC (Exhibit C18-5), the District of Chetwynd (Exhibit C21-2), the Council of Canadians, Powell River Chapter (Exhibit C11-9), the Canadian Office and Professional Employees Union – Local 378 ("COPE"), (Exhibit C5-3) and the Council of Canadians, Vancouver Chapter (Exhibit C18-8) encourage the Commission to

give the broadest interpretation of its powers and to the public interest criterion (i.e., criterion (f)). Some of the general public interest issues these Intervenors raise include possible impacts on rates, jobs in B.C., and taxes payable in B.C. and Canada.

Some Intervenors submit that the motives of KMI and the premium it has offered for Terasen should specifically be within the scope of the public interest consideration (e.g., Sykes, Exhibit C20-7; Craig, Exhibit C32-2; Council of Canadians, Vancouver Chapter, Exhibit C18-8). Many Intervenors also raise questions about the corporate structure of KMI and possible implications for the Terasen Utilities. For example, the LMLGUA/CEC (Exhibit C18-5, p. 2) question the fairness and risks associated with KMI's corporate structure, arguing that "Kinder Morgan is heavily subsidized by the U.S. government and this allows the company to minimize taxation of net income to enhance their balance sheet and raise capital for acquisitions."

The Council of Canadians, Vancouver Chapter (Exhibit C18-8) raise concerns that the privacy of British Columbians may be violated under the provisions of the U.S. *Patriot Act* if billing and record keeping functions are relocated to offices within the U.S.

In his submission, Mr. Sykes (Exhibit C20-7, p. 3) proposes some specific criteria the Commission Panel should add to the list proposed by KMI. These include the following.

(a) Impacts on current and future productivity and employment relating to Terasen utilities;

(b) Amount of money paid annually to persons outside British Columbia, and in particular persons in the United States;

(c) Current and future amount of gas and other resources transported by Terasen utilities to the United States;

(d) Prices of natural gas to users in British Columbia; and

(e) Compliance of the U.S. Government with Canadian laws, including Canada-US agreements and decisions of competent authorities.

As noted previously, many letters of comment oppose the Application solely on the basis of the nationality of the Applicant. However, some letters also express more specific concerns about the possible impacts of foreign ownership on rates, service, employment, energy security, and environmental performance.

The BC Business Council submits that the nationality of the Applicant is not a relevant issue in this Proceeding, and goes further to highlight the benefits of foreign direct investment in the development of the Canadian and B.C. economies and the fact that Canadian companies are increasingly involved in the acquisition of foreign companies, including those in the energy and water sectors (Exhibit C10-2).

A number of submissions suggest that the Applicant must go beyond simply ensuring the Transaction has no detrimental impact on the public interest compared to the status quo, but rather must actually demonstrate positive benefits to the public interest (e.g., District of Chetwynd, Exhibit C21-2; Craig, Exhibit C32-2).

4.3.3 Commission Panel Determination

The Commission Panel accepts the criteria proposed by KMI and outlined in earlier decisions as appropriate for reviewing this Application. The Commission Panel finds that many of the concerns raised by Intervenors and in letters of comment are already contemplated by and subsumed within the criteria summarized by KMI (e.g., concerns related to compliance with environmental and safety regulations, privacy considerations, and continuity of existing service contracts). The Commission Panel finds, for example, that the additional criteria proposed by Mr. Sykes are either redundant with the criteria proposed by KMI and used in other Decisions by the Commission (e.g., compliance with relevant laws), are irrelevant in the context of the Terasen Utilities (e.g., the Terasen Utilities do not purchase or transport gas for export and the Transaction will not alter the structure or dynamics of natural gas markets or pricing in B.C.), or are outside the relevant scope for the Commission's review under Section 54.

With respect to the preservation of the public interest, the Commission Panel agrees with KMI that "…the Commission's consideration of the public interest is not a broad, open-ended examination of any issue that is raised by an Intervenor or in a letter of comment" (Exhibit B-34, p. 19). It is up to the Commission to carefully consider the context of the specific Application to determine the appropriate criteria that it considers relevant in the circumstances. In this particular case, the Commission Panel finds that criteria (a) through (e) above adequately capture the key issues it must consider in this Application. Criterion (f) provides an opportunity to weigh any impacts identified in criteria (a) through (e) in order to make an overall determination of whether the Application preserves the public interest.

In determining the issues to be considered in this Proceeding, the Commission Panel has applied the following principles.

First, the public interest must be considered with respect to the Utilities over which the Commission has

jurisdiction. As noted by BCOAPO (Exhibit C3-1), the jurisdiction of the Commission in this matter does not extend to KMI's acquisition of Terasen but only to the indirect acquisition of the Terasen Utilities. Many submissions raise concerns related to the impact of the Transaction on exports of natural gas and on the availability and prices of natural gas in B.C. However, the Terasen Utilities do not "own" natural gas and are not involved in its export.

Second, the public interest must be viewed in the context of the scope of the approval that is being requested. For example, the Application does not request any change in the rates charged by the Terasen Utilities and does not propose any change in the jurisdiction of the Commission to regulate rates and services in the public interest.

Third, the Commission Panel concludes that the public interest criterion used in this Proceeding should not extend beyond issues normally considered by this Commission for the general regulation of public utilities in the public interest. For example, beyond ensuring compliance with existing tax laws and other relevant regulations, the Commission does not normally consider the fairness of taxes or other transfers to government in setting utility rates or issuing certificates of public convenience and necessity.

Finally, the Commission Panel concludes that it is appropriate to exclude issues that are more appropriately dealt with by, or that are more properly within the jurisdiction of, other agencies or levels of government. For example, the Transaction will require approval by the federal government under the *Competition Act* and the *Investment Canada Act*. The *Investment Canada Act* requires the federal government to examine all foreign acquisitions of Canadian companies with assets greater than $250 million in cases involving World Trade Organization member countries, to ensure the acquisition will benefit Canada.

With respect to some of the specific issues raised by various Intervenors and letters of comment with respect to the public interest, the Commission finds as follows.

> **Foreign Ownership:** The Commission has ruled in prior Decisions that what is relevant under Section 54 of the *Utilities Commission Act* is the potential detrimental impact, if any, of an acquisition upon the utility and its customers, the services provided by the utility, and the regulation of the utility by the Commission under the Act (e.g., Utilicorp Decision, 1987). The Commission has also previously expressed the view that the foreign origin of a proposed purchaser of a reviewable interest in a domestic public utility is properly the concern of the federal government (Utilicorp Decision, p. 10). The Commission has, therefore, focused its consideration of the foreign ownership question on an evaluation of the potential detrimental effects arising from the Transaction and this Commission Panel concludes that foreign ownership, in and of itself, is not an issue. It is only relevant where as a result of the Transaction

and the new ownership, there could be an adverse functional or operational impact on the Terasen Utilities in the context of the criteria outlined above.

The Commission Panel also notes that the Transaction will require approval by the federal government under the *Competition Act* and the *Investment Canada Act*. The *Investment Canada Act* explicitly requires the federal government to consider benefits to Canada but this is not an assessment that is properly within the purview of the Commission under the UCA and it is not a proper role for the Commission to determine or comment upon federal policy with respect to such issues.

Trade Disputes: Many public comments suggest linkages between this Transaction and trade disputes between Canada and the United States on issues such as softwood lumber. It is not the role of the Commission to use its regulatory power in retaliation for trade disputes between the federal governments of Canada and the U.S., which revolve around broad issues related to market access and tariffs. Nor would it be appropriate for the Commission to consider trade disputes that are unrelated to the Transaction in its consideration of KMI's Application. The Panel also notes that the Terasen Utilities are not involved in the export to the United States of natural gas, which is regulated by the National Energy Board and that KMI has stated that it has no intention of diverting the Terasen Utilities' gas supply to the United States (Exhibit B-19, Response to Varley IR No. 1, pp. 1-2). Further, the Commission Panel agrees with KMI that "…the provisions of the North American Free Trade Agreement ("NAFTA") and the proportional sharing rules do not apply to this Transaction, and that matters involving NAFTA are not within the scope of this proceeding or the jurisdiction of the Commission" (Exhibit B-33, p. 5).

Impacts on Employment: The Application does not propose any significant changes in employment within the Terasen Utilities and gives several assurances with respect to the retention of senior management and staff within the Terasen Utilities. These assurances notwithstanding, the Commission Panel does not generally consider impacts on employment to be within the scope of this Proceeding. Beyond complying with labour laws and general principles of fairness to employees, the Commission does not generally consider job creation as an end in and of itself, nor is it a matter that is within the purview of the Commission in its regulation of public utilities. In any event, the Commission notes KMI's statements that there will be some limited employee reductions related to overlapping corporate administrative functions in the Vancouver corporate office and KMI's assurance that employees will be fairly treated in accordance with all applicable company policies, procedures, regulations and agreements (Exhibit B-15, Response to Wessler IR No. 1, p. 4). Further, should any staff reductions have the potential to impact upon customer service, the Commission Panel notes that the Commission has broad powers to establish, monitor and enforce levels of service provided by public utilities within its

jurisdiction.

Impacts on Taxes Payable in B.C. and Canada: Beyond ensuring compliance with existing tax laws and other relevant regulations, the Commission does not normally consider the fairness of taxes or other transfers to government in setting utility rates or issuing certificates of public convenience and necessity. KMI states that the acquisition of Terasen by KMI will not shift the tax base of the Terasen Utilities which are B.C. taxpayers to the U.S., nor will it affect the taxable status of the Terasen Utilities in B.C. or their obligation to pay B.C. taxes (Exhibit B-14, Response to Helten IR No. 1, p. 2).

With respect to arguments by some Intervenors that the Applicant must demonstrate positive benefits for the public interest, the Commission Panel notes that the UCA explicitly states the Commission must not give its approval under Section 54(9) unless it considers that the public utility and users of the services of the public utility "will not be detrimentally affected." The Commission Panel does not agree that Section 54 contemplates a more stringent test that requires further benefits to the users of the utility or general public as conditions for approval of an acquisition under Section 54.

4.4 Review Process and Sufficiency of Evidence

In their written submissions, several Intervenors argue that there is insufficient evidence for the Commission to reach a determination regarding whether the Application is in the public interest or whether any conditions that may be attached to approval of the Transaction are adequate to mitigate or eliminate potential impacts on the public interest (e.g., Sykes, Exhibit C20-7; LMLGUA/CEC, Exhibit C18-5; BCOAPO, Exhibit C1-3; Democratic Reform Party of BC, Exhibit C12-12; Wessler, Exhibit C27-4; Dimitrov, Exhibit C30-2). Many of these submissions urge the Commission to hold oral hearings into the matter.

Mr. Dimitrov (Exhibit C30-2) submits that the Commission Panel's decision not to hold a public hearing constitutes a reasonable apprehension of institutional bias and he requests that the Commission Panel recuse itself and remit the matter back to the appropriate Minister. Mr. Dimitrov further maintains that the failure or refusal of the Commission Panel to remit this matter to a full public hearing constitutes a breach of the common law doctrine of fairness, according to factors set out in the Supreme Court of Canada decision in *Baker v. Canada* (MCI), (July 9, 1999), S.C.J. 817, File No. 25823. Mr. Dimitrov also suggests, without referencing any factual or legal support, that a written hearing does not constitute meaningful consultation with First Nations according to law.

While many arguments about the review process and sufficiency of evidence were general in nature, the BCOAPO (Exhibit C1-3) cites specific concerns regarding deficiencies in the Application and KMI's responses to Information Requests with respect to the impact of the Transaction on the credit rating of the Terasen Utilities, and whether the Terasen Utilities will continue to be operated by existing management and essentially in the manner they have been operated.

KMI submits there is clear and compelling evidence of a high degree of public consultation in the review process including the following (Exhibit B-34, p. 3).

- Extensive communication with customers and stakeholders, including phone calls, meetings, mailings and advertising (as summarized in Exhibit B-6).
- Open houses throughout British Columbia attended by senior executives of Terasen and KMI.
- Thousands of letters of public comment received by the Commission.
- More than 30 Registered Intervenors who have submitted and received responses to Information Requests, and have had an opportunity to provide written comments.

KMI argues that an oral public hearing would not reveal any further issues that have not already been canvassed or expressed through extensive public response.

During the Pre-hearing Conference a number of Registered Intervenors took a position with respect to an oral hearing. After reviewing the comments of participants in the Pre-hearing Conference and after considering the specific issues that may be relevant to this Application, the Commission Panel established a written hearing process, which included two rounds of Information Requests (Exhibit A-4). However, the Commission Panel also established a date for a possible oral phase of submissions if the Commission Panel had questions arising from written submissions. Having reviewed all written submissions, the Commission Panel determined that an oral phase would not be required (Exhibit A-7).

Section 40(1) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which applies to the Commission, provides as follows:

> (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

With respect to the sufficiency of evidence in this Proceeding, the Commission Panel agrees with Mr. Sykes that

the onus is on KMI, the Applicant, to prove its case with sufficient evidence (Exhibit C-20, p. 3). However, the Commission Panel is satisfied with the adequacy of evidence before it. In arriving at this determination, the Commission Panel considered the adequacy of evidence as it relates to issues it has determined are relevant to the Application under Section 54 of the UCA. Both Registered Intervenors and the general public raised many concerns about the adequacy of evidence that relate to issues the Commission Panel considers beyond the appropriate scope of this Proceeding, as outlined in the preceding section. Again, having considered the issues raised and the nature of the concerns expressed by Intervenors and the public in the letters of comment, the Commission Panel does not consider that a further oral submission phase or oral public process would have identified new issues or would have provided material assistance to the Commission Panel to consider and make a decision related to KMI's Application.

The Commission Panel also notes that while the various assurances made by KMI are helpful, it has not relied solely on these assurances to establish whether the Transaction will or will not preserve the public interest. In many cases, the Commission Panel considers that it is sufficient to establish that the Transaction does not alter or hinder the current authority and sanction powers of the Commission over the Terasen Utilities. This limits somewhat the scope of evidence that the Commission Panel must rely on in making its determination regarding the possible impacts of the Transaction on the public interest.

5.0 REVIEW OF RELEVANT ISSUES

5.1 Introduction

In Section 4.3.3 of this Decision, the Commission Panel discussed the criteria relevant for determining whether the Transaction should be approved under Section 54 of the UCA. In this section, the Commission Panel reviews the evidence and makes specific determinations regarding the potential impacts of the Transaction in relation to those criteria.

5.2 KMI's Financing Ability

5.2.1 Views of the Parties

In its Application filed on August 17, 2005, KMI stated that the Transaction would not affect the financing ability of the Terasen Utilities. In its Information Request, Commission Staff requested more direct evidence that the Transaction would not impair the credit rating and financial capability of TGI and the other Terasen Utilities (Exhibit A-2). In response, KMI filed a copy of a press release from the Dominion Bond Rating Service ("DBRS") dated August 2, 2005 and also filed copies of investment analyst reports on KMI and Terasen issued after the announcement of the Transaction. The DBRS press release stated, in part, that "…[i]n view of the stand-alone nature of these operations, DBRS believes that the business and financial risk profile of the above-noted issuer would not be changed by completion of the proposed transaction between KMI and Terasen. Consequently, DBRS is confirming its ratings as noted above" (Exhibit B-4, Schedule 2).

In their first Information Requests, LMLGUA/CEC (Exhibit C18-2) and the Council of Canadians, Powell River Chapter (Exhibit C11-2) asked KMI if it was aware of credit watch alerts issued by other credit rating agencies such as Moody's Investors' Services ("Moody's") and Standard & Poor ("S&P"). In its responses, KMI acknowledged that Moody's and S&P issued credit watch alerts following announcement of the Transaction. However, KMI maintained that it "…did not believe the referenced credit agency reviews would result in any detrimental affect on the financing capabilities of the Terasen Utilities, and believed that it was premature to address or speculate on credit agency reviews while discussions were taking place" (Exhibit B-16, Response to LMLGUA and CEC IR No. 1, p. 2).

In response to the concerns raised by Intervenors and others, and based on credit agency discussions, KMI subsequently proposed "ring-fencing" conditions that could be attached to a Commission order approving the Transaction. In its final submission KMI acknowledges that "a downgrade in TGI's credit rating *resulting from*

the Transaction [emphasis in original] could increase the costs of borrowing and such costs are integrally linked to utility rates as part of the overall cost of service" (Exhibit B-34, p. 4). KMI submits that the ring-fencing conditions should mitigate any risks that the financing capabilities of the Terasen Utilities would not be reduced or impaired as a result of the Transaction. Further, KMI suggests these conditions create a benefit for the customers of the Terasen Utilities that currently does not exist.

The specific ring-fencing conditions (included in Exhibit B-12, Response to Council of Canadians, Powell River Chapter IR No. 1, among others) proposed by KMI are as follows.

(1) Each Terasen Utility shall maintain, on a basis consistent with BCUC orders and accounting practices, a percentage of common equity to total capital that is at least as much as that determined by the Commission from time to time for ratemaking purposes.

(2) No Terasen Utility will pay a common dividend without prior Commission approval if the result would reasonably be expected to violate the restriction in 1) above.

(3) No Terasen Utility will lend to, guarantee or financially support any affiliates of the Terasen Utilities, other than between TGI and TGS, or as otherwise accepted by the Commission. TGI and TGS shall together maintain separate banking and cash management arrangements from other affiliates. TGVI shall establish separate banking and cash management arrangements from other affiliates once it has completed its proposed refinancing.

(4) No Terasen Utility will enter into transactions with affiliates on terms less favourable to the Terasen Utility than those available from third parties on an arms-length basis, unless otherwise accepted by the Commission.

(5) No Terasen Utility will engage in, provide financial support to or guarantee non-regulated businesses, unless otherwise accepted by the Commission.

In response to an Information Request from the Ministry of Energy, Mines and Petroleum Resources ("MEMPR") (Exhibit B-28, Response to MEMPR IR No. 2, p. 7), KMI explained that:

- Condition 1 and 2 would help to ensure the Terasen Utilities maintain a level of common equity approved by the Commission.

- Condition 3 would restrict exposure of the Terasen Utilities to the risks of other affiliates. The restriction on banking arrangements would further ensure that in the event of bankruptcy of the parent company or an affiliate, the bank assets of the Terasen Utilities will not be subject to seizure by creditors.

- Condition 4 would reinforce the protections provided by Condition 3 by restricting non-arms-length transactions with affiliates.

- Condition 5 is similar to Condition 3 but would further restrict involvement of the Terasen Utilities in non-regulated activities.

In its final submission, Terasen (Exhibit C2-2) includes a press release from Moody's Investors' Service, which states that "Moody's believes that the provisions proposed by KMI…would serve to substantially insulate TGI…". Although Moody's continues to review Terasen's credit ratings, KMI submits that this is not relevant to this Proceeding since Terasen is not a regulated public utility. Further, KMI notes that Moody's continues to review TGI but states that this review predates the Transaction and is related to TGI's stand-alone credit profile relative to its gas distribution peers (Exhibit B-34, p. 6). KMI also notes that the Commission will have continuing oversight of debt costs through its existing and regular review of utility rates.

The BC Business Council (Exhibit C10-2) supports the ring-fencing conditions as suggested by KMI. The Inland Industrials support the concept of establishing ring-fencing conditions, but also submit that the success of this approach depends on several factors (Exhibit C9-2). First, the Inland Industrials argue that it is not possible to write an exhaustive set of conditions that anticipate all future situations in which the Terasen Utilities may experience adverse effects arising from the activities of the broader KMI/Terasen corporate family of companies. They argue that the Commission must have an ongoing mandate to impose regulatory conditions on TGI that will preserve its credit rating and financial integrity on a stand-alone basis. Second, they argue that TGI must file sufficient and timely financial information to ensure no detrimental impacts, and that the Commission identify issues and bring them forward for public review as necessary. Finally, they argue that the Commission must maintain expertise to review the financial information and accounting practices of TGI.

COPE 378 (Exhibit C5-3), the LMLGUA/CEC (Exhibit C18-5), and the BCOAPO (Exhibit C1-3) express additional concerns related to the ring-fencing conditions proposed by KMI. BCOAPO argues that the Commission should not consider approving the Transaction until it determines what, if any, impact on ratepayers will result from the final determination of Moody's or any other credit rating agencies.

The Council of Canadians, Powell River Chapter argues that there is considerable uncertainty over the extent to which the ring-fencing conditions will be sufficient to protect ratepayers and urges the Commission to place a condition on the sale that "should credit ratings be negatively affected by the sale, utility ratepayers would be held harmless and shareholders would bear any increased cost of borrowing" (Exhibit C11-9, p. 4). The LMLGUA/CEC (Exhibit C18-5) "are not satisfied that the very general and non-specific proposals of the Applicant to "ring fence"' the Utilities will mitigate this [credit] risk" (p. 7).

The LMLGUA/CEC, as well as the Council of Canadians, Powell River Chapter, both refer to the evidence of Dr. Laurence Booth that was prepared on behalf of the Joint Industry Electricity Steering Committee ("JIESC"),

the LMLGUA/CEC and others on October 12, 2005 and that was filed in the Terasen Return on Equity ("ROE") proceeding currently before the Commission (Exhibit C2-6 in that proceeding), and included in its entirety as an attachment to Exhibit C11-9 in this Proceeding. In his evidence in the Terasen ROE proceeding, Dr. Booth provided background on the S&P's approach to Canadian utility holding companies, and the reasons S&P's approach may vary from Canadian rating agencies such as DBRS. Dr. Booth cited examples from the 1990s of several US telecoms whose credit-worthiness was downgraded when they were acquired by more risky holding companies and the holding company had control of the subsidiary and could over-leverage it or dividend cash out to support parent company debt. Dr. Booth maintained that as a result of these cases S&P now has a policy that the credit rating of a regulated telecom cannot be higher than the credit rating of its parent. However, Dr. Booth noted that while the S&P rarely assigns a different default risk to an unregulated subsidiary, it will consider exceptions in the case of a regulated subsidiary where the regulators are involved in insulating a subsidiary from its parent. Specific "structural insulation techniques"' may include separate incorporation of the subsidiary, independent directors, minority ownership stakes and ongoing regulatory oversight of the subsidiary. With respect to the last condition, Dr. Booth indicated that the S&P requires a high standard of evidence that appropriate regulatory intervention will be forthcoming to protect bond holders and therefore support a higher credit rating. Dr. Booth suggested that FERC's rules and subsequent investigations regarding inter-affiliate transfers within Enron were insufficient to meet the S&P's standard of evidence.

In the context of the KMI acquisition of Terasen, Dr. Booth cited concerns about the premium paid for Terasen and the manner in which the deal is being financed. Dr. Booth suggested that the premium indicates either that TGI's financial parameters are too generous, or that KMI has "found a new way to wring cash out of TGI" (as quoted in Exhibit C18-5, p. 10). Dr. Booth referred to a CIBC World Markets ("CIBC") report dated August 19, 2005 (filed as part of Commission Information Request No. 1) that claims KMI plans a "double dip" financing structure (i.e., making interest deductions in Canada and the U.S.) resulting in lower income taxes payable by Terasen. Dr. Booth indicated that CIBC assumes that savings in income taxes will be allocated to the benefit of shareholders rather than ratepayers, and that interest charges can be allocated without any reduction in the equity component of revenue requirements. Dr. Booth suggested that the report is troubling because it conflicts with standard regulatory practice. Specifically, he argues that if the $2 billion in acquisition financing can be pushed down to the operating companies, then the revenue requirements of those companies should also be altered, in recognition of the fact they can carry more debt. Further, Dr. Booth suggested that the additional $2 billion of debt at the parent level raises concerns about the management of cash flow in the Terasen Utilities and specifically the possibility that the Terasen Utilities may be required to increase dividend payments to support KMI's higher debt loads. Dr. Booth notes these concerns have been raised by other investment analysts such as BMO-Nesbitt Burns.

Given the highly leveraged nature of the KMI Transaction, Dr. Booth suggested:

- TGI's financial parameters (ROE and common equity ratio) remain as is since there is no demonstrated need to increase these given the premium paid for Terasen.
- There is no need to increase TGI's financial parameters to help pay for the KMI acquisition.
- That TGI be ring fenced to prevent it being "raided" to support the parent's debt load and that interest costs of TGI are fair and reasonable.
- The ring-fencing should include restrictions on dividend payments to a maximum of 70 percent of TGI's earnings; prohibition on inter-corporate loans and tax sharing agreements; restrictions on the management of TGI's cash, such that TGI maintains separate cash management services with a separate treasurer and CEO signing off on TGI financial statements.

These suggestions notwithstanding, the LMLGUA/CEC continue to express concerns about the ability of these and other ring-fencing conditions to protect ratepayers. They also express concerns that the Transaction is being financed through U.S. tax subsidies and that this represents an unfair competitive advantage compared to other companies who pay corporate tax.

KMI challenges the use of Dr. Booth's evidence in these Proceedings but also responds to his concerns in its final submission (Exhibit B-34). Specifically, KMI challenges Dr. Booth's view that the only reason it would pay a premium for Terasen (and similarly have the ability to finance the acquisition) is because KMI intends to "strip" or "wring" cash out of TGI. In its responses to Commission Information Requests (Exhibit B-4), KMI argued that the enterprise consists not just of the Terasen Utilities but also includes Terasen's strong oil pipelines and other businesses. KMI also provided information on its ability to finance the cash portion of the consideration to be paid to Terasen's shareholders with approximately $2.1 billion in debt (Exhibit B-5). KMI indicated that the Transaction will increase the parent's current debt to total capital ratio from 38 percent to 56 percent, and that the additional debt will be financed by available cash from Terasen, including the Terasen Utilities (Exhibit B-4, Schedule 2). KMI maintains that this is a legitimate and discretionary use of available cash, which will in turn be restricted by the proposed ring-fencing conditions. KMI also points out that in addition to the ring-fencing conditions, the Commission has supplemental and existing cash management constraints on the Terasen Utilities resulting from its existing regulatory authority.

KMI also takes exception with the assertion by the LMLGUA/CEC that the Transaction is being heavily subsidized through KMI's U.S. limited partnership tax status and that this represents an unfair competitive advantage to KMI. In particular, KMI asserts that Intervenors have confused KMI, the Applicant, with KMP, a master limited partnership indirectly owned by KMI.

KMI submits that the proposed ring-fencing conditions, combined with the Commission's existing and continuing regulatory authority over Terasen Utilities' operations and activities, is sufficient to protect ratepayers and that these conditions provide a new and additional long-term benefit to utility customers that currently does not exist. Specifically, there are no formal ring-fencing conditions between Terasen and the Terasen Utilities.

In response to arguments made by the Inland Industrials, KMI also submits that the Commission need not set out an "open-ended" condition for events that may or may not transpire after the completion of this Transaction, but may use its ongoing regulatory authority to ensure the interests of customers are addressed with respect to future issues and events. KMI also maintains that existing financial disclosure requirements are sufficient to address financial issues after the Transaction is completed, including verification of compliance with ring-fencing conditions. KMI also confirms that "…there are no covenants, agreements or legislative restrictions on the Kinder Morgan Companies that would reduce or impair the ability of the Terasen Utilities to access capital markets…" and that "…none of the Terasen Utilities will be obligated now, or in the future, to guarantee the debt obligations of KMI, Subco or any KMI affiliates (Exhibit B-34, p. 10). KMI further notes that "with respect to the intended financial arrangements to be put in place by KMI to complete the acquisition of Terasen, there will not be any covenants requiring guarantees from the Terasen Utilities…" and "…any such guarantee would require advance approval of the Commission under Section 50(5) of the Utilities Commission Act" (Exhibit B-34, p. 10). In addition, ring-fencing Condition 3 would also prevent such inter-corporate guarantees.

5.2.2 Commission Panel Determination

The Commission Panel agrees that its jurisdiction extends only to the Terasen Utilities, and not to the parent companies Terasen, Subco or KMI. What is relevant to this Proceeding is the impact of the Transaction on the financing capability of the Terasen Utilities.

The Commission Panel shares the concern of BCOAPO (Exhibit C1-3) and was displeased that, in response to the initial Commission Information Request, KMI was not totally forthcoming about concerns raised by bond rating service agencies with respect to the Transaction.

Having considered the subsequent submissions, the Commission Panel agrees with KMI and Intervenors that ring-fencing conditions would be beneficial in mitigating possible risks arising from the financial status of the parent companies and non-regulated affiliates following the Transaction. After reviewing the submissions of Intervenors, however, the Commission Panel has revised the ring-fencing conditions proposed by KMI. Specifically, the Commission Panel has added one additional condition that no Terasen

Utility will enter into a tax sharing agreement with any affiliate of the Terasen Utility, unless the agreement has been approved by the Commission. In addition, the Commission Panel has modified the fourth condition proposed by KMI to include reference to Commission guidelines, policies, and directives regarding affiliate transactions. The full set of revised conditions are contained in Section 7.0 of this Decision.

The ring-fencing conditions will apply in perpetuity and may be revisited and revised or supplemented by the Commission as required to protect the public interest. Each Terasen Utility will accept and comply with all directions or conditions issued by the Commission from time to time, in particular those directions or conditions that the Commission may issue in the future so as to ensure that the Terasen Utility and the users of the services of the Terasen Utility will not be detrimentally affected by the acquisition of the shares of Terasen Inc. by KMI.

While the Commission Panel is somewhat reassured by the statements made by Moody's, it notes that the press release contains somewhat tentative language. Specifically, the press release states that "Moody's <u>believes</u> that the provisions proposed by KMI…would serve to <u>substantially</u> insulate TGI…" [emphasis added] (Exhibit B-4, Schedule 2). However, the Commission Panel notes that given the modified ring-fencing conditions suggested above and the Commission's ongoing jurisdiction over the recovery of costs, it need not wait for and rely on a determination by credit agencies to approve the Transaction. The Commission Panel notes that in the event of a credit downgrade arising specifically from this Transaction, the Commission can deny recovery of higher debt service costs from ratepayers.

The Commission Panel also notes that in response to the Information Requests from the LMLGUA/CEC, KMI has provided an assurance "… that it does not intend to apply to recover from Terasen Gas utilities (sic) ratepayers any premium that it may be paying for the acquisition of the shares of Terasen Inc." (Exhibit B-16, p. 14). This assurance notwithstanding, the Commission Panel notes that in the event future costs can be directly linked to the Transaction, the Commission may deny recovery of these costs in rates based on assurances and determinations made in this Application.

The Commission Panel concludes that it does not need to establish fixed targets for ROE or common equity ratios at this time, since these matters are already subject to regular review by the Commission.

In addition to the ring-fencing conditions above, the Commission Panel also has determined that a further condition should be attached to approval of the Transaction. The Commission Panel finds that the Terasen Utilities should be required to maintain existing governance policies and that any changes in these policies should be approved by the Commission. Specifically, in response to an Information Request from Mr. Black, KMI states that "Within the mandate of Terasen's Board of Directors is a requirement that a majority of the Directors comprising the Board must be independent Directors. A Director is independent if he or she has no material direct or indirect material relationship with Terasen" (Exhibit B-30, Response to Anderson IR No. 2, p. 2). The Commission Panel considers that the continued independence of a majority of Directors will provide a further assurance that the Terasen Utilities will comply with the ring-fencing conditions.

5.3 Impact on Existing Covenants

In its final submission, KMI maintains that since the ownership of the Terasen Utilities by Terasen will not be changed by the completion of the Transaction, the Transaction will not affect any existing covenants given by the Terasen Utilities, whether financial, commercial or otherwise (Exhibit B-34, p. 11). In its original Application, KMI also assured the Commission that it will ensure the Terasen Utilities are in a position to meet their capital investment obligations (Exhibit B-1, p. 20). In response to an Information Request from Mr. Downey, KMI noted that "…the Terasen Utilities land use arrangements, tenures, etc. and those of the Terasen companies involved in the transportation of petroleum products, do not change with the Transaction since those companies will continue to hold the land rights. KMI will become the shareholder of the parent of those companies, which will not affect any of the land rights" (Exhibit B-11, p. 2). In response to an Information Request from the City of Abbotsford, KMI also indicated that "…[e]xisting easements, right-of-way grants, facility locations, etc. will not change as a result of the Transaction" (Exhibit B-24, p. 1). No Intervenors raise any issues related to existing covenants in their final submissions.

The Commission Panel accepts KMI's assurances and concludes that the Transaction will not affect any existing covenants, whether financial, commercial or otherwise.

5.4 Conduct of Utility Business and Customer Service

5.4.1 Views of the Parties

The LMLGUA/CEC raise questions about any premium KMI may have offered for Terasen and how such a premium, if any, would be recovered by KMI (Exhibit C18-5). The LMLGUA/CEC are concerned that any premium must somehow be recovered from customers of the Terasen Utilities and they submit that reductions in costs and associated service levels are a likely source of such recovery. They suggest that "…[t]o gain a level of comfort that service levels will not be the primary vehicle to recoup high investment costs, service standards and proactive maintenance commitments should be more clearly benchmarked and auditable" (Exhibit C18-5, pp. 13-14). They also suggest that the Application "…raises significant concerns around gas purchasing and supply" (Exhibit C18-5, p. 15). They maintain that these risks arise from KMI's ownership of entities in storage, retail and transportation sectors. They note these risks are not clearly identifiable at this time and suggest additional conditions such as requiring procurement of gas supply remain in British Columbia and remain independent and discrete from other KMI gas purchasing activities.

COPE 378 (Exhibit C5-3) and the BCOAPO (Exhibit C1-3) both maintain that the Commission cannot conclude that the conduct of utility business and customer services will be maintained because of possible changes in senior management, loss of employees and lack of information regarding the Terasen reorganization.

The BCOAPO submits that in addition to the financial ring-fencing proposals put forward by KMI, the Commission should impose four additional conditions related to the future management of the Terasen Utilities and the make-up of the Board of Directors of the Terasen Utilities and Terasen as follows: 1) the Terasen Utilities will continue to be operated as presently constituted; 2) the management of the Terasen Utilities will be retained; 3) the Boards of the Terasen Utilities will be Canadian; and 4) the Board of the company finally constituted as the parent company of the Terasen Utilities, its senior management will be Canadian (Exhibit C1-3, p. 6). With respect to the last condition, BCOAPO acknowledges the Commission does not have jurisdiction over the parent company of the Terasen Utilities but it sees no reason why this could still not be made a condition or why KMI would not agree to such a condition.

The Council of Canadians, Vancouver Chapter (Exhibit C11-8) raises concerns about corporate practices with respect to the location of customer records and possible impacts on the privacy of customer information if those records were to be kept in the United States.

Hul'qumi'num Treaty Group expressed concerns that KMI and Subco do not have a policy or mandate to develop

relationships or reconcile interests with Aboriginal communities, as highlighted in recent court decisions (Exhibit D-22). As a result, Hul'qumi'num Treaty Group urges the Commission to either deny the Application, or attach a condition for a clear written policy and mandate, as well as a commitment to retain the Aboriginal Liaison department.

Mr. Anderson raises concerns about the priorities in capital allocation decisions by Terasen and its new parent. Specifically, he argues:

> "…the priority of KMI in the takeover of Terasen is to expand the pipeline services portion of the business. Their infusion of cash into Canadian operations will be focussed in this area since it will give the greatest return on investment. Expansion of the utility portion of the Terasen business would in fact be in direct conflict with this prime objective of facilitating exports of fossil fuels through the non-regulated Terasen infrastructure. Thus any project that would expand the utility services would be at a considerable disadvantage for being approved by KMI over other possible projects" (Exhibit C15-7, p. 1).

Mr. Sykes suggests that the BCUC specify the Code of Conduct, Transfer Pricing Policies, Retail Markets Downstream of the Meter (RMDM) Guidelines and other rules that apply to ensure the criteria are met and that KMI will not allow any of the Terasen Utilities to restrict the supply of gas to the existing or future users of services of Terasen Utilities (Exhibit C20-7, p. 28).

KMI suggests that COPE 378 and BCOAPO have confused the potential for changes in executives of Terasen and the operational management of the Terasen Utilities (Exhibit B-34). KMI further expects the operational management of the Terasen Utilities to remain in place and commits that it will take reasonable steps to retain all key Terasen staff . However, citing the British Columbia Court of Appeal decision in *British Columbia Hydro & Power Authority v British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106 (B.C.C.A.), KMI submits that the imposition of conditions related to the future management of the Terasen Utilities and the Directors of the Terasen and the Terasen Utilities Boards is not within the jurisdiction of the Commission (Exhibit B-34, p. 12). In its responses to Information Requests and again in its final submission, KMI makes several assurances with respect to the management of the Terasen Utilities as follows:

- **Quality of Service:** "…the quality of service of the Terasen Utilities will not be detrimentally affected by KMI acquiring indirect ownership of the parent company" (Exhibit B-34, p. 11). "Following the Transaction, KMI will provide, and/or will cause its subsidiaries and affiliates, including Terasen, to continue to provide, services to the Terasen Utilities in accordance with the terms and conditions of each of the Service Agreements, for the duration of the term of those agreements" (pp. 12-13). "…[Customer Care] arrangements will not change as a result of the Transaction" (p. 13). "Under it's [sic] 2004-2007 rate settlement, TGI is to maintain and report on a series of Service Quality Indicators (SQIs) and Directional Indicators. KMI is open to exploring the introduction of SQIs for TGV [sic] similar to those

at TGI" (p. 15).

- **Staff:** "…KMI will take all reasonable steps to retain key Terasen staff and anticipates only some limited employee reductions related to overlapping corporate administrative functions primarily in the Vancouver corporate office of Terasen Inc." (p. 11).

- **Senior Management:** "…[w]ith respect to the Terasen Utilities, KMI intends to retain key senior management" (p. 11).

- **Headquarters:** "The location of the headquarters of the Terasen Utilities in Greater Vancouver will not change as a result of this Transaction" (p. 12).

- **Pipeline Integrity Programs: "**The Terasen Utilities will have existing pipeline integrity management programs in place which will continue to be managed and maintained by the management team for the Terasen Utilities into the future…Following the Transaction, changes to existing pipeline integrity management programs and policies would be made, as they would be made without this Transaction, only if justified from a safety, reliability, and efficiency standpoint, and only if in compliance with statutes and regulations and after appropriate consultation with the Commission" (p. 13).

- **Governance:** "Following the closing, the Boards of Subco, Terasen and the resulting entity from the amalgamation of Subco and Terasen are expected to have a majority of Canadian members" (Exhibit B-27, Response to Council of Canadians, Power River Chapter IR No. 2, p. 11).

In addition to these assurances, KMI stresses again that completion of the Transaction would not affect the Commission's ongoing regulation of the Terasen Utilities in the public interest.

5.4.2 Commission Panel Determination

The Commission Panel acknowledges and appreciates the assurances made by KMI with respect to business conduct and services. However, the Commission Panel also notes that, if approved, the Transaction would not alter the Commission's broad supervisory authority over the Terasen Utilities or its sanction powers if the Terasen Utilities fail to comply with the Commission's requirements. The Commission's powers with respect to the supervision of public utilities include authority over the extension of works, the filing of rate schedules, reporting requirements and other matters it considers advisable for the safety, convenience and service of the public. Further, under Section 26 of the UCA the Commission may, on its own motion or on complaint, hold a hearing to determine and set just and reasonable standards, classifications, rules, practices or services to be used by the public utility; determine and set standards for measuring the quantity or quality of service; and prescribe regulations for examining, testing or measuring service.

The Commission Panel also notes that, in other processes, the Commission has approved a Code of Conduct and Transfer Pricing Policy that governs the relationship between TGI and non-regulated businesses for the use and

pricing of Utility resources for unregulated activities (i.e., products or services for which there are no Commission approved tariffs). This includes shared services, employment or contracting of Utility personnel, and the treatment of customer, utility, or confidential information (Commission Order No. G-51-03, Appendix A, pp. 21-22). **The Commission Panel concludes that the Transaction in no way changes the obligations imposed on the Terasen Utilities under these guidelines.** The Commission Panel notes KMI's assurance that Terasen's Internal Audit department will review the Terasen Utilities' compliance with the Code of Conduct and Transfer Pricing Policy (Exhibit B-34, p. 16). However, the Commission Panel also notes that as part of TGI's 2004-2007 negotiated settlement, TGI is required to file an internal audit report in its Annual Review material (Commission Order No. G-51-03, Appendix A, pp. 21-22). Although not required, TGI has also decided to file an external audit report each year.

The Commission Panel does not agree with the additional conditions suggested by BCOAPO. The Commission Panel notes that any change in the organization of the existing Terasen Utilities (e.g., consolidation, amalgamation or disposition) would require Commission approval. The Commission Panel acknowledges the assurances made by KMI regarding staff, senior management and Directors of Terasen. However, the Commission Panel notes that the Commission does not currently impose conditions regarding the hiring or removal of senior staff in utilities and considers that it would be difficult to enforce such a condition in the context of this Transaction. Further, the Commission Panel has included conditions related to general governance practices in its discussion of ring-fencing. **Beyond requiring the maintenance of current governance policies, the Commission Panel does not consider it appropriate to place further specific constraints on the composition of Boards of Directors and notes that the Commission does not currently impose such constraints on other public utilities within its jurisdiction. Finally, the Commission Panel agrees it has no jurisdiction over the parent of the Terasen Utilities and therefore concludes it could not effectively impose conditions with respect to the management or Directors of the parent.**

With respect to the submission of Mr. Anderson raising concerns about the management priorities of Terasen following the Transaction, the Commission Panel assumes that Terasen currently has incentives to allocate capital to those areas of its businesses that have the greatest return on investment. These incentives are, in part, balanced by the obligation of its subsidiary Utilities to serve and the powers of the Commission to require adequate capitalization and service quality within the Terasen Utilities. The Commission Panel notes that the Transaction does not in any way reduce the Utilities' obligations or the Commission's regulatory powers in this regard.

With respect to the concerns of the Hul'qumi'num Treaty Group regarding the reconciliation of Aboriginal title and rights and treaty negotiations and related court decisions, the Commission Panel notes that regardless of

ownership, the location of the assets and operations of the Terasen Utilities in B.C. will not change as a result of the Transaction and that the Terasen Utilities would continue to be subject to any related commitments or obligations imposed by court decisions. The Commission Panel also notes that commitments made to Aboriginal communities are and will continue to be the responsibility of the management of the Terasen Utilities and the Commission Panel expects that the Terasen Utilities will continue to meet or exceed the standards for relationship building and maintenance which have been established with the Hul'qumi'num by Terasen Inc.

With respect to the privacy concerns raised by the Council of Canadians, Vancouver Chapter, and other concerns about gas procurement and other critical functions, the Commission Panel concludes that it would be appropriate to attach further conditions to the approval of the Transaction to protect customer interests. The Commission Panel notes that under Section 44(2) of the UCA, "…[a] public utility must not remove or permit to be removed from British Columbia an account or record [required by the commission]…except on conditions specified by the Commission. Section 54(9) of the UCA also permits the Commission to attach conditions and requirements to an approval under Section 54 that it considers necessary and desirable in the public interest. **In order to address concerns related to privacy and the general removal of critical functions from the Utilities' service areas, the Commission Panel concludes that it should establish a condition that requires KMI not to change the geographic location of any existing functions or data currently in the Terasen Utilities' service areas, without prior approval of the Commission.**

5.5 Compliance with Appropriate Enactments and Regulations

In its Application (Exhibit B-1), KMI states that the Transaction will not be completed unless and until it receives all required governmental and regulatory authorizations. As a result, at the time of its completion, the Transaction will be in compliance with all applicable Provincial and Federal legislation and regulations. In its final submission (Exhibit B-34, p. 14), KMI provides an update on the current status of regulatory approvals:

(a) *Competition Act*: On August 22, 2005, the Commissioner of Competition, acting through her designee, issued an advance ruling certificate in respect of the Transaction. KMI is thereby exempted from the obligation to file a notification. Thus, there are no approvals required under the *Competition Act*

(b) *Investment Canada Act*: KMI's application for review with the Investment Review Division of Industry Canada ("IRD") was filed on August 18, 2005. KMI is in discussions with IRD on possible undertakings in support of the Minister's review of KMI's application.

(c) *Water Utility Act*: KMI is required to apply for approval of the Transaction in relation to the Panorama Mountain Water Utility operated by TMUS. KMI submitted its application to the Comptroller on August 23, 2005, and on October 12, 2005, the Deputy Comptroller of Water Rights approved the application.

No Intervenors specifically challenge these statements, although the LMLGUA/CEC (Exhibit C18-5) note that KMI has been involved in a large number of regulatory and litigation matters which, in its view, raises concerns regarding the aggressiveness with which the Applicant deals with the appropriate enactments and regulations.

The Commission Panel concludes that the Transaction, even with Commission approval, will not be completed until KMI obtains all other necessary governmental and regulatory approvals.

5.6 Structural Integrity of Assets

5.6.1 Views of the Parties

With respect to impacts on the structural integrity of public utility assets, KMI (Exhibit B-34) submits that the Transaction will not alter the Commission's broad authority or sanction powers over the Terasen Utilities, which include general powers over reliability and safety. KMI points out that the Terasen Utilities are also subject to the continuing oversight of the BC Safety Authority, the BC Oil and Gas Commission, and the BC Workers Compensation Board. KMI notes that the BC Safety Authority and the Oil and Gas Commission have both indicated they see no detrimental impact from the Transaction and have no safety or environmental concerns arising from the Transaction (Exhibit B-12, Response to Council of Canadians, Powell River Chapter IR No. 1, p. 7; Exhibit E-32; Exhibit E-10). KMI also notes that the Terasen Utilities will also continue to be subject to all other local, provincial and federal environmental and safety regulations and standards. KMI submits that to the best of its knowledge, and the knowledge of TGI management, TGI has never been subject to an environmental legal proceeding that has resulted in a fine.

With respect to pipeline integrity, KMI refers to the existing pipeline integrity management programs at the Terasen Utilities that were approved by the Commission, as well as a rigorous distribution integrity management program. KMI assures the Commission it "…has no intention or plans whatsoever to make any changes in the Terasen Utilities that would adversely affect or be in any way detrimental to the ability of the Terasen Utilities to continue providing safe and reliable service to their customers in compliance with the applicable safety and environmental laws and regulations" (Exhibit B-34, p. 15). With respect to pipeline integrity, KMI specifically

warrants that "[t]he pipeline integrity management programs and the rigorous distribution integrity management program will continue to be managed and maintained by the management team for the Terasen Utilities into the future" (Exhibit B-34, p. 16).

KMI further assures the Commission that, in consultation with the management of the Terasen Utilities, it "…will examine opportunities for best practice enhancements to operations, relationships and practices of the Terasen Utilities after the Transaction" (Exhibit B-34, p. 16).

The BC Business Council (Exhibit C10-2) is satisfied with the reviews conducted by two safety regulators of the Terasen Utilities that there will be no deleterious safety consequences resulting from the acquisition.

Several Intervenors, including the LMLGUA/CEC, COPE 378, the Council of Canadian, Powell River Chapter, and Ms. Baldazzi express skepticism about KMI's ability and commitment to ensure the Terasen Utilities' high level of safety and service, citing various environmental and safety incidents, investigations and sanctions in other jurisdictions.

KMI suggests that the submissions of Intervenors related to KMI's environmental and safety record are misleading. Specifically, KMI states that the various media reports and extracts filed by Ms. Baldazzi and the extracted Form 10K filings (annual filings on a company's business and financial condition required by the U.S. Securities and Exchange Commission) referred to by the LMLGUA/CEC are actually in relation to its affiliate KMP and/or KMP subsidiaries, not KMI. KMI submits that "…the difference between KMI and KMP as it relates to the business of the Terasen Utilities *is* significant and should not be minimized or ignored by either the Intervenors or the Commission for the purposes of this Application" [emphasis in original] (Exhibit C-34, p. 17). KMI notes that it has owned and operated natural gas utility systems in the United States for approximately 70 years through its business unit "KM Retail." KMI submits that "…KM Retail has a strong record of safety and environmental compliance with respect to its natural gas utility assets and services. KM Retail has not committed any material breach of any environmental or safety rules, regulations or legislation in the past seven years or more, and no penalties or costs have been incurred or passed through to customers/ratepayers [sic]" (Exhibit B-34, p. 17). More details of their environmental and safety record are set out in KMI's response to Information Requests from the LMLGUA/CEC (Exhibit B-16, Response to LMLGUA and CEC IR No. 1, pp. 6-13). KMI argues that "…where there is interaction between KMI and the Terasen Utilities regarding the operation of best practices related to a natural gas utility business, the KMI personnel most involved in such interactions will be those individuals who operate KM Retails' natural gas utility business operations" (Exhibit B-34, p. 18).
KMI points out that KMP acquires, owns and operates mostly existing energy assets that were constructed many years ago by predecessor companies. KMI acknowledges the environmental and safety related incidents that have

occurred in relation to these assets and advises that "…KMP has put in place additional organizational processes to more effectively monitor and oversee environmental, health and safety matters and to ensure future compliance with all applicable laws and regulations" (Exhibit B-34, p. 18). Further, in response to an Information Request from the Council of Canadians, Powell River Chapter, KMI maintained that "…[n]o fines or penalties assessed against KMI have ever been passed on to customers in rate proceeding matters" (Exhibit B-12, Response to Council of Canadians, Powell River Chapter, IR No. 1, p. 8).

Finally, KMI notes that the Terasen Utilities will remain subject to environmental and safety laws in British Columbia and Canada and assures the Commission that it "…will seek to maintain and enhance the current level of safety and reliability for the Terasen Utilities customers through the capture of the expanded operational experience expected to be gained and shared as a result of the Terasen Utilities being part of a more diverse enterprise under the KMI corporate group umbrella" (Exhibit B-34, p. 18).

5.6.2 Commission Panel Determination

Given the existing systems and management record of the Terasen Utilities, the natural gas system operating experience of KM Retail, the continued oversight of environmental and safety issues by other agencies in B.C. and Canada, and the ongoing supervisory authority and sanction powers of the Commission, the Commission Panel determines that the Transactions will not have any foreseeable detrimental impact on the structural integrity of Terasen Utilities' assets.

The Commission Panel sees value in the best practices review referred to by KMI at page 16 of Exhibit B-34 and, in the event the Transaction receives all of the necessary approvals and is completed, directs KMI to perform and file the results of this review with the Commission no later than one year from the completion date of the Transaction.

6.0 SUMMARY OF ASSURANCES MADE BY THE APPLICANT

The Inland Industrials encourage the Commission to document specific assurances made by the Applicant in its Decision so they can serve as the standards by which future activities involving TGI and affiliated entities may be measured (Exhibit C9-2). The Commission Panel agrees this would be helpful. Some of these assurances have already been referred to above but are reproduced again here. Except for the ring-fencing conditions, the Commission Panel does not believe it need elevate other assurances to conditions for approval of the Transaction since in virtually all cases, the Commission has the power to consider these assurances in the context of its regular oversight and review of the Terasen Utilities.

Senior Management and Employees of Terasen Utilities:

"…KMI will take all reasonable steps to retain key Terasen staff and anticipates only some limited employee reductions to overlapping administrative functions in the Vancouver corporate office" (Exhibit B-33, p. 4).

"…KMI intends to retain key senior management and will continue to have local engineering, repair and operations employees" (Exhibit B-33, p. 4).

"While KMI does not know specifically who Subco's/Terasen's Chair, CEO, CFO and Vice President of Canadian Operations will be following the closing of the Transaction, it is expected that such persons will be Canadians and that the operational management of the Terasen Utilities will remain in place following the closing of the Transaction" (Exhibit B-27, Response to Council of Canadians, Powell River Chapter IR No. 2, p. 11).

Location of Headquarters for Terasen Utilities:

"The location of the headquarters of the Terasen Utilities will remain in Greater Vancouver" (Exhibit B-33, p. 4).

Customer Service:

"KMI has no intention or plans whatsoever to make any changes in the Terasen Utilities that would adversely affect or be in any way detrimental to the ability of the Terasen Utilities to continue providing safe and reliable service to their customers in compliance with all applicable safety and environmental laws and regulations" (Exhibit B-34, p. 15)

"Customer care service arrangements for Terasen Gas will not change as a result of the Transaction" (Exhibit B-33, p. 4).

"…KMI will provide, and/or will cause its subsidiaries and affiliates, including Terasen, to continue to provide, services to the Terasen Utilities in accordance with the terms and conditions of each of the Service Agreements, for the duration of the term of those agreements" (Exhibit B-34, pp. 12-13).

"Under it's [sic] 2004-2007 rate settlement, TGI is to maintain and report on a series of Service Quality Indicators (SQIs) and Directional Indicators. KMI is open to exploring the introduction of SQIs for TGV[I] similar to those at TGI" (Exhibit B-34, p. 15).

"Kinder Morgan will ensure that the needs and requirements of Terasen's gas utility customers will be met" (Exhibit B-15, Response to Wessler IR No. 1, p. 3).

"Customer service delivery enhancements will be analyzed using sound business case techniques to ensure cost savings or service improvements that customers are willing to pay for would result on a sustainable basis" (Exhibit B-34, p. 16).

Environmental and Safety Management Practices:

"…[t]he pipeline integrity management programs and the rigorous distribution integrity management program will continue to be managed and maintained by the management team for the Terasen Utilities into the future" (Exhibit B-34, p. 16).

"… changes to existing pipeline integrity management programs and policies would be made, as they would be made without this Transaction, only if justified from a safety, reliability, and efficiency standpoint, and only if in compliance with statutes and regulations and after appropriate consultation with the Commission" (Exhibit B-34, p. 13).

"The Kinder Morgan management and other personnel who would be involved with the Terasen Utilities will be those individuals who have responsibility for KM Retail's environmental health and safety program and gas utility business operations, and who have been responsible for KM Retail's excellent safety and environmental record over the years" (Exhibit B-16, Response to LMLGUA and CEC IR No. 1, p. 9).

"NO [sic] changes will be made in the current operations, practices, personnel, or other facets of the Terasen utilities that would adversely affect safety or environmental compliance" (Exhibit B-26, Response to LMLGUA and CEC IR No. 2, p. 3).

Organization Structure and Management Practices:

"KMI is not planning to implement any material organizational changes in the Terasen Utilities, and certainly none that would detrimentally affect the operations, relationships and practices that Terasen has established" (Exhibit B-9, Response to MEMPR IR No. 1, p. 16).

"…[KMI] will examine opportunities for best practice enhancements to operations, relationships and practices of the Terasen Utilities after the Transaction" (Exhibit B-34, p. 16).

Finances:

"KMI acknowledges that it does not intend to apply to recover from Terasen Gas utilities ratepayers any premium that it may be paying for the acquisition of the shares of Terasen Inc." (Exhibit B-16, p. 14).

"…KMI confirms that none of the Terasen Utilities will be obligated, now or in the future, to guarantee the debt obligations of KMI, Subco, or any KMI affiliates" (Exhibit B-34, p. 10).

"No Transaction related costs are or will be passed on to utility rate payers. Any time being spent by utility employees in support of the Transaction and/or application before the BCUC is being cross charged to Terasen Inc. in accordance with the Commission approved transfer pricing policy thereby conferring a benefit on ratepayers" (Exhibit B-26, Response to LMLGUA and CEC IR No. 2, p. 4).

"Transaction related costs will be borne by the parties to the Transaction, i.e. Terasen Inc. and KMI" (Exhibit B-28, Response to MEMPR IR No. 2, p. 6).

"The cash that each of KMI and KMP is committed to returning to its shareholders and unit holders respectively is the excess cash that remains after all expenses and sustaining capital expenditures are made, all debt repayments to maintain a strong balance sheet are made, and all satisfactory capital expansion projects are addressed" (Exhibit B-9, Response to MEMPR IR No. 1, p. 6)

Governance:

"Following the closing, the Boards of Subco, Terasen and the resulting entity from the amalgamation of Subco and Terasen are expected to have a majority of Canadian members" (Exhibit B-27, Response to Council of

Canadians, Powell River Chapter IR No. 2, p. 11).

"Compliance with the Code of Conduct and Transfer Pricing Policy will continue, including an independent review by Terasen's Internal Audit department" (Exhibit B-34, p. 16).

"KMI, in consultation with the management of the Terasen Utilities, will continue to ensure that the Terasen Utilities keep the Commission informed and involved in those areas that would have significant impacts on the customer" (Exhibit B-34, p. 16).

Natural Gas Resources / Exports:

"Kinder Morgan [KMI] does not plan to invest in natural resources" (Exhibit B-12, Response to Council of Canadians, Powell River Chapter IR No. 1, p. 5).

"The Transaction will *not* result in the natural gas supplies purchased by Terasen being diverted to markets in the United States" (Exhibit B-15, Response to Wessler IR No. 1, p. 2).

7.0 COMMISSION DECISION, CONDITIONS AND DIRECTIONS

7.1 Approval of the Transaction

On August 17, 2005 KMI applied to the Commission for approval to acquire the shares of Terasen and an indirect acquisition of the Terasen Utilities. As a result of the written process established to consider the KMI Application, 36 individuals or organizations registered to participate as Intervenors, many of whom filed information requests and submissions. In addition, more than 8,000 letters of comment were filed by the October 14 deadline, as further discussed in Chapter 3.2 of this Decision.

The Commission Panel is fully conscious of and appreciates the degree of sincere public concern related to the Transaction and transfer of ownership of the energy transportation and natural gas and propane distribution subsidiaries of Terasen in B.C. to KMI, a U.S.-based corporation. The services provided by the Terasen Utilities are vital and integral to the residents and businesses of B.C. and are regulated by the Commission in accordance with its authority and powers under the *Utilities Commission Act* ("UCA").

As noted above in Chapters 3.2 and 4.3.3, many concerns related to the Transaction appear to be based on misunderstandings about the existing ownership and structure of Terasen, the structure of the natural gas market in B.C., and the authority of the Commission over public utilities operating in B.C. The Commission's review of KMI's application extends only to Terasen's ownership of regulated public utilities in B.C. and must be conducted in accordance with the Commission's jurisdiction and mandate under the *Utilities Commission Act*.

Because the Terasen Utilities would continue as separate corporate entities following the Transaction, the Commission Panel concludes that the Transaction does not involve the disposition of property as contemplated by Section 52, nor the consolidation, amalgamation or merger of a utility with another person as contemplated by Section 53. The Commission Panel finds, therefore, that the Application is appropriately brought and considered under Section 54 of the UCA as a Transaction involving a "reviewable interest" within the context of that provision (where KMI would own or control 100 percent of the voting shares of the Terasen Utilities).

Section 54 provides that that the Commission may give its approval of the KMI Application, subject to conditions and requirements it considers necessary or desirable in the public interest, but the Commission must not give its approval unless it considers that the public utility and the users of the services of the public utility will not be detrimentally affected.

The Commission Panel has considered the criteria established in its previous decisions and in the context of the submissions and issues and concerns raised and concludes that the relevant criteria for evaluating the impacts of this Application are as follows:

(a) the utility's current and future ability to raise equity and debt financing not be reduced or impaired;

(b) there be no violation of existing covenants that will be detrimental to the customers;

(c) the conduct of the utility's business, including the level of service, either now or in the future, will be maintained or enhanced;

(d) the application is in compliance with appropriate enactments and/or regulations;

(e) the structural integrity of the assets will be maintained in such a manner as to not impair utility service; and

(f) the public interest will be preserved.

With respect to the preservation of the public interest, the Commission Panel concludes that the public interest is not a broad, open-ended examination of any issue raised by an Intervenor or in a letter of comment, but rather is defined by the Commission's statutory mandate and its determination of relevant issues. Issues, therefore, such as trade disputes, employment impacts and tax impacts, as discussed in Chapter 4.3, for example, are outside the Commission's jurisdiction and authority and are thus beyond the scope of this review. Foreign ownership is not an issue in and of itself but only to the extent that new ownership could have a detrimental impact, for example, where the credit rating of the parent could affect the financing capability of its new subsidiaries. The Commission Panel finds that criteria (a) through (e) above adequately capture many of the relevant concerns raised and the key issues it must consider related to KMI's Application. Criterion (f) also provides an opportunity to weigh any impacts identified in criteria (a) through (e) in order to make an overall determination of whether the Application preserves the public interest.

Having determined that the above criteria cover the key public interest considerations relevant to its review of the Transaction and after reviewing the potential impacts of the Transaction in relation to these criteria, the Commission Panel finds that, in view of the assurances provided by KMI and with certain conditions and directions discussed previously and described below, the Transaction will not have a detrimental impact on the public interest.

In this light, and most significantly, it is critical to recognize that the Commission's ongoing regulation of the Terasen Utilities will not change as a result of the Transaction. The Commission has very broad supervisory powers and authority under the *Utilities Commission Act* to regulate the Terasen Utilities, particularly with respect

to rates charged to customers for services and the quality of those services. As acknowledged by KMI, the Commission also has sanction powers to ensure compliance with Commission requirements. The Commission has in place established guidelines and procedures, and will to continue to monitor and enforce them, to ensure that the current standards are maintained and that there is no detriment as a result of this Transaction.

7.2 Conditions

As noted above, the Commission may attach conditions to an approval under Section 54 that it considers necessary and desirable for the public interest. The Commission Panel has determined that the following conditions should be attached to approval of the Transaction.

7.2.1 Ring-Fencing

KMI recognized the importance of the 'credit rating risk analysis and ring-fencing' criteria for evaluating the Transaction's impact on the Terasen Utilities and acknowledged that a downgrade in TGI's credit rating resulting from the Transaction could increase the costs of borrowing and the cost of service to ratepayers. KMI, therefore, proposed ring-fencing conditions to insulate TGI from credit rating downgrades and related financial risks associated with any affiliates in the larger Terasen/KMI corporate family. After reviewing the ring-fencing conditions proposed by KMI, its responses to information requests and the submissions of Intervenors related thereto, the Commission Panel has revised the ring-fencing conditions. The ring-fencing conditions approved by the Commission Panel are as follows:

(1) Each Terasen Utility shall maintain, on a basis consistent with BCUC orders and accounting practices, a percentage of common equity to total capital that is at least as much as that determined by the Commission from time to time for ratemaking purposes.

(2) No Terasen Utility will pay a common dividend without prior Commission approval if the result would reasonably be expected to violate the restriction in (1) above.

(3) (a) No Terasen Utility will lend to, guarantee or financially support any affiliates of the Terasen Utilities, other than between TGI and TGS, or as otherwise accepted by the Commission.

(b) TGI and TGS shall together maintain separate banking and cash management arrangements from other affiliates. TGVI shall establish separate banking and cash management arrangements from other affiliates once it has completed its proposed refinancing.

(c) No Terasen Utility will enter into a tax sharing agreement with any affiliate of the Terasen Utility, unless the agreement has been approved by the Commission.

4) No Terasen Utility will enter into transactions with affiliates that are not in compliance with Commission guidelines, policies or directives regarding affiliate transactions, and no Terasen Utility will enter into transactions with affiliates on terms less favourable to the Terasen Utility than those available from third parties on an arms-length basis, unless otherwise approved by the Commission.

5) No Terasen Utility will engage in, provide financial support to or guarantee non-regulated businesses, unless otherwise approved by the Commission.

These conditions may be revised and/or supplemented in future by the Commission as required to protect the public interest.

7.2.2 Governance

The Commission Panel finds that the Terasen Utilities should be required to maintain existing governance policies and that any changes in these policies should be approved by the Commission. In particular, the Commission Panel concludes that the continued independence of Directors, as required in existing governance policies, will provide a further assurance that the Terasen Utilities will comply with the ring-fencing conditions.

7.2.3 Location of Functions and Data

In order to address privacy concerns and other concerns, the Commission Panel determines that it would be appropriate to attach a condition to approval of the Transaction that requires KMI not to change the geographic location of any existing functions or data currently in TGI's service area without prior approval of the Commission.

7.3 Directions

The Commission Panel sees value in the best practices review referred to by KMI at page 16 of Exhibit B-34 and, in the event the Transaction receives all of the necessary approvals and is completed, directs KMI to perform and file the results of this review with the Commission no later than one year from the completion date of the Transaction.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of November 2005.

Original signed by:

Robert H. Hobbs
Chair

Original signed by:

Lori A. Boychuk
Commissioner

Original signed by:

Robert W. Whitehead
Commissioner

SIXTH FLOOR, 900 HOWE STREET, BOX 250
VANCOUVER, B.C. V6Z 2N3 CANADA
web site: http://www.bcuc.com

BRITISH COLUMBIA UTILITIES COMMISSION

ORDER NUMBER G-116-05

TELEPHONE: (604) 660-4700
BC TOLL FREE: 1-800-663-1385
FACSIMILE: (604) 660-1102

IN THE MATTER OF
the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Kinder Morgan, Inc. and 0731297 B.C. Ltd.
for Approval of the Acquisition of the Common Shares of Terasen Inc.

BEFORE: R.H. Hobbs, Chair
L.A. Boychuk, Commissioner
R.W. Whitehead, Commissioner

November 10, 2005

O R D E R

WHEREAS:

A. On August 17, 2005, Kinder Morgan, Inc. ("KMI") and 0731297 B.C. Ltd. ("Subco") ("collectively the Kinder Morgan Companies") applied pursuant to Section 54 of the Utilities Commission Act ("the Act") for an Order approving the acquisition of the common shares of Terasen Inc. ("Terasen") which would cause the Kinder Morgan Companies to have indirect control of certain public utilities regulated by the British Columbia Utilities Commission ("the Application"); and

B. The public utilities are Terasen Gas Inc. ("TGI"), Terasen Gas (Vancouver Island) Inc. ("TGVI"), Terasen Gas (Whistler) Inc. ("TGW"), Terasen Gas (Squamish) Inc. ("TGS"), and Terasen Multi-Utility Services Inc. ("TMUS") (collectively the "Terasen Utilities"); and

C. TGI, TGVI, TGW, TGS and TMUS are, directly or indirectly, wholly-owned subsidiaries of Terasen; and

D. KMI, Subco and Terasen have entered into an August 1, 2005 Agreement under which Subco, a wholly-owned subsidiary of KMI, will acquire all of the issued and outstanding common shares of Terasen; and

E. Section 54(9) of the Act states:

> "The commission may give its approval under this section subject to conditions and requirements it considers necessary or desirable in the public interest, but the commission must not give its approval under this section unless it considers that the public utility and the users of the service of the public utility will not be detrimentally affected."; and

F. KMI and TGI jointly undertook a communication and consultation program in the TGI, TGVI, TGS, and TGW service areas and submitted a summary of the comments to the Commission as part of the materials filed in support of its Application; and

…/2

G. Following a Procedural Conference held on September 9, 2005, the Commission by Order No. G-86-05 established a Regulatory Timetable for the review of the Application in a written public hearing process with a deadline for Intervenor submissions of October 14, 2005 and KMI submissions of October 21, 2005; and

H. By letter dated October 24, 2005 (Exhibit A-7), the Commission advised KMI, TGI and the Intervenors that the Commission Panel did not have questions arising from the written submissions and the oral phase of submissions would not be held on November 2, 2005; and

I. The Commission has considered the Application and the evidence all as set forth in the Decision issued concurrently with this Order.

NOW THEREFORE the Commission, for the reasons stated in the Decision, orders that the Application is approved subject to the conditions contained in the Decision accompanying this Order.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of November 2005.

BY ORDER

Original signed by:

Robert H. Hobbs
Chair

APPEARANCES

G. FULTON	Commission Counsel
P. CASSIDY	Kinder Morgan, Inc. and 01731297 B.C. Ltd
C. JOHNSON	Terasen Gas Inc. and Terasen Inc.
D. BURSEY	Inland Industrials
C. WEAFER	Lower Mainland Large Gas Users Association and Commercial Energy Consumers Association of British Columbia
G. BIERLMEIER	Ministry Of Energy, Mines And Petroleum Resources
J. YARDLEY	City of Abbotsford
R. GATHERCOLE	B.C. Old Age Pensioners' Organization| Counsel of Senior Citizens' Organizations, B.C. Coalition of People With Disabilities Council of Senior Citizen's Organizations Federated Antipoverty Group of B.C. End Legislated Poverty and Tenants Action Coalition
J. BROWN	Canadian Office and Professional Employees Union, Local 378
D. ASKEW	Council of Canadians Vancouver Chapter
N. MAXEY	Council of Canadians Powell River Chapter
S. SIMPSON	Legislature for Vancouver Hastings and Environment Critic for the Official Opposition
C. EVANS	MLA for Nelson Creston and The Energy Critic for the Official Opposition
B. DOWNEY	Democratic Reform Party of B.C.
C. FOGAL	Canadian Action Party
M. JAMES	Self
S. ANDERSON	Self
R. SYKES	Self
G. HELTON	Self
J. WESSLER	Self

P.W. Nakoneshny W.J. Grant J.W. Fraser J.B. Williston	Commission Staff
Trent Berry Compass Resource Management Ltd.	Commission Consultant
Allwest Reporting Inc.	Court Reporters

IN THE MATTER OF

the Utilities Commission Act, R.S.B.C. 1996, Chapter 473

and

An Application by Kinder Morgan, Inc. and 0731297 B.C. Ltd.
for Approval of the Acquisition of the Common Shares of Terasen Inc.

EXHIBIT LIST

Exhibit No.	Description
COMMISSION DOCUMENTS	
A-1	Letter dated August 19, 2005 and Order No. G-76-05 establishing a Procedural Conference and Regulatory Agenda
A-2	Letter and Commission Information Request No. 1 dated August 26, 2005
A-3	Letter dated September 8, 2005 advising that the Commission will seek submissions at the Procedural Conference regarding the use of Confidential Exhibit B-5
A-4	Letter dated September 14, 2005 and Order No. G-86-05 issuing the Regulatory Timetable for this proceeding
A-5	Letter dated September 27, 2005 Response to Russell Sykes from Gordon Fulton, BLC on behalf of BCUC
A-6	Letter dated October 3, 2005 requesting that Intervenor Submissions include comments on the scope of issues that are appropriate for consideration by the Panel under Section 54 of the Utilities Commission Act
A-7	Letter dated October 24, 2005 cancelling the oral phase scheduled for November 2, 2005
APPLICANT DOCUMENTS	
B-1	Application dated August 17, 2005 by Kinder Morgan, Inc. for the approval of the acquisition of the Common Shares of Terasen Inc.
B-2	Terasen Inc. Stakeholder Purchase Information Package
B-3	Regional Consultation Plans – Regional Open House Schedule dated August 24, 2005

Exhibit No.	Description
B-4	Letter and Responses to Commission Information Request No. 1 dated September 1, 2005
B-5	**CONFIDENTIAL** – Schedule 1 information responding to Commission Information Request No. 1
B-6	Letter dated September 7, 2005 enclosing Summary of Public Consultation
B-7	Letter dated September 13, 2005 waiving Confidentiality of financial documents in Exhibit B-5
B-8	Response to COPE378 Information Request No. 1 dated September 19, 2005
B-9	Response dated September 19, 2005 to Ministry of Energy Mines and Petroleum Information Request No. 1
B-10	Response dated September 19, 2005 to BCOAPO Information Request No. 1
B-11	Response dated September 19, 2005 to the Democratic Reform Party of BC Information Request No. 1
B-12	Response dated September 19, 2005 to Council of Canadians-Powell River Chapter Information Request No. 1
B-13	Response dated September 19, 2005 to District of Chetwynd Information Request No. 1
B-14	Response dated September 19, 2005 to Greg Helten Information Request No. 1
B-15	Response dated September 19, 2005 to Joachim Wessler Information Request No. 1
B-16	Response dated September 19, 2005 to LMLGUA and CECA Information Request No. 1
B-17	Response dated September 19, 2005 to Russell Sykes Information Request No. 1
B-18	Response dated September 19, 2005 to Sam Anderson Information Request No. 1
B-19	Response dated September 22, 2005 to Beatrice Varley Information Request No. 1

Exhibit No.	Description
B-20	Response dated September 22, 2005 to Andy Shadrack Information Request No. 1
B-21	Response dated September 29, 2005 to Joachim Wessler Information Request No. 2
B-22	Response dated September 29, 2005 to Marshall James Information Request No. 2
B-23	Response dated September 29, 2005 to Brian Downey Information Request No. 2
B-24	Response dated September 29, 2005 to the City of Abbotsford Information Request No. 1
B-25	Response dated September 29, 2005 to Jean Binette Information Request No. 2
B-26	Response dated September 29, 2005 to LMLGUA and CEC Information Request No. 2
B-27	Response dated September 29, 2005 to Council of Canadians, Powell River Chapter Information Request No. 2
B-28	Response dated September 29, 2005 to Ministry of EMPR Information Request No. 2
B-29	Email dated September 19, 2005 providing additional process information
B-30	Response dated October 12, 2005 to Sam Anderson Information Request No. 2
B-31	News Release dated October 18, 2005 - Terasen shareholders approve acquisition by Kinder Morgan
B-32	Letter dated October 21, 2005 – Review of Mr. Shane Simpson Letter to follow
B-33	Submission dated October 21, 2005 – Responses to concerns expressed by Interested Parties and the Public
B-34	Letter dated October 21, 2005 – Written Submissions
B-35	KMI cover letters and Emails confirming Information Responses and Order Distribution

Exhibit No.	Description

INTERVENOR DOCUMENTS

C1-1 **THE BC OLD AGE PENSIONERS ORGANIZATION *ET AL*.** – Notice of Intervention dated August 24, 2005

C1-2 Information Request dated September 12, 2005

C1-3 E-mail dated October 13, 2005 - Submission

C2-1 **TERASEN GAS INC.** – Notice of Intervention dated August 24, 2005 from Scott Thomson

C2-2 Letter dated October 14, 2005 - Submission

C3-1 **COUNCIL OF CANADIANS (VANCOUVER CHAPTER)** – Notice of Intervention dated August 25, 2005 from David Askew

C4-1 **SIMPSON, SHANE** MLA for Vancouver Hastings – Notice of Intervention dated August 26, 2005

C5-1 **CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION – LOCAL 378 (COPE)** – Notice of Intervention dated August 24, 2005 from Pat Junnila

C5-2 Information Request dated September 12, 2005

C5-3 COPE Local 378 Final Submission dated October 14, 2005

C6-1 **DIRECT ENERGY MARKETING LIMITED** – Notice of Intervention dated August 29, 2005 from Chad Painchaud

C7-1 **JAMES, Marshall** – Notice of Intervention dated August 24, 2005

C7-2 Letter of Comment dated August 30, 2005

C7-3 Letter of Comment dated September 23, 2005

C8-1 **WEST FRASER MILLS** – Notice of Intervention dated August 29, 2005 from David Humber

Exhibit No.	Description
C9-1	**INLAND INDUSTRIALS** – Notice of Intervention dated August 31, 2005 from David Bursey, Bull, Housser & Tupper
C9-2	Inland Industrials submission dated October 14, 2005
C10-1	**BUSINESS COUNCIL OF BRITISH COLUMBIA** – Notice of Intervention dated September 1, 2005 from Jerry Lampert
C10-2	Letter dated October 14, 2005 – Brief submission
C11-1	**COUNCIL OF CANADIANS POWELL RIVER CHAPTER** – Notice of Intervention dated September 1, 2005 from Nelle Maxey
C11-2	Information Request No. 1 dated September 12, 2005 from Nelle Maxey
C11-3	E-mail dated September 19, 2005 from Nelle Maxey – Written submissions
C11-4	E-mail dated September 20, 2005 from Nelle Maxey – KMI responses
C11-5	E-mail dated September 23, 2005 from Nelle Maxey – Unable to complete IR's
C11-6	E-mail dated September 26, 2005 from Nelle Maxey – Council of Canadians Information Request No. 2
C11-7	E-mail dated September 27, 2005 from Nelle Maxey – Letter of Comment
C11-8	Letter of Comment dated October 14, 2005
C11-9	Council of Canadians Submission dated October 14, 2005
C12-1	**DEMOCRATIC REFORM PARTY OF BC** – Notice of Intervention dated September 2, 2005 from Brian Downey
C12-2	E-mail dated September 12, 2005 Information Request from Brian Downey to Terasen Inc. and Kinder Morgan Inc.
C12-3	E-mail dated September 13, 2004 – Revised Exhibit C12-2 Information Request from Brian Downey
C12-4	Submission dated September 9, 2005 from Brian Downey
C12-5	E-mail submission dated September 21, 2005 from Brian Downey
C12-6	E-mail submission dated September 26, 2005 from Brian Downey

Exhibit No.	Description
C12-7	E-mail submission dated September 23, 2005 from Brian Downey
C12-8	E-mail dated September 28, 2005 from Brian Downey – Additional Information Request
C12-9	E-mail dated September 30, 2005 providing a comprehensive list of community newspapers
C12-10	E-mail dated October 7, 2005 – Additional Information Request
C12-11	E-mail dated October 11, 2005 – Additional Information Request to Kinder Morgan
C12-12	E-mail dated October 14, 2005 from Brian Downey – Suggested Draft Order
C13-1	**CANADIAN ACTION PARTY** – Notice of Intervention dated September 5, 2005 from Constance Fogal
C14-1	**BINETTE JEAN** – Notice of Intervention dated September 6, 2005
C14-2	E-mail dated September 20, 2005 – Explanation to Exhibit C11-3 accepted
C14-3	E-mail dated September 21, 2005 – Comment on Exhibit C12-5
C14-4	E-mail dated September 25, 2006 – Unable to file
C14-5	E-mail dated September 26, 2006 – Information Request No. 2
C14-6	E-mail dated September 26, 2005 – Reply to Exhibit C12-6
C14-7	E-mail dated September 28, 2005 - Submission
C15-1	**ANDERSON, SAM** – Notice of Intervention dated September 6, 2005
C15-2	Letter of Comment dated September 9, 2005
C15-3	Information Request No. 1 received September 13, 2005
C15-4	Letter received September 30, 2005 – Information Request No. 2
C15-5	Addendum to Information Request No. 2 dated September 30, 2005
C15-6	Letter of Comment dated October 1, 2005
C15-7	Submission and Addendum dated October 14, 2005

Exhibit No.	Description
C16-1	**CITY OF ABBOTSFORD** – Notice of Intervention dated September 2, 2005 from James G. Yardley, Murdy & McAllister
C16-2	Letter dated September 26, 2005 confirming extension of deadline for IR's
C16-3	Letter dated October 17, 2005 – Does not propose filing any submissions
C17-1	**HANISON-NAGEL, STEPHEN** – Notice of Intervention dated August 30, 2005
C18-1	**LOWER MAINLAND LARGE GAS USERS ASSOCIATION** – Notice of Intervention dated September 6, 2005 from Christopher Weafer, Owen-Bird
C18-2	Information Request dated September 12, 2005
C18-3	Letter dated September 22, 2005 regarding response to KMI's IR No. 2
C18-4	Letter dated September 26, 2005 LMLGUA Information Request No. 2
C18-5	Submissions of the Lower Mainland Large Gas Users Association and the Commercial Class Energy Consumers Association of British Columbia dated October 14, 2005
C19-1	**MINISTRY OF ENERGY, MINES & PETROLEUM RESOURCES** – Notice of Intervention dated September 6, 2005 from Stirling Bates
C19-2	Information Request dated September 12, 2005
C19-3	Information Request No. 2 dated September 23, 2005
C20-1	**SYKES, RUSSELL** – Notice of Intervention dated September 3, 2005
C20-2	Submission dated September 13, 2005
C20-3	Submission dated September 12, 2005
C20-4	Letter and Information Request dated September 12, 2005
C20-5	Letter dated September 14, 2005 – Correction/clarification
C20-6	Letter dated September 20, 2005
C20-7	Letter dated October 14, 2005 – Submission

Exhibit No.	Description
C20-8	Letter dated October 17, 2005 - Submission
C20-9	Facsimile dated October 14,2005 – Support of R. Sykes Submission from N.V. Schaefer, PhD
C21-1	**DISTRICT OF CHETWYND** – Notice of Intervention dated September 2, 2005 from Colin Stewart, Staples McDannold Stewart
C21-2	Submission dated October 14, 2005 – Opposing acquisition of shares
C22-1	**SHADRACK, ANDY** – Notice of Intervention dated August 30, 2005
C23-1	**RAILEX ENERGY GROUP, INC.** – Notice of Intervention dated September 6, 2005 from M.L. Pennfield Bradley
C23-2	Letter dated October 14, 2005 – No objection to transaction
C24-1	**EVANS, CORKY** MLA (Nelson-Creston) – Notice of Intervention dated September 6, 2005
C25-1	**COMMERCIAL ENERGY CONSUMER ASSOCIATION OF BRITISH COLUMBIA –** E-mail dated September 7, 2005 requesting Intervenor Status from Christopher Weafer, Owen-Bird
C26-1	**HELTEN, GREG –** E-mail dated September 6, 2005 requesting Intervenor Status
C26-2	Information Request dated September 12, 2005
C27-1	**WESSLER, Joachim M.O.** – Facsimile dated September 6, 2005 requesting Intervenor Status
C27-2	Information Request dated September 12, 2005
C27-3	Information Request No. 2 dated September 23, 2005
C27-4	Letter dated October 14, 2005 - Submission
C28-1	**VARLEY, Beatrice** – Notice of Intervention dated September 16, 2005

Exhibit No.	Description
C28-2	E-mail dated October 14, 2005 – Comments
C29-1	**ANDERSON, Tod** – Notice of Intervention dated September 29, 2005
C30-1	**DIMITROV, Peter** – Notice of Intervention dated September 28, 2005
C30-2	Letter dated October 17, 2005 - Submission
C31-1	**BALDAZZI, Elisabeth** – Notice of Intervention dated September 30, 2005 Letter of Comment received September 12, 2005 (see Exhibit E-77)
C31-2	E-mail dated October 13, 2005 - Submission
C32-1	**CRAIG, Lorne** – Notice of Intervention dated October 6, 2005
C32-2	Letter dated October 14, 2005 – Protest proposed sale
C32-3	Letter of Comment dated October 6, 2006
C33-1	**BALL, Don** – E-mail dated October 14, 2005 - Request change to Intervenor Status
C34-1	**MCNAB, Lorne** – Web registration dated October 17, 2005 requesting Intervenor Status
C35-1	**DESROCHERS, Ed** – Web registration dated October 17, 2005 requesting Intervenor Status
C36-1	**IBEW Local 213** – Web registration dated October 17, 2005 from Randy Loski requesting Intervenor Status

Exhibit No.	Description

INTERESTED PARTY DOCUMENTS

D-1 **Rental Owners and Managers Association** - E-mail dated August 22, 2005 requesting Interested Party Status from Al Kemp, CEO

D-2 **PGH Consulting Services Ltd.** - E-mail dated August 25, 2005 from Paul Henderson

D-3 **WILSON, Greta** - Web registration dated August 25, 2005

D-4 **BINETTE, Jean** – Web registration received August 29, 2005
WITHDRAWN – see Exhibit C14-1

D-5 **DAVIS, C** – Web registration received August 29, 2005

D-6 **DUNN, Greg** – Web registration received August 29, 2005

D-7 **VARLEY, Beatrice** – E-mail dated August 31, 2005 requesting Interested Party Status

Withdrawn

D-8 **EDDY, Diane** – Email dated August 31, 2005 requesting Interested Party Status

D-9 **GOWAN, Tom –** Web registration dated September 2, 2005

D-10 **JOANNA** – Web registration dated September 1, 2005

D-11 **LORIEAU, Jean-Paul** – Web registration dated August 30, 2005

D-12 **SPERLING, Don** – Web registration dated September 1, 2005

D-13 **DAVIS, Angus** – E-mail dated September 4, 2005 requesting Interested Party Status

D-14 **PARKINSON, Glenn** – Web registration dated September 2, 2005

D-15 **ROSS, Patricia** – E-mail dated September 4, 2005 requesting Interested Party Status

D-16 **HILLS, William G., Ph.D** – E-mail dated September 5, 2005 requesting Interested Party Status

E-mail Letter of Comment dated October 13, 2005

Exhibit No.	Description
D-17	**WESTCOAST ENERGY INC. –** Letter dated September 1, 2005 requesting Interested Party Status from Kirsten B. Jaron
D-18	**MARSH, FRED G** – Letter dated September 3, 2005 requesting Interested Party Status
	Facsimile Letter of Comment dated September 5, 2005
D-19	**YOUNG, ROGER** – Letter dated September 1, 2005 requesting Interested Party Status
D-20	**THORNBURGH, JACK –** E-mail dated September 6, 2005 requesting Interested Party Status
D-21	**EWART, PETER –** E-mail dated September 6, 2005 requesting Interested Party Status
D-22	**HUL'QUMI'NUM TREATY GROUP –** Web registration dated September 8, 2005 requesting Interested Party Status
	Submission dated October 14, 2005 on the Kinder Morgan acquisition of Terasen Inc. and the reconciliation of Aboriginal title and rights and treaty negotiations, per recent court decisions
D-23	**SHANNON, BARRY –** Web registration dated September 11, 2005 requesting Interested Party Status
D-24	**KLEINSTEUBER, CATHERINE –** Web registration dated September 13, 2005 requesting Interested Party Status
D-25	**MCFEE, DOUG -** Web registration dated September 29, 2005 requesting Interested Party Status
D-26	**BALL, DON –** E-mail dated September 29, 2005 requesting Interested Party Status
D-27	**MARTINEAU, Sylvia Dodgson**– E-mail dated September 30, 2005 requesting Interested Party Status
D-28	**JESSACHER, KRISTA –** Web registration dated October 3, 2005 requesting Interested Party Status and E-mail Letter of Comment
D-29	**DUNCAN, R –** Web registration dated October 6, 2005 requesting Interested Party Status

Exhibit No. **Description**

D-30 **INGRAM, G. PAUL -** Web registration dated October 1, 2005 requesting Interested Party Status

D-31 **CONROY, RORY N. -** Web registration dated October 6, 2005 requesting Interested Party Status

D-32 **MILES, KEITH –** Web registration dated October 17, 2005 requesting Interested Party Status

D-33 **ANDERSON, SALLY –** Web registration dated October 17, 2005 requesting Interested Party Status

D-34 **LEES, CHRISTINA -** Web registration dated October 17, 2005 requesting Interested Party Status

D-35 **BLACK, DAVID -** Web registration dated October 17, 2005 requesting Interested Party Status

D-36 **REDMAN, BRIAN -** Web registration dated October 17, 2005 requesting Interested Party Status

D-37 **GAYTON, DON GAYTON & HARRIS, JUDY -** Web registration dated October 17, 2005 requesting Interested Party Status

LETTERS OF COMMENT

E-1 Letters of Comment dated August 2, 2005 from the following:

Anne Sanderson
Heather Rush
Richard Robinson
Sammy Pan
Sidney Taylor

E-2 Letters of Comment dated August 3, 2005 from the following:

Claire Cutler Page
Debbie & Linda Tedsten
Edward Chan-Henry
Ken Laing
Phil Johnson
Sasha McInnes

Exhibit No.	Description
E-3	Letters of Comment dated August 4, 2005 from the following: Carol Gray Chris Becenko David & Linda Seller Karen Donovan Shawn Levesque
E-4	Letters of Comment dated August 5, 2005 from the following: Barbara Grant Heather Whiteford John Petryk Lynda Lees Marina Dodis Moira S. Greaven Peter & Karen Will
E-5	Letters of Comment dated August 8 and 9, 2005 from the following: Lynn Cvitko Mary Lane & Wilma Childerley Roger Poulton
E-6	Letters of Comment dated August 12, 2005 from the following: Allegra Sloman Andrew Astfalk Donn Tarris Jim Norie Russ Hartman Scott Henney
E-7	Letters of Comment dated August 13, 2005 from the following: Alison Dennis Daniel Holburn Judith Gurney Kevin Shoesmith Madeleine Tarris Margo M. Catamo

Exhibit No.	Description

E-8 Letters of Comment dated August 14, 2005 from the following:

C.D. Routliffe
David Hart
Eddie Y. Fong
Hans Kratz
Joan Munson
John C. Clement
John D. Taylor
Judy Brayden
Marianne Busby
Peter & Eleanor Holuboff
Robert E. Hollies
Sandford Tuey

E-9 Letters of Comment dated August 15, 2005 from the following:

Andy Shadrack
Debora Ritchie
Dennis Tham
Dr. D.H. Kelly
Heidi Gerhardt
Helen Ward
Jack deWit
Jefferey Simpson
Joanne Worton
Kenneth Mitchell
Leif Iverson
M. Mason
Micelle Moss
Penny Green
Suzanne Murray

E-10 Letters of Comment dated August 16, 2004 from the following:

BC Safety Authority
Brian Weeks
Chelan Barclay
Dan Murray
Fred Muzen, Hospital Employee's Union
Jacqueline Webster
Jenni Agnew
Jim French
Joy French
Kathleen Perreault
Larry Kazdan
Lisa Penny
Margaret Tidswell
Simona Di Giuseppe
V & B Swetlishoff
Walter Ewen

Exhibit No. **Description**

E-11 Letters of Comment dated August 17, 2005 from the following:

Darlene Legare
Donna Vance
Garry Gallagher
Irmgard I. Dommel
Jim Manson
John Mackenzie
Lauren Bacon
Lindy & Jeanette Mikkelsen
Reg Belzac
Roger & Ann Belzac

E-12 Letters of Comment dated August 18, 2005 from the following:

Allan Smith
Betina Ali
Brian Nixon
Christopher Gas
Corinna Penner
Danielle Sykes
Dixie & Richard Hayduk
Elizabeth Woods
Gerry Lewko – White Light Academy
Heather Ward
Janet Groves
Joan Scott
Jodi Koberinski
Leanne Walker
Nichaline Novak
Myra Mason
Susanne Astfalk

E-13 Letters of Comment dated August 19, 2005 from the following:

M. Callaway
Mike Desmarais
Nadine Poznanski
Nick Monahan
Sheila Pratt
Susan Stout
WH Ramsden

E-14 Letters of Comment dated August 20, 2005 from the following:

Christina Simpson
Dan Bianco
Lucille & Kim Reynolds
M. Scott Horswill

Exhibit No.	Description

E-15 Letters of Comment dated August 21, 2005 from the following:

B. Ohlke
Bernard Wera
Catherine Ruskin
Eva M.F. Sharell
Mae Gracey

E-16 Letters of Comment dated August 22, 2005 from the following:

Brian O'Connor
Heather Alton
Isaac Rempel & Coleen Sargent
James E. McConnell
Jane Turner
Jean Blackwood
Karen Rauser
Krista Adams
Liana Keller
Norma Liston
Rick & Karen Staub
Roland & Murielle Perrin
Sharon Lemp
Steve Guidone

E-17 Letters of Comment dated August 23, 2005 from the following:

Michael & Linda Steele
Ruth Haynes

E-18 Letters of Comment dated August 24, 2005 from the following:

Brian Kingman
City of Port Alberni
Craig Speirs – District of Maple Ridge
Deanne Dieleman
Fred & Marion Schindel
Gerald Fitzgerald
Grant Mononen
Hal Weinberg
Ianna Selkirk
June Hills
Keven & Lorraine Bonell
M.W. Philips
T.J. Lee

E-19 Letters of Comment dated August 25, 2005 from the following:

Abbie Balcom
Bill & Irene Dunwoody
Bonnie Meena
Catherine Webb
Clay & Mary Richardson
Don and Maryann Wilson
Don Bens
Gerry Chidiac
Judy Smith
Lindsay Harris
Peter Kerr
Phil Harrison
Tom Brown

Exhibit No. **Description**

E-20 Letters of Comment dated August 26, 2005 from the following:

AL & Elaine Wutzke
Al & Rita Purdon
Brian & Patti
Christopher Stevenson
Carol & Ernie Smith
David Lemp
Dawn Arnold
Don Sharp
Finn Hestdalen
Garry & Linda Cook
Gerry Houlden
Janet Boeur
Leslie & Brian Franklin
Murray Phillips
R.O. Gilbert
Robert Heye
Robin Hickman
Roxann Smith
Sean Walker
Sherylee Harper
Shirley Heidelbach
V. Morgan

E-21 Letters of Comment dated August 27, 2005 from the following:

Audrey & Terry Wells
Barbara Lambert
Brenda Brumwell
Charlene Jennejohn
Clint Smith
Elan Richards
Garry W. Gilbert
Guy Santucci
Jana Mcfarlane
Jay Dumas
Jim Bleker
Joe Dobson
Kathleen McCarthy
Laurie
Lionel Guy
Lynnette Lettinga
Matthew Jaques
Rick Smith
Robert McLean
Terry Kennedy
Tom Anderson

E-22 Letters of Comment dated August 28, 2005 from the following:

Akash Sablok
Arne Sahlen
Bill Young
Don Bens
Fern & Grant
Garry G. Gosselin
Gwen Davis
Ian Puchlik
Jack & Barbara Cooper
Joe Lintz
Louise E. Palmer
Maryam Murat-Khan
Morley Brown
Pollyanne Moorman
R. Seddon
Rennie Holley
Sara Taherzadeh
Sharyn Sigurdur

Exhibit No. **Description**

E-23 Letters of Comment dated August 29, 2005 from the following:

Bill & Pauline Carras
Brenda Lothrop
Brian Bellbeck
Carol Cole
Cindy Orivolo
Connie Strafford
Dave & Wanda Hamilton
Gaille Bisson
Jane Blamire
John & Elizabeth Beeching
Justin Schmid
Les Halvarson
Lois Marr
Loreta & Bill Burden
Lynn & Dan Carlyle
M. Gibbons
Marg Tidswell
Mark Perry
Marlene Pauls
Martin McCarthy
Marty Butler
Mary Anne Comadina
Mesbah Taherzadeh
Michele McManus
Penny Powers
Sebrina Woligroski
Stella Hansen
Steven C. Hutton
Tom Astley
Tony Gilbert
Mark Wagner

E-24 Letters of Commend dated August 30, 2005 from the following:

Adrienne Montani
Carol Stein
Cliff Hammond
Darlene Bester
Elaine & Gerry Lavingne
Florence Nickel
Fred DeRosa
Gordon Giesbrecht
Jackie Webster
Jivana Tao
John & Dorothy Johnston
Karla Hellewell
Ken Dunion
Leo Riley
Mateo Ocejo
Maureen Bricker
Mike Warawa
Penny & Ron Tilby
Richard L. Drinnan
Sherrie Viberg
Susanne & Paul Velleux
Tina Marten
Lonnie Young

E-25 Letters of Comment dated August 31, 2005 from the following:

Bill Silversides
Carli Miles
Christine & Leo Verstraete
Clare Hills
Clint Price
Darryl Yockey
Dave Stuart
Eunice Bower
Garry Fossum
Karen Demidoff
Kathryn Sutherland
Maria Morgenthaler
Marilyn & Gordon Page
Olga Baron
Paul of Burnaby
Peter Wainwright
RJ Thompson
Ron Peterson

Exhibit No.	Description
	Joan Carr John Smith Stewart & Hazel Andreen
E-26	Letters of Comment dated September 1, 2005 from the following:
	Bonnie Soles Doreen & Hugh Chappell Esther Schroeder F. Bevis Gordon A Brady Harry & Hope Chatry Jared Jones Karry McKenna Kristie Moore Lawrence Sawatsky Lynn Moore Marcel Smutek Marion Maynard Michael Crawford Nancy Baldwin Patrick Burke Rena Simpson Richard Hagensen Risk Allen Tom Gowan Zidonja Dave Blagdon
E-27	Letters of Comment dated September 2, 2005 from the following:
	Amy Meyer Bob Sperling Eleanor Bridge G. Clark Garry Clifford Gwen Boymer Harvey Wong Helena Arseneault Ida & Douglas Oberg Joanna Sokolic Lowell Paulson Murray Martin
E-28	Letters of Comment dated September 3, 2005 from the following:
	Agnes Chan Alston Chase Barbara Peterson Bob Robertson Debra Herst Dianne Quong Glenn Baker Glenn Tarrant Gordon McGregor Peter Bates Jan Lyle & Tom Douglas Jeannette Ide John Somerville Maisie Beattie Margaret Robertson Marian Rose Maureen & Tony Simmonds Michael Cowtan Michael Tanaka Paul & Arlene Tanaka

Exhibit No.	Description

E-29 Letters of Comment dated September 4, 2005 from the following:

Bette Simpson
Clive Loader
Dale Fidler
Danny Kostyshin
J. Hardwick
Joanne Martin
Kristine Shearer
Luis Curran
Lyn Gardner
PR Brown
Ralph Fulber
Richard Berg
Roberta & Leo Lavigne
Stu Neatby

E-30 Letters of Comment dated September 5, 2005 from the following:

Albert Semper
Barbara Hill
Darryl Hagel
Dominic & Jocie Maletta
Garfield Jones
Geoff A'Bear
Heather Holding
Herbert Korenberg
Jackie Whalley
Jen & Stephen Bradley
John Seymour
Lindsay McCormick
Lorene Oikawa
Lorraine Kuchinka
Margaret Shaw
Meghan LaCoste
Stephen Bradley
Terence C. Davis
Zidonja Ganert

Exhibit No. **Description**

E-31 Letters of Comment dated September 6, 2005 from the following:

A.S. Wretham
Bev & Jim Murphy
Brian Jackson
Cariboo Regional District
Charles McKaig
Doug Singer
Douglas Shipp
Elliot Hare
Fae E. Hansen
Frank Inglin
Gordon & Audrey Fairbairn
Gudrun Langolf
Jim Hardwick
Jodie Grover
Jordan Rosenfeld
Karen Susheski
Kathleen Ness
Keith Booth
Leo Cooper
Ruther Wittorf
Sabrina Mutterer
Shelley Combs
Shirley Potter
Tom Maddigan
Una wagner

E-32 Letter of Comment dated September 7, 2005 from the Oil and Gas Commission

E-33 Letters of Comment dated September 7, 2005 from the following:

Alfred A. Cassidy
Barbara O'Neil
Betty Gage
Dave Pouw
Greg Gage
Greg Moon
Ian McDougall
Ivor Murzello
Jean-Paul Lorieau
Jim & Yvonne
Karen Kristensen
Karen Wasilenchuk
Ken Simpson
Linda Towe
Maddi Newman
Marnie Dangerfield
Patricia Spencer
Pete Cassidy
R.G. Weller
Rander Leiter

E-34 Letters of Comment dated September 8, 2005 from the following:

Brant Zwicker
Darryl & Faye Sherstobetoff
Dorene Sharkey
Douglas H. Hall
Elsie & Orist Sharun
Gerald & Dora Steeves
Harv Nagra
Jagandeep Nagra
Jessie Pears
Jo-Ann Picard
Miechiel F. Maas
Millie Lambell
Old Age Pensioners Organization, Branch No. 93
Paula Murray
Peter Gleave
Pia Mckoryk
Roy E. Maas
Stephen Green
Yvonne Pinder

Exhibit No. **Description**

Marian Brown
Roy Maas

E-35 Letters of Comment dated September 9, 2005 from the following:

Ann Swann
Barbara & Dimitrios Antoniou
Bill Potma
Brian W. Archer
Cynthia van Ginkel
Dave Filgate
Dave Mills
Freya Scheel
Hellen Allen
Joann McArthur
Larry J. Terrick
Lorell Gingrich
Maggie McKee
Matt Rampton
Maureen Trotter
Michael K.N. Chin
Pat & Susan Harrison
Pat Schindel
Ron Grantham
Tony Wilson

E-36 Letters of Comment dated September 10, 2005 from the following:

Andrew Murray
Artemis Fire
Carol & Richard Migneault
Cheryl Gaster
D. Kent
David Hickman
David Kennedy
Doug & Susan McDougall
Esther Dombrowski-Dyck
Glenda Bartosh
James Fuhr
Joe Boguski
Julia Ravensbergen
Lorne A. Kostyshin
Roger Granville-Martin
Ron Turner & Family
Shamim Shivji, LL.B.
Terry Bilash
Terryl Faulkner
Thomas Crone
W.F. Leipert

E-37 Letters of Comment dated September 11, 2005 from the following:

Ann Turcott
Craig Heighway
Garry Lucas
Hans Schmid
Heath Onstine
Mark Gage
Michael McGlenen
Michael Miller
Mitch Thomas
David T. Todd
Mhairi Todd

Exhibit No.	Description

E-38 Letters of Comment received via Canada Post/Facsimile from the following:

Barbara O'Neil
Betty Gage
Bob Mastin
Bonnie Bowe
Brewster & Cathleen Kneen
Candace O'Connor & Alan Simmonds
Clifford W.H. Green
Colin Anderson
D. Raffa
Deanne Armitage
E. & Marie-Rose Piscia
Gay McMillan
I. & J. Dickson
Iva Kimberley
Jana McFarlane
Joan Lansdell
Landi Bledsoe
Laurie Stott
Lori Gillard
Marian E. Grimwood
Maryam Murat-Khan
Mrs. B. Clarke
Mrs. D. Galavan
Mrs. Dale Zinovich
R.S. Paulin
Tom Gowan
Vivienne parkes
WE_ACT Women Elders in Action

E-39 Letter of Comment dated September 2, 2005 from Cariboo Regional District

E-40 Letter of Comment dated August 30, 2005 from Mayor of District of 100 Mile House

E-41 Letters of Comment dated September 12, 2005 from the following:

B.A. Kennedy
Cristina Baldazzi
Donald Forsyth
Ena Cassells
J. Birch
Joan & Knud Sorensen
John Bobick
Judy Lakusta
Maegen M. Giltrow
Melissa Montague
Nicholas Swindale, Ph.D.
Pete Law
Richard Brunt
Sandi Forbes
The Luhman Family
Val Wilson
Vera Mayor

E-42 Letters of Comment from Maurice Boulanger and Chantelle Boulanger & Malcolm Ferrier

E-43 Letter dated September 12, 2005 from the Oil and Gas Commission to Stephen D. Green

Exhibit No.	Description

E-44 Letters of Comment dated September 13, 2005 from the following:

Amy Reiner
Dave Weller
Dolores de la Torre
Frank Martens
Georgetta Wuori
Glenna Pollon
Heather Beresford
Jillian Scott McIntosh
Kathy Clancy
Kimi Robinson
Mark Jospephy
Morgan McDonald
Nadine Ponzanski
Pam Woolridge
Peter & Maureen Davidson
Suki Bains
The Powell River Raging Grannies

E-45 Letters of Comment dated September 14, 2005 from the following:

Bernie Hartinger
Cheryl Wickham
Connie Thurber
F. Millbank
John McGough
Kent B. Green
Lara Smith
Robert LeBlanc
Tiia Kore

E-46 Letters of Comment dated September 15, 2005 from the following:

Adrienne Montani
Al Goertzen
Angela MacKay
Ann Grant
Bob Hetzel
Brian Morgan
Cathy Marumoto
Cheryl Power
Cora Arguelles
Dan Dittrick
Darlene Heath
Dave Glaze
Gail Haddad
Gayle Gavin
James Roy
Jane Boxer
Jane K. Harper
Jennifer Browen
Karen Ho
Karen Maurage
Keith Vickers
Kent B. Green
Kin Lo
K.J. Vandenberg
Lara Smith
Liliane Karnouk
Linda Kovach
Livio Susin
Lori Bruneau
Louis Zuccato
Lura Osborne
Michelle Wishart
Mike Sessions
Murray Soder
Patricia Sedgwick
Rita Beiks

Exhibit No.	Description

Joan & George Sabo
Joanne Pulis
Joni Howe
Rob Francis
Traci Goertzen
Vic Tait

E-47 Letters of Comment received September 15, 2005 via Canada Post/Facsimile from the following:

A. Charles
J. Weidenbruch
Jonagh Fairbrother
M.J. Verigin
Marilyn Sayers
Rita Welleland
Scott Wilson
Sheila Wallace
Vivian E. Charles
World Federalists of Canada

E-48 Letters of Comment dated September 16, 2005 from the following:

Adrian Palmer
Brennan Anstey
Bryan & Janet King
Don & Rosemarie Woods
Dora Kolody
Earl D. Marsh
Freyja ManySkies
Hadas Level
Isabelle Somekh
Jack Greenwell
James Dimas
Janet Forsyth
Jenn Errico
Jeremy Jacob
Jim Edmondson
Jim V.
Krishna Mattu
Kimberly Goertzen
Larry Kazdan
Laszlo Gati
M. Milne
Madeline Bruce
Mrs. Florence Platerson
Robert F. Whiteley
Romilly Cavanaugh
Sherri Wretham
Spence Johnston
Susanne Shaw
Wesley Knight

E-49 Letter of Comment dated September 7, 2005 from RSM Drafting Services Ltd.

E-50 Letter of Comment dated September 6. 2005 from Angus Davis, Councillor, City of Cranbrook

Exhibit No.	Description

E-51 Letters of Comment received via Canada Post/Facsimile on September 13, 2005 from the following:

Alfred Hieculak
E.M. McEwan
E.R. (Ted) Grimwood
Eric Creber
Fraser Information Society
Gladys Hay
Grace Kosicki
J. Goldammer
Odette Hieculak
Phyllis J. Cannel
T.L. Sadlier-Brown
Terry J. Biggar

E-52 Letters of Comment dated September 17, 2005 from the following:

Barrie McLachlan
Brent & Stacy Campbell
Bruce Macdonald
Dimitri Dedes
Eloise Carbone
Ian Giles
Isabelle & Victor Ainley
Jacqueline Golsby
Lara Smith
Lorne Fredrick Szmek
Roger McNamara
Tod Anderson

E-53 Letters of Comment dated September 18, 2005 from the following:

Aidan C. Gordon
Brian Kossey
Brian S. Moorhouse
Christopher Coward
Dorienne Jaffe
Jason Lewko
Laura Millar
Michelle Cole
Richard Riach
Tracy Bowdige
Vivian Donnan

Exhibit No. **Description**

E-54 Letters of Comment dated September 19, 2005 from the following:

Allison Dunn
David B. Tynan
David Takishita
Douglas Hood
Evelyne Forbes
Garrett Anstey
Giorgio & Doreen Rescigno
James Lineger
Joe & Margaret Palesch
Larry Walske
Orvil & Helen Patzwald
pat Bennett
Patricia Cocksedge
R & M Aldus
Sam Meisel II
Sandra Pottle
Stan Grimson
Ted & Lorraine Ault
Tracy Porcelli
Valerie Ng
W.W. Shewchuk

E-55 Letters of Comment received September 19, 2005 via Canada Post/Facsimile:

Catherine Kraetch
Dave & Eleanor Henn
James & Eileen Reed
Joe Farrell
Walter & Shirley Mitchell

E-56 Letters of Comment dated September 20, 2005 from the following:

Adriana Addison
Alistair MacKay
Allen Pasnak
Andrew Larcombe
Barbara Cullen
Barry K. Morris
Barry Wilkinson
Bente Nielsen
Bill Sample
Brent Forester
Carles Roch-Cunill
Chris Ayling
Chris Harris
Chris Crowther
Christopher Stephens
Chrystal Ocean
Clinton
Curtis Spring
D.W. Arland
Dana Owen Still
Dr. Dallas E. Hinton
Fred Gietz
Fred Rathje
Graham Elder
Greg Barkovich
Jake Bornstein
James Burns
Jeff Nield
Joan Fleischer
Joan O'Connor
John Corry
John Henville
Karen Larsen
Karin Wickson
Kelli Gallagher
Keren Freed
Larry Kuehn
Lisa Desandoli
Lisa Penney
Marcell M. Pavan

Exhibit No.	Description

Dave & Jackie White
Dawn Steele
Donald G. Munro
Doug Brown
Norma Buckland
Pat Robertson
Peter Narsted
Peter Robson
R.A. Lesar
R. Gallow
Rene Poulin
Rick/Autocraft
Rob Baxter
Rob Sinclair
Rodney Cottrell
Rodney Neudorf
SWade Appenheimer
Wend Podgurksy
Marjorie McDougal & Robert Furness
Mary Sherlock
Michael Proud
Mike Robinson
Ron Taylor
Ron Van't Schip
Sean Lymworth
Sheila Paterson
Steve Denroche
Steven W. Metzger
Taco Niet
Teresa McGuire
Therese Ramond
Tom & Chris Milton
Vene Lambourne
Vince Silva
Yulia Stange

E-57 Letters of Comment dated September 21, 2005 from the following:

Andrew Asfalk
Anisah Madden
Audrey Reinson
Barbara Allan
Barry Morley
Bhupinder Mattu
Bill Weaver
Bob Telling
Bonnie Edgar
Bradley Bailey
Bruce Bingham
David DeWitt
David Simms
David Tynan
Don Cavers
Dr. Christina Mader
Garry Walsh
Heidi Bolliger
Jason Meroniuk
Jobe Hayes
Joseph Main
Karen L. McKean
Kathaleen Neufeld
Kathi Birosh
Lane McDonald
Lloyd Irwin
Lynn Smyth
M. Downie
Maggie Humeny
Michelle Beam
Neil K. Dawe
Otto & Lynn Oltmanns
Robert Kraljii
Robert Smith
Robin Stuber
Ryan Rawson
Shelley Micholuk
Stuart Richardson
Terry Webster
Travous Quibell
Vic Foote

Exhibit No. **Description**

E-58 Letters of Comment received September 21, 2005 via Canada Post/Facsimile:

Bill McEnery
Flora McIntyre
Laurie Page
Mary & James Evans
Richard Lowe

E-59 Letters of Comment dated September 22, 2005 from the following:

Benjamin Anderson
Bill & Aileen Orthner
Bill Horne & Claire Kujundzic
Chad Rickards
Cindy Smaha
Corrie Murray
D.C. Mong
Diane Kyryluk
Elana Dean
Ellen Williams
Erhart & Berenice Kreuzinger
Freya Scheel
George Loeppky
Harvey Lajeunesse
Judy Gill
Kathy Schroeder
Keith Fitzgibbon
Kylee Hamilton
Lisa Kennedy
Manfred E. Stief
Marjorie Lewis
Miranda Luttmerding
Mr. & Mrs. Murphy
Nancy Black
Renee Ardill
Shaun Leoppky
Shawna Smith
Susan Richards

E-60 Letters of Comment dated September 23, 2005 from the following:

Angus McPherson
Brian Caldwell
Casey Cowan
David Frier
David Larose
E.L. Heeren
Erhart & Berenice Kreuzinger
Eva Filipiak
Fernando Seriosa
Garry Walsh
Gary Collins
Helen Garry
James Williams
Jay Hayashi
Jean Macleod le Cheminant
John D. Griswold
Malcolm Elliott
Marlene del Hoyo
Nikiki Pulla
Paul Arnel
Peter Manson
Rebecca MacDonald
Rob Florio
Ron Van't Schip
Ron Y. Kornfeld
Shane Stothert
Sherri Wretham
The Sutton Family
Taivo Evard
Tim Crossin
Veronica Phipps
William Heavenor

Exhibit No. **Description**

John D. Marchant
Karl Gray
William Wong

E-61 Letters of Comment dated September 24, 2005 from the following:

A. Mons
Anne Maria Fulop
Brad Bossack
Dan Ferguson
Daryl J. Clayton
Dorothy Miller
Elaine Hatch
Gerald Udson
Gord Wilson
Hermann Meyer
Honor Jones
J.L. Oja
Jim & Rhonda McDougall
Jing Vance & Brent Vance
John A. & Susan J. Barrett
Josiane Ochman
Kathie J. Oud
M & H Hillert
Mariusz Petrykowski
Mark Groen
Mary & Harry Hill
Matthew Alexander
Michael Kruse
Noreen Hawksworth
Paul Tones
Richard Smiley
Steve Coffin
Terri Lube
The Hamiltons
Tinus Boer
Waren Chapman
Wendy Bergerud

E-62 Letters of Comment received via Canada Post/Facsimile from the following:

Jean Archer
Joe Dan Turner
John O'Grady
Judy McKee
Lynn Douglas
Melvyn Monsell
Michael & Aase Levy
Michael Pearce
Ron & Jean Sweetland
Rosemary Sinclair
Shirley Dishaw
Tracy Teeple
Anonymous

E-63 Letters of Comment dated September 25, 2005 from the following:

Barbara Aylett
Brian Stovel
Chris & Evelyn Thomson
D. Gagnon
David & Madeline Sutton
David Popp
Edward Infanti
Eileen Kosior
Eric Kunze
Evelyne Forbes
Heather Allen
Heather Oishi
Ian MacLean
James Doll
Jim Kinzel
Joan Sturdy
John Fulop
Ken Birch
Laraine & Dale Tellman
Lesley Moore
Linda Wassell
Liz Fox
Marianne J. Dupre
Shirley Kavaloff
Susan Davenport
Yvonne Morrish

Exhibit No. **Description**

E-64 Letters of Comment dated September 26, 2005 from the following:

A.S.N. Smith
Adina Lyon
Anna Heavenor
Arend & Conny Stamhuis
Barb Bunz
Bev Dawson
Bill Prouten
Bob Hansen
Brian Kennelly
Bruce Bingham
Bruce Macdonald
Bruce Scott
C. Mallis
C. Plourde
Carol Fisher
Carold Judd
Carollyne Conlinn
Clayton Cunningham
Colleen O'Neill
Cyril Beaulieu
Dale Berg
Dan Murray
Darcy Franklin
Dave Haine
David Sills
David Wieler
Debra Koecher
Dell Meredith
Dennis Weyman
Dermott Wilson
Diane Dougan
Diane Haynes
Diane Michaels
Don Sugden
Donald J. Cunningham
Dr. Phillip Harding
Earl Steele
Elizabeth Atking
Ellie O'Day
F. Dean Wilson
Florence Comtois
Frank Mitchell
Fred Rogger
Gary & Freda Bateman/William Dickinson
Judy Reeves
Judy Wong
Karen Fyles
Kate Miller
Kathleen Froese
Kathleen Woodley
Katie Ross
Ken Olive
Kim Nelson
Lea Langford
Lisa Cameron
Lyle G. Nesbitt
M. Durnie
Margaret Petsul
Maria Hedderson
Marie Elmore
Marija Cvenkel
Marilyn Kendall Smith
Mark Nelson
Marlene Rosner
Martha Waldon
Martin & Anna Eastman
Michael Greene
Michael H.T. Fall
Michelle Black
Mike Landers
Mike Nickerson
Nancy Buchanan
P. Sumner
Pat Miller
Paul Jensen
Peggy Cunningham
Professor Michael Keefer
Randy Apps
Ray Blackmore
Ron Krickan
Ryan Olson
Ryan Ternier
Sally Windley
Sarah Wilson
Saul Arbess
Hannon Mark
Herrie MacIvor
Suan H. Booiman

Exhibit No. **Description**

Geri Smith
Gerry & Ruth Luck
Gerry Kilgannon
Gregory McCay
Jacqui Tremblay
Jill Newman
John Stiles
Judy Minion
Susanne Shaw
Susie Ambrose
Suzanne Kimpan
Tania Fuccenecco
Teri Mooring
W.D. Jamieson
W.G. Smith

E-65 Letters of Comment dated September 27, 2005 from the following:

Alan Mackworth
Albert Hoglund
Ale Waterhouse-Hayward
Alex Lisman
Ann Crowley
Brent A. Palmer
C. Scott
Carrol Turvey
Darren Hauck
Dick & Gloria Robison
Doris Dimock
Doug Brown
Drew Larsen
Esa Kuusisto
Eva Marchant
George & Goergia Wickham
Glenn Smith
Grace MacDonald
Gregory Kerr
J. Daniel Horovatin
James Bateman
James Mecham
Jean Birch
Jeff Delwo
Jennifer Roberts
Joanne Krickan
John Alton
Joyce Martin
Joyce Sprietsma
Karen Billett
Karin Bourget
Katherine
Ken Fergusson
Kris Werner
Kurt Pedersen
Lauren Ramsay
Leon Davidoff
Linnett
Lori Stadel
Lynn Cvitko
Margaret St. Aubin
Maxine Dutour
Mike Stewart
Mike
Nadine & Dan Nichel
Onkar Rajora
Patrick Brian Colgan
Rod Moorcroft
Saif Sayani
Sharron Lee Gardner
Sherry Mitchell
Sue Wilson
Trish Fuccenecco
Wayne MacGregor
Wendy Forrest

Exhibit No. **Description**

E-66 Letter of Comment dated September 21, 2005 from the City of Port Alberni signed by Mayor Ken McRae

E-67 Letters of Comment dated September 28, 2005 from the following:

A.A. Brown
Ann Daskal
Bert Slater
Carolann Glover
Cecil Robinson
Charles Bailey
Cindy Salamine
Colleen Burns
Colleen Murphy
Dale Norman
Daniel Holburn
Darrell Harvey
Dave Stefiuk
Doug Kinna
Edna Park
Emily Walter
Ennia Cundy
F.W. & D.C. Knox
Frank Thompson
Gail. Adams
George & Marilyn Atha
George Heyman
Gerry Pelletier
Holly Pender-Love
Jackie Santa
Joan Postnikoff
Joanna Koczwarski
John Fraser
Julie Hardy
Katheryn Kennedy
Kathy Silversides
Ken Bryden
Lorna Gentry
Lorrain Jordan
Margaret Klimia
Marge Johnson
Marguerite Hall
Marianne Smith
Mark Galarneau
Marny Grafton
Mavis DeGirolamo
Patricia Fritzel
Patricia Yavis
Patrick Colgan
Patrick Dubois
Paul Dore
Pearl Perehudoff
Pete Cassidy
Ray & Anne Rust
Regan Duckworth
Rodney Neudorf
Ron Storm
Roni Knutson
Ruth & Ed Wiebe
Sue Powell
Tome Hsieh
Tony Sprackett
Travis Hess
Vera Kristiansen
Walter Boehene
Walter Wilson

E-68 Letters of Comment dated September 29, 2005 from the following:

Adele McIntyre
Barb Peters
Barbara Hay
Barry Brazier
Bernie Abromaitis
Bert & Gladys Evans
Joanne Circle
John & Marion Corless
John Bot
John Malcolmson
Judi MacGillivray
Judy Clerke

Exhibit No.	Description

Bob Wilson
Brian Howard
Brian Shantz
Bruce Gates
Carol McGregor
Carol Suggitt
Carolyn Johnston
Cindy Bryson
Cindy Karl
Colleen Buchanan
Colleen Carey
Cuthbertkn
D. Fleming
Dave Duprey
David Hart
Dennis McConnell
Dorine Lamarche
Dr. & Mrs. Fernand Williamson
Earle Peach
Ed Tanaka
Elaine Rudniski
Eleanor Calderwood
Em Graham
Eva Sharell
Frances Lepine
Fred Kristmanson
Gail Cruickshank
Gary Werk
Georgina McKee
Gerry Kilgannon
Gerry Masuda
Greg Hoover
Gudrun Langolf
Hanny Pannekoek
Helen Edstrom
J. Makhan Dube
Jack Kikstra
Jackie Hendrix
Jan Westlund
Jane Harper
Janice Gobbi
Janis Green
Jennifer Johnston
Jessie Paul
Jim & Bonnie Overland
June Ross
Karen Magill
Kathy Marinov
Kerlie McDowall
Kevin Maser
Kim Halverson
Krystal Madill
Larry Anderson
M. Davis
Madeline Bruce
Marcela Mrnka
Marilyn Hannah
Marilyn Young
Mark Ekelund
Marlene Lang
Maureen & Tony Simmonds
Merlin Moss
Millie Wison
Mitzi Arthur
Mrs. Marjory I. Ward
Pamela W. St. Thomas
Paul Elworthy
Paul Price
Peter Walsh
Rea
Rita & Michael Taenzer
Rita Dawson
Rob Upton
Robert P. Stoddard
Robin Kirby
Rod Spruston
Ron Watteyne
Ryan DeCorby
Sandi Wingrove
Sara Morgan
Saul Arbes
Stacey Hendrix
Stephanie McDowall
Steve Neish
Susan Dickenson
Susan Gage
Tracey Ferguson
William & Georgina Atkins
William Mooney
Woody Woodard

Exhibit No.	Description

E-69 Letters of Comment dated September 30, 2005 from the following:

Al Henderson
Anonda Berg
Barbara Allen
Barbara Hinchliffe
Betsy van Halderen
Bill & Joan Burke
Carol Bjarnason
Carol Boothroyd
Chris Good
Clint Meyers
Dan
Dave Ages
David Dumaresq
Deanna Carrothers
Debra Scott
Derek Moscato
Don & Veronica French
Doug Currie
Edna Curtis
Freda Knott
Gebhard Pfeiffer
Gerard E. Deagle
Gina Devlin
Gordon Flett
Howard Dancyger
Ivona Vujica
Jack Moss
Jackie Prince
Jan E. Muller
Jan Goodwin
John Stewart
Karla Pivarnyik
Kathy Stewart
Laraine Shedden
Laurel Anderson
Lynda Ellis
Marguerite Hall
Marilyn Smillie
Melanda Schmid
Melody Wollen
Mervyn Nicholson
Mike Townsend
Monica Carey
Monty Walden
Murray Martin & Laarni de los Reyes
Myrna Campeotto
Paul McIsaac
Perry Haddock
Peta Kelly
Phyllis Janeway
Reba Boyd
Rodger Oakley
Sabine Pfeiffer
Scott Conway
Shirley Shorten
Susan Stefanyshyn
Terrence R. Hanna
Tim Jacob

E-70 Letter of Comment dated September 29, 2005 from Dr. Joan Russo

Letter dated September 30, 2005 commenting on the Intervenor meeting held to have input into the process for accessing the application made by the Kinder group

Letter dated October 1, 2005 commenting on the Intervenor meeting

Exhibit No.	Description

E-71 **Town of Gibsons** – Email dated October 2, 2005 providing a copy of the Emergency Resolution passed by the Union of BC Municipalities

Email dated October 2, 2005 from the Mayor of Gibsons to Carol Greaves providing a copy of the Emergency Resolution passed by the Union of BC Municipalities

Email dated October 3, 2005 from David Bodnar of Terasen Gas regarding the Emergency Resolution passed by the Union of BC Municipalities

Email dated October 3, 2005 from the Mayor of the Town of Gibsons to David Bodnar, Terasen Gas

E-72 Letters of Comment dated October 1, 2005 from the following:

Andrew Kenyon
Andrew Ng
Annie Ingram
Arthur Kube – Council of Senior Citizens Organization of BC
B. Holtskog
Barry Wheaton
Betty Ann Prier
Brenda Millar
Brendan Scott
Caroline Schellenberg
Christi York
Dave Grundy
David Bowie
Douglas R. Gordon
Glenn Grant
Heather Ballard
Jacquie & Dennis Lynes
Jeff Payne
John & Margaret Spruce
Kathy Edwards
Ken Murray
Lea McDermid
Marguerite Kennedy
Melva Grant
Milvia Hayman
Mrs. Myra Magson
Nancy Reger
Rob & Susan Green
Robert Browning
Roger Stallwood
Ruth Hufty
Sharon Browning
Shawn Leclair
Stefanie Pfeiffer
Sue Tomio
Trevor & Denise Smith
Victor Grundy
William Plut

E-73 Letters of Comment dated October 2, 2005 from the following:

Alexandra Kirchner
Angel Richards
Barbara Berger
Bob Fisher
Bob Thompson
Brian Morissette
Candice McMahon
Christine Rempel
Kent Donaldson
Kevin Bao
Kim Dunlop
Laurie Sweet
Len Dimery
Leo Morissette
Leona Rushant
Lesley Lee

Exhibit No.	Description

Connie Thurber
D.R. Braithwaite
Darryl Franta
Dave Morrison
David Lewis
Debroah Collings
Dennis Larcombe
Donna Gault
Donna Grobell
Edward Lafleur
Edwin & Shirley Jerke
Eric Allen
Gary Blake
George Malfair
Gerry & Leslie Walerius
Glenda Barker
Gord McGrath
G.P. Swaren
Hazel Parker
Heather Malcolm
Hugh Jenney
I.A. Peters
James C. Blake
James Wymer
Jim Lockhart
John Little
Judy Becker
Karen E. Rice
Karen Nobel
Ken Noga
Kenneth P. Burke
Leslie Schulze
Linda Veenhof
Lisa Penney
Margot Gagne
Marie Campbell
Marion Barker
Martine Millard
Mary Ries
Mary-Ellen Hutter
Meg Stevens
Nancy Czigany
Neil Pys
P. Krell
P. Garnett
P. Halley
Patricia & Gary Adair
Phil & Lily Marquardt
Ralph Moorhouse
Randy Andrews
Rob Murray
Robin & Bill Garrett
Ron Jeeves
Roy Daniels
Sarah Bethell
Sarin Moddle
Shirley Cotter
Stephen W. Love
Tom & Marie Dick
Truman Kennedy
Wallie Marzoff
Yvonne Daly

E-74 Letters of Comment dated October 3, 2005 from the following:

Al Grundy
Al Kinsman
Andrea & Mike Droege
Anne Combe
Arnet Tuffs
Auriel Souchuck
Bernice Crockett
Betsy French
Beverleigh S. Cassidy
Bill & Shirley Giachino
Bill & Judy Frederick
Bill Hamilton
Brenda Beauchene
Ken House
Neil Kennedy
Keven Doyle
Kevin Peltz
Kim Buchan
Kirstin Menzies
Kurtis Scramstad
Larry & Diane Feere
Larry Kazdan
Leslie Molnar
Leslie Wilson
Linda & Jack Chisholm
Linda E. Menzies

Exhibit No.	Description
	Brenda Jordison
	BrendaLea Birch
	Brent Lowther
	Bruce Lyster
	Byron Beauchene
	Cathy Bolton
	Charles Burns
	Charlie Dickson
	Cheryl Smith
	Chris Rose
	Conor Mackenzie
	C.W. Petersen
	D.E. Johnson
	D. Boisvert
	Daniel Bouman
	Daphne Wilson
	Darcie MacFronton
	Darlene Burns
	Dave & Gayle Burgess
	Dave Scott
	David Laithwaite
	Donelda Massullo
	Doreen Boal
	Dorothy Sly
	Doug & Judy Conners
	Douglas Hewitt
	Douglas MacLean
	Dr. Paul Deelman
	E.L. Heeren
	Ed Hulks
	Edith Picard
	E Jean Verner
	Elaine Hodgson
	Eleanor Haydock
	Elizabeth Rose
	Ellen Facey
	Fran Campbell
	G. James Rose
	Gail Haya
	Gary Barr
	Gary Filewich
	George Favre
	Graham Hall
	Gwen Monteith
	Harold M. Wiest
	Heather Maddigan
	Helen Sears
	Linda Rooker
	Lisa Cimaglia
	Lori Ruggles
	Luke Olver
	Lyn Adamson
	Lyn Oram
	Lynda Hurst
	Malcolm MacKay
	Marc Belcourt
	Marcia Mitchell
	Margaret Lowther
	Marje Umezuki
	Mark Forsythe
	Maureen Forrest
	Michael C. Smith
	Michael Dumaresq
	Michael Kuruliak
	Mike Lane
	Gordon B. Hewitt
	Mr. & Mrs. William Zimmerman
	Mrs. M. Hudson
	Norma Hewitt
	Nadine Simonis
	Nikkim Potesta
	Norma Emerson
	Owen Gaskell
	Pat Tardif
	Paul Rainville
	Peter Kelley
	Peter Whiteside
	Rachel Ann Lamont
	Richard Weatherill
	Riches Wong
	Robert & Irene Hadley
	Robert Waite
	Roes Garden
	Rolland Miller
	Ron Bar
	Ron Deaton
	Ron Sheffield
	Ronda Houlind
	Ross McLaren
	S.G. Sweeney
	Sam McCready
	Sharon Affeld
	Sharon MacDonald
	Sharon Vevea

Exhibit No. **Description**

Henry Schnee
Herb Reesor
Ian Kind
Irene G. Bjerky
Ivor M. Watson
J. David Smith
J. Milne
Jack Blackhall
James A. Peters
Janice Rivest
Jay Lowther
Jean Godmaire
Jean Gordon
Jean Laurie
Jeff Laurie
Jenn Sowa
Jenylyn MacDonald
Jill Musser
Jim & Glenda Beggs
Jim Pinares
Jo-Anne McNevin
John Ireland
John Young
Johnny Mac
Jo Johnston
Judy Bjornson
Kelly Lee Tarzwell
Sheila Thompson
Sheilagh Best
Sheldon Duff
Shelly Foster
Silas White
Spomenka Majstoric
Sr. Barbara Borts
Stephen Forster
Sue Creba
Suki Dhillon
Susan & Charles Stafford
Susan Park
Terence William Boal
Teresa Bickert
Terry D. Molnar
Terry D. Stevens
Tina Phillips
Tony Culos
V. Suffron
Vivienne Crebo
W. Cameron
W.C. Hill
Wendy Twomey
Wilfried Brandl
William McKee
William Pugh
Yvonne Dixon

E-75 Letters of Comment received via Canada Post/Facsimile:

A. Charles
Angelika Mertz
David DuBois
Glen Y Margaret Jeffrey
J. Weidenbruch
J.C. Harvey
Jonagh Fairbrother
M.J. Verigin
Marilyn Sayers
Rita Welleland
Ruth Webber
Scott Wilson
Sheila Wallace
Vivian E. Charles

E-76 World Federalists of Canada - Petitions

E-77 Letter of Comment received September 12, 2005 from Elisabeth Baldazzi

Exhibit No. **Description**

E-78 Letters of Comment received October 4, 2005 from the following:

Adam Nicholls
Agnes Geiger
Alison Yale
Allan Jones
Andrea Sword
Anita Roy
Annette Bertrand
Arnold Penno
B. Stoward – BCOAPO Cariboo-Yellowhead Region
Barbara Smith
Beverlee Birce
Beverley Stone
Beverly Nelson
Bob Garner
Bonnie Krakalovich
Brad Barton
Brenda Kuecks
Brenda Sarvis
Brian D. Johnson
Cal Burkosky
Candice Shaw
Carl Gowans
Carol Penno
Cathy Burkosky
Cathy Gordon
Charles Bertrand
Charolotte Bouvier
Cheryl Perdue
Chris Olausen
Cindy Fiorentino
Clara L. Smith
Cole Dudley
Curtis Symmes
Daisy Mah
Dale Hynes
Dana Woolliams
Danielle Nielsen
Daphne aterson
Darryl Russell
Daryl Poole
Dave Barratt
Dave Robinson
Jeanette M. Dagger
Jessie & Blake Panchishin
John Harding
John Hood
Joyce A. Chong
Judith Beer
Judy Holman
Judy Sens
K. Hurley
Ken Dresen
Kenneth M. Atkey
Kerri Lynn warren
Kim Bennett
Kim I. Briscoe
Larry Taylor
Laurence Manning
Linda Doig
Linda Norris
Lois V. Milligan
Lottie Bonin & Joyce Cook
Margaret Nagel & Beverley LaRocque
Lynne Forrest
M. Symmes
Malcolm F. Marshall
Marilyn Atkey
Marilyn VanDongen
Mark Peckford
Matt Lynes
Michelle Colussi
Mike Richardson
B.R. Champagne I.
Murray Perret
Nicholas Buck
Norma MacPhee
Patricia & Duncan MacDonald
Paul Lavallee
Peter Neudorf
R. Moxam
Rachel Grant
Richard C. Horch
Richard P. Horch
Ron Eyben

Exhibit No. **Description**

David Sims
Denis Perry
Don & Marilyn McLean
Don Estrada
Don Grant
Donald G. McPhadyen
Donald Robb
Donna Vidal
Douglas Koyama
Ellen – Prince George
Eric Arnold
Flora Rositano
G. Kramer
Gail Blatchford
Gladys & Ed Hrechuk
Gladys Hrechuk
Gordon Bell & Victoria Maxwell
Heath Colliar
Heather Anderson
Henry Ekelund
Howard Richardson
I. Wilma Swain
I'Lee Tara
Jaime Montana
Janet Lacroix
Ron Skene
Ron Williams
Rosa Reid
Ross & Joyce Campbell
Ross Muirhead
Roy & Machiko Budai
Roy Salter
Sally & Jim Hodgson
Sally & Steve Van Ingen
Sandra Pentland
Sandra Widdershoven
Scott McKay
Shannon Phillips
Sharon Lemp
Sheldon Dwyer
Sherri Payne
Susan Biagi
Suzanne Hewitt
Sydney Martin
Terri Wright
Verna Woodall
Vivien Warstat
Wayne Williams
William Wardley
Wilma Ferguson
R.H. Yetman
Zach Robertson

E-79 Letters of Comment dated October 5, 2005 from the following:

A. Attwood
Aaron Hoolsema
Adam Maryanovich
Adrianne Thomson
Adrienne Friensen
Adrienne Leduc
ahcurrie@webtv.net
AJ & EA Jordan
Al & Linda Smythe
Al Brochu
Al Dinis
Alan Forseth
Albert and Elizabeth Lafrenier
Alex Dresser
Alex Eged
Alex Watson
Alex.G.Kravchenko
Joseph & Mary Kapuszta
Josephine McNeilly
Joy Allbright
Joy Soutar
Joyce & Frank Danner
Joyce Dubin
Joyce K. MacDonald
Juanita Hyde
Jude Campbell
Judi Bates
Judith Akins
Judy Hayes
Jules Bodner
Julie Bennett
Julie Faye Parker
Julie Ovenell-Carter
Julie Thomson

Exhibit No.	Description
	Alf Henningsen
	Alfred & Violet Cordoni
	Alison Taylor
	Allan & Susan Asaph
	Allan & Mildred Thir
	Allen York & Jill Lawton
	Alma & Doug Brenton
	Amy Jones
	Ananda Lazare
	Anar Janmohamed
	Andrea Pearce
	Andrea S. Fredeen
	Andrew C. Lucko & Helen E.Schoono
	Andrew Jackson
	Andrew Kenyon
	Andrew Libbiter & Meryl McDowell
	Andrew White
	Angela Giannetti
	Angie & Bert Sonntag
	Anika Yuzak
	Anita Eng
	Ann Dyble
	Ann Leeson
	Ann Willsie
	Anna Wright
	Anne and Travis Judson
	Anne Mancell
	Arlene Garman
	Arlene Huska
	Arlette Slatta
	Arline Garcia
	Arne Bryan
	Arthur Bridge
	Arthur Doerksen
	Ashley Dermer
	Atul Hans
	Audrey Henbury
	Aulda Jensen
	Anderson Lawrence Watson
	Barb Charlton
	Barbara Chalmers
	Barbara Dafoe
	Barbara Farle
	Barbara Johnson
	June & Reo Jerome
	C. Fur
	K. Laszlo
	K.A. Ellis
	Kabir Ebrahim
	Karen Copp
	Karen Fox
	Karen Heys
	Karen Newman
	Karen Opas
	Karrie Burns
	Kathee Rilkoff
	Katherine Farris
	Kathleen Pearson
	Kathryn Woodward
	Kathy Heisler
	Kathy Porpaczy
	Kathy Thomas
	Katie Frigault
	Keith Alspaugh
	Keith Wilkinson
	Kelli Renwick
	Kelly Jago
	Kelly Klein
	Ken & Anne Sutfin
	Ken & Donnie Aquilon
	Ken Dresen
	Ken Pool
	Ken Sykes
	Kenneth Schmidt
	Kerrie Desjardins
	Kevin Lusignan
	Kevin Randhawa
	Kim Clark
	Kim Haberger
	Kim Jones
	Kornelia Meszaros
	Kunsra Breckterfield
	L Clifford Kindree
	Lane Beaton
	Lani Royce
	Lani Sheldon
	Lara Smith
	Larry & Audrey Engstrom
	Larry Smith
	LaTiesha Fazakas
	Laura Beaton

Exhibit No. **Description**

Barbara Kostopoulos
Barbara Moore
Barbara Scott
Barry Mclean
Beautybyimpairment@gmail.com
Belinda Lyons
Bernie McCallum
Bernie Villeneuve
Bert Brownsmith
Beth Reynolds
Betty & Dave Hunt
Betty Eckgren
Betty Fawcett
Betty Lee Sinclair
Betty Moretti
Bev Clkoutier
Bev Pride and family
Beverli Barnes
Beverly
Bill & Linda Thompson
Bill & Norma Cannell
Bill & Eileen Lee
Bill & Lesley Virtue
Bill & Mary Hustler
Bill Thompson
Bill Tkach
Bill & Karen
Bob & Sue Tritschler
Bob & Gail Hais
Bob & Isobel Francis
Bob & Maren Readings
Bob & Rita Lemon
Bob Fair
Bob Houston
Bob Ivens
Bob Mackay
Bob Mcgill
Bob Porter
Bob Salcke
Bob Stewart
Bonnie Worthington
Brad Zarikoff
Brenda & Wally McMorland
Brenda Laing & Heather Hesson
Brenda McDonald
Brendan Moran
Brian Biddlecombe
Laura Derwentwater
Laurie MacDonell
Laurie Rockwell
Lawrence Williams
Leanne Baugh-Peterson
Lee & Marilyn Engman
Lee Goodman
Leeann Cochrane
Leo Hillairet
Leo Jansen
Leo Verstraete
Leonard F Bradley
Leonore Halkett
Lesley & Hugh Dobbie
Leslie Mildiner
Liane Gagnier
Lillian Juk
Linda Douglas
Linda Fornwald
Linda Gourlay
Linda Montemurro & Elgin Richards
Linda Naiman
Linda Theodosakis
Linda Trommeshauser
Lindy & Jeanette Mikkelsen
Lisa Dionne
Liz Hendriks
Loesha Zeviar
Lois Lewis
Lois Vatcher
Lori Lautermilch
Lorna J. Kirkham
Lorraine Boone
Louise & Ford Warner
Louise Gale
Louise Kalutycz
Louise Perry
Lucy Egers
Lydia Hoffman
Lynda & Margaret-Jean Pitt-Brooke
Lynda Newson
Lynn Acheson
Lynn Finter
Lynne & Ken Carey & D. Nelson
M.R. Paton

Exhibit No. **Description**

Brian Brown & Family
Brian Christopherson
Brian J. Desrocher
Brian Ringrose
Brian S. Moorhouse
Brian Skare
Brian Stewart
Bridget
Bridgid Warner
Broom Annette R.
Bruce Burlington
Bruce Gordon
Bruce King
Bruce McKinnon
Bryan & Judy McFarland
Bryan Beaulieu
Bouvier
C. Franklin
C. Middelkoop
C. Tilney & W. Emigh
Cam Craig
Candice Dowhaniuk
Carmen Elduayen
Carol Abernethy
Carol Christian
Carol Moffatt
Carol Suggitt
Carole Roebuck
Carole Whiteley
Carolyn and Bart De Freitas
Carolyn Morrison
Carolyn Thomas
Carroll Klein
Catherine and Mason Cooke
Catherine McLaughlin & R. Ian Mitchell
Cathie and Larry Provencal
Cathy Farrow
Cathy
Cec Scantland
Charity Young
Charlaine Shepherd
Charles Lester
Charmaine & Bert Riswold
Cheryl & Donald Kittson
Cheryl Davis
Cheryl Podgornik
Maggie McNish
Maggie
Marc Paquette
Marc Tilkin
Marcia MacDonald
Marcus Unger
Marg Norris
Margaret, Pauyl & Richard Geschke
Margaret Danby
Margaret Graham
Margaret Jones
Margaret Needham
Margaret Ostroff
Margaret Schulz
Margie Hayes-Holgate
Margot Maclaren de Lorenzana
Maria Dagg
Marie Eusanio
Marie Gibbons & Catherine Walter & Gary Weber & Janice Goodall & Tami Marcus & Ev Walter & Ken Lissimore & Randy Walter & Rudy Dick & Ashley Collins & Val Mickey
Marilyn & Grayson Laite
Marion Heffernan
Marjorie Buckham
Marjory I Ward
Mark & Chrystal Hebb
Mark Briggs
Mark Ferguson
Mark Gould
Mark Kroh
Mark Petriw
Mark Schultz
Mark Shirreff
Mark Yeoman, Daphne Locke & Kevin Ledo
Marleen Gamracy
Martin Podgornik
Martin Vondruska
Mary & Bob McNabb
Mary Jane Cowan
Mary Lou Miller
Mary Walters
Marylou Leslie
Matt Kwantes

Exhibit No.	Description
Cheryl Strachan	Matt Morrison
Chris & Bella Vokes	Matthew Kowalchuk
Chris Burrows	Matthew Stephens
Chris Hall	Maureen & Ray McElgunn
Chris McGill	Maureen Barbosa
Chris W.	Maureen Caine
Christine Beech	Maurice Ouimet
Christine Brown	Mee Lin Hong
Christine Logan	Megan Paulsen
Christine McCuaig	Mel & Josh
Chuck Dixon	Melanie Browell
Clarence Stephenson	Meryle Hillairet
Claudia Felderhof	Micheal (Mike) C Hansen
Claus Andrup	Micheal Anderson
Cliff fu Fresne	Micheal Brown
Coleen Hansen	Micheal Clee
Cora Irving	Micheal Holt
Corinne Loeppky	Micheal Neill
Craig Buvyer	Michelle Cooper
Craig Dewar	Michelle Lam
Craig Marshall	Michelle Thrustle
Curt Watts	Mike Cackette
Richter.	Mike Craig
D.C. Walker	Mike Lebrun
Dale Finch	Mike Mueller
Dale Stromberg	Mike Turner
Dan Melanson	Mike Turner
Dana Koch	Mimie Tang
Daniel Sullivan	Mindy & Richard Fast
Daniel	Miyeko Homma
Danielle & George Perry	MJ Jordan
Daphne Shepherd	ML & G. M. Munroe
Darlene Gibson	Monica Granadino
Darlene Smith	Monica Little
Darrell Evans	Monique Roukema
Darrell Robinson	Morris Street
Darren Beairsto	Mr & Mrs. Harry Ng
Darren Thornton	Mr. & Mrs. C.R. Wilkins
Darryl Carracher	Mr. & Mrs. R. G. Hoadley
Daryl	Mr. & Mrs. A. Michel
Dave Decarlo	Mr. R. Ballard
Dave Glover	Murdo A. Mackinnon
Dave	Murray J Welte
David & Colleen Wardell	Muscatlady@aol.com
David. A. Bain	N.Haylett
David & Patricia Buxton	Nadja Rence
David Belando	Nan Watson

Exhibit No.	Description
David Durrance	Nathan Hall
David Edwards	Nena Hansen
David Klein	Nicole Moen
David L. Griffin	Nigel Matthews
David Popoff	Nikos Theodosakis
David Smith	Nnifer Ferris
Dbrekke1@telus.net	Nora Gwilt
DBurton	Noreen Warrington
Dean Aussem	Norma & E.O. Taite
Dean Cloutier	Norma Ahrens
Deanna Jenkinson	Norman Hill
Deanna Ries	P. Bjarnason
Dearle Graham	P. G. Smith
Deb Bryant	P. M. Conover
Debbie Lloyd	P. Wolfe
Debi Pister	Paddy Munro
Deborah Hamilton	Pam Postle
Deborah Long	Pamela Coates
Debra Hagblom	Pat & Mike McRanor
Denis Kushnirak	Pat Frewer
Denise Taker	Pat McCutcheon
Dennis & Gwen Anholt	Pat Mills
Dennis & Janice Day	Pat Shonwise
Dennis Dargatz	Patricia Comeau
Dennis Kay Brad & Kelly Graham	Patricia Dixon
Dennis McDonald	Patricia Kushner
Derek Frampton	Patricia McKnight
Derek Zral	Patricia Rasmussen
Derek	Patricia Renard
Desmond Connor	Patricia Roberts
Devra Samson	Patricia Rosa
Diane Eyre	Patrick Hull
Diane Ferrell	Patrick Veitch
Diane Markham	Patti Ellis
Diane S. Rampone	Paul Andolfatto
Diane Sawatzky	Paul Barbosa
Diane Wade	Paul Berntsen
Diane Williams	Paul Chow
Dianna McDonald	Paul Stouse
Dianne Adair	Paula Grasdal
Dianne Burditt	Paula Grossman
Dianne Woodman	Paula Pappajohn & Mike Caton
Dick & Helen Sleep	Paula Rogers
Dick & Marian Doorschot	Paula Rose
Don & Carol Parkes	Pauline Harrison
Don & Collen Urbanoski	Paz Inverncial
	Penny Osborn

Exhibit No.	Description
Don & Glenys Tudge	Perc2@mox.interiorhealth.ca
Don & Irene Sparks	Perry Abrahamson
Don Campbell	Peter & Suzan Guest
Don Connors	Peter A. Atherton
Don Cretney	Peter & Gail Notter
Don Ellam	Peter McLoughlin
Don G Silvester	Peter McLoughlin
Don Germiquet	Peter Skinder
Don Holzer	Petri Vartiainen
Donald & Claire Gunderson	Phil & Luci Redmond
Donald F. Deeprose	Phil Cady
Donald Zarowny	Phil Devitt
Donna & Orest Pyrch	Ping Mui
Donna Maud	R A McGladrey
Donna Nerbas	R. J. Kot
Donna Nesjan	R. G. Spokes
Doreen Miller	R. S. Chadha & Family
Dorothy & Orest Maksymiw	Rainer & Waltraut Horstmann
Dorothy & Willy Thielen	Ralph M Randt
Dorothy Chambers	Ralph Maundrell
Dorothy Nielson	Randy Kellaway
Doug Hamer	Randy Nicholls
Doug Hill	Randy Sharp
Doug Miller	Ray Brookbank
Douglas-Adam & Pamela Lupasko	Ray Steigvilas
Dr. Caroline Ferris (MD)	Ray Wanless
Dr. David R. Pugh	Raymond Stohl
Dr. Peter Austen Ph.D.	Real & Judy Laurin
Dr. Maureen Bendick	Rebecca A. Kinney
Duncan Pope	Reg Maidment
E.A. Roy and Gilles Roy	Rene Blais
E.D. Calverley	Renee Mor
William Heffernan	Rennie & Shirley Simpson
Earl & Faye Wildeman	Rev. Brian Kirby
Ebba & Gert Schovsbo	Richard Begin
Ed Thompson	Richard K. Porsch
Edie Rittinger	Richard McDermid
Edith Havig	Rick & Frances Blake
Edmund R. Bristow	Rick Callaghan
Edna Jewell	Rick Jones
Edward Yaremchuk	Rick Wright
Edward Yee	Rita Knight
Edwin Sanger	Rita Schmidt
Edyta	Rob & Susan Green
Eileen Schieldrop	Rob & Bev Mallett
Elaine Andrews	Rob Danielson
	Rob Gibson

Exhibit No.	Description
Eleanore Arkesteyn	Rob Hollins
Elinore Delf	Rob MacFarlane
Elizabeth & John Scott	Rob & Cindy Mcauley
Ellen & John Faraday	Robby Preugschat
Ellen Klootwyk	Robert & John Sellers
Emilia Antoshchuk	Robert & Joan Gray
Emily & Karl Wessel	Robert Bonderud
Emmy & Ronald Ferrie	Robert C McLaren
Eric Dodds	Robert Dennis
Erin Hubbert	Robert Gilgoff
Erne Watson	Robert Heard
Esther M. Bernard	Robert Helms
Evan Dupuis	Robert McLean
Evelyn & Al Jones	Robert Muncaster
Evelyn Martens	Robert Waters
Evert Gerretsen	Rod Lizee
Fane Stevenson	Rod McCormick
Farida Jamal	Roger & Eileen Mills
Faye Poirier	Roger & Eileen Mills
Fe McGough	Roger Adams
Fernando Von Rossum	Roger Chin
flembot@telus.net	Rolande Harrison
Fran Banks	Ron & Ruth Steeves
Frank & Patricia McKerry	Ron & Wietske Sittrop
Frank & Jan Dwyer	Ron & Charlotte Alekson
Frank Farmer	Ron Barr
Fred & Barbara Maynard	Ron Fallon & Grace Morrow
Fred & Marion Orsetti	Ron Finigan
Fred Lee	Ron Haack
Freda Sather	Ron Hodacsek
P. Ann Stanley	Ron Pyatt
Rupert	Ron Reid & Kirsten Pankow
Gail Adams	Ronald & Beverly Glauser
Gail Barron	Ronda Urquhart
Gail Danby	Rosaleen Mac Fadden
Garry Townsend	Rose Meyer
Gary Grant	Rose Westlake
Gary Hawes	Rosemary & Peter Williams
Gary Lewis	Roshni R. Singaraja, PhD.
Gary MacDonald	Rosie Jamal
George & Vera Smart	Rosina Schmidt
George Jenkins	Ross Mallory
George Sherwood	Rosswell Ferguson
George Young	Roy & Albina Morris
Georgina Clark	Roy & Elva Sheppard
Georgina Strother	Roy & Violet Gordon
Gerald Johanson	Russel Moore

Exhibit No.	Description
	Geraldine Swayze
	Gerard & Tania Batten
	Gerhard Schmiing
	Gerry Hughes
	Gillian McDougall
	Glen Breaks
	Glen Shuttleworth
	Glenn Duke
	Gloria Ash
	Gord Hemrich
	Gord Lester
	Gord McLeod
	Gordon & Cynthia Fitch
	Gordon Moore
	Grace Malm
	Graham Parker
	Grant Lowe
	Greg Buchan
	Greg Cherniwchan
	Greg Doerksen
	Greg Hatch
	Greg McLaren
	Greg Wyma
	Greta Wenckebach
	Groesch Marko
	Gunter Jaschinsky
	Guy Stanford
	Gwen. Edwards
	Coltman
	H.J. Jordan
	Hans Ruttimann
	Harry & Laura Robinson & Family
	Harry Scholten
	Harry Swain
	Harvey Gifford
	Heather & Wilson Christianson
	Heather C. Nicol
	Heather Durrand
	Heather Rozier
	Helen E. Froom
	Helen Laue
	Helen Marsen
	Helmut Burke
	Hilda Higgs
	HJ Stevens
	Howard & Edith
	Ruth Duff
	Ruth McVeigh
	Ruth Peterson
	S. Cruz & Family
	S.L. Beaton
	Salim Jaffer
	Sally Laite
	Sandi & Glen Wideman
	Sandra Chellew
	Sandra Knott
	Sandra Polinsky
	Sandra Tucker
	Sandy A. Schemmer
	Scary Gerry
	Scott Desa Zachary & Helen Chipman
	Scott Hedlund
	Sergio Petrucci
	Shane Klatt
	Shane Rothwell
	Shannon Alexis
	Shannon Turner
	Shantel Shave
	Sharon & Derrick Elliott
	Sharon Hives
	Sharron L Franklin
	Shawn Maher
	Sheila Barrett
	Sheila Gair
	Sheila Lloyd
	Sheila Macdonald
	Sheila Nott
	Shelley Kean
	Sheri Kirilenko
	Sheridan Clements
	Sherry Blanchard
	Shirley A. Wishlove
	Shirley Smith
	Simon Jones
	Simon Zhang
	Sister Margaret Wilson
	Sonia Francke
	Stan Bowles
	Stan Gabriel
	Stan Hall
	Stephannie
	Stephen Howard-Gibbon

Exhibit No.	Description
	Hugh & Ellie Stewart
	Hugh Fraser
	Ian & Rose Finlay
	iLorelle Turnquist
	Ina Paik
	Ineke McLean
	Inger & Jake Mortensen
	Inger Ottosen & Henning Ottosen
	Ingrid Vermegen
	Irene & Charles Mitchell
	Irene & Edward Yurechko
	Irene Gray
	Iris LaPlante & Bob Evans
	Isabel Evans
	Ishbel M Elliot
	J Rishel
	Barry Martin & Lois N Martin Sterling
	J. Sterling
	J.M. Ellis
	J. Quentin Methot
	Jack & Patricia Owen
	Jack Masterman
	Jack Stewart
	Jackie Scheepbouwer
	Jackie Wray
	Jacqueline Johnson
	Jacqueline M Jones & Family
	Jacqui & Derek Sewell
	Jake Doell
	James A. D. Simpson
	James Brewer
	James Fair
	James Haslett
	James T. Fyles
	Jana Ludwig
	Janet Anderson
	Janet Groves
	Janet Hong
	Janet Watkins
	Janice Carruthers
	Janis & Norm Pappin
	Jason Demidoff
	Jay Ruparelia
	Jayeson Van Bryce
	Jean & Lui Farina
	Stephen Lindsay McDonnell
	Steve Herringer
	Steven Flannery
	Steven Toothill
	Stuart Johnston
	Stuart Smith
	Suan H. Booiman
	Sue Davies
	Sue Irving
	Sunny Shiney
	Susan & Keith Clamp
	Susan C Barrett
	Susan Evans
	Susan Greenwell
	Susanne Kumar
	Suzanne Farrington
	Suzanne Sorensen
	Sybil Wahl
	Sylvia & Edward Noble
	Tammy Williams
	Tanya Cadez
	Tara Shave
	Ted Blaha
	Ted Goudsward
	Terry A. Smith
	Terry J. Ferguson
	The Council Advocacy
	The Zivins
	Thomas Edwards
	Thomas Everitt
	Thompson Marilyn
	Thomson
	Tim Ryan
	Tim Storvick
	Tim Williams
	Tina Godin
	Tobi Carlson & Ian Todd
	Todd Reed
	Tom & Kathi Cinnamon
	Tom Cocking
	Tom Lord
	Tom Munroe
	Tom Reamsbothom
	Tom Williams
	Tomm Dool
	Toni Kushner
	Toni Johnson

Exhibit No.	Description
Jean & Murray Ellis	Tony D'Andrea
Jean Ballard	Twila Bancroft
Jean L. Barnes	Tyler & Joan Perry
Jean Walker	Tyson Bartel
Jeanne Chanowski	Val Byker
Jeannette Paterson	Valerie Adams
Jeannie Bardach	Valerie Fodor
Jeff & Eleanor Bowcock	Van & Linda Reed
Jennifer Holden	Vern @ Linda Coulter
Jeremy Santa Cruz	vhmynett@telus.net
Jerry & Val Abramson	Vickie Lessoway
Jerry Constant	Victor Klassen
Jerry Reed	Victor Okunev
Jessica Macnab	Virginia Young
Jessie Lynn	W. Vandenberg
Jill Dykes	W. L. O'Dell
Jill Howard	W. McMunagle
Jill Strachan	W.R. Merrie
Jim & Grace Baugh	Waldemar & Marilyn Kisser
Jim & Heather Alton	Wally Fawkes
Jim & Amy Hockey	Walter Francl
Jim & Jean Wyman	Walter Swanson
Jim Buchanan	Wan-Phek How
Jim Hayman	Warren Thomlinson
Jim Kennett	Wayne & Lois Keil
Jim Pattison Toyota	Wayne Galvin
Jim Stuart	Wayne Hull
Jim Trethewey	Wendy Durack
Jim Woolsey	Wendy Robb
Joan Annan	Wendy
Joan K. Kindree	Wesley Warren
Joan Mathers	Willard & Yvonne Clark
Joan Press	William A Mosher
JoAnn Braem	William & Ruth Shaw
Joannne MacLennan	William D. Goddard
Joanne Mellquist	William D. O. Bees
Joanne Morgan	William Den Hertog & Family
Joe Barrett	William H. Ferris (Rev.)
Joe Konowalchuk	William Myers
Joe Pal	William Ross
Joe Stark	Wilma Barclay
Joel Meggison	William Neaves
Johanna Mills	wprobinson@shaw.ca
John & Arlene Sawchuk	Yvonne Bombard
John (Ian) Murray	Yvonne
John A Sunley	Zac
John Alfano	Zubeda Virjee

Exhibit No. **Description**

John & Louise Dillabough
John & Pamela Bell
John Artuso
John Cringan
John D. Hall
John Doerksen
John Engelmann
John Evjen
John James
John Lam
John Lang
John Mallett
John Ounpuu
John Owen
John P. Williams
John Versfelt
John Warren
Jon Tinker
Anita & Austin Hunter
Anita Eng
Brian Short
Cheryl & Donald Kittson
Cheryl Mineault
Diane Kemp
Eileen Dunning
Lynn Acheson
Martin Vondruska
Merv Miller
Peter Sanders
Sandra Roberts
Seppo & Marjean Hokkanen
Susan McDougall

E-80 Letters of Comment received October 3, 4 & 5, 2005 via Canada Post/Facsimile from the following:

A. Welch
Alexander J. Gillis
Alfred & Gertrud Sulzberger
Alfred Lehmann
Alice McLelan-Thelma Hansen –
Clara Capewell – Lois Terreberry
Aloma- Tom- Thomas Ferris
Anonymous 2
Anonymous
Anthony L. Townsend
Arthur Goldman
Gallant
Ben H. Giesbrecht
Bruce Wyder
C Dudek
Charles A. Simpson
Colleen Lee
Crystal Esaryk
Brandt
Dale R. Evoy
Donna Hossack
Dr. Ashley Davies
Edward & Isabel Thouret
Elaine & Bruce Beattie
Elsam & Richard Arnold
Joanne Fry
Joanne Loch Joe W Cook
John Alton
John C. Wemyss
JR Redfern
JR Turk
Karen E. Rice
Kathleen Walsh
Leona Gom
Leslie A. Todd
Lillian Juk
Lisa Engelage
Lloyd E. Reiner
M. Huntington
Manjinder Bal
Margaret Penticton
Margaret Schroeder
Marlene McDougall
Mary Block
Miranda See
Mottes
Mr. & Mrs. Brenan Simpson
Mr & Mrs. Dwayne Smith
Mr. & Mrs. N. Pearson
Patricia M. Rupper

Exhibit No. **Description**

G. Fraser
Georgina & Jim Causier
Gerald Watson
Geraldine Glattstein
Gerri & Lori Cook
Gordon Moore
Harold C. Shepherd
Harry Tuck
Harry Vogt
Heather Manning
Hector J. Moren
Helen Faulkner
Helen Ostermeier
Horace Lapointe
Ian Ellman
Investment Canada Resp to Harry Turk
Jennifer Sanders
Jerry & Jean Brown
Jim & Joyce Beach
Jim Pine
Joan Wright Sth Vanc Seniors Council
Peter & Christine Kowalski
Peter S Wolanski
Phil Hewkin
Phyllis A. Norris
Phyllis Tew
R. Sherwin
Randy Nicholls
RE Bernstein
Renee Picco
Richard Reinders
Robert C Miner
Robert Pulsford
Robyn Smith
Ronald W. Hyatt
Shirley Brown
Shirley L. Clarke
SL Pennock
Susie George
The Aujla Family
Tony Parker
Wendy Weisner
William D. Goddard
Win & Margarete Rompf

E-81 Letters of Comment dated October 6, 2005 from the following:

J. (Tony) Wharrie
Aarno Pehkonen
Aaron Hamilton
Adam Sloan
Ailsa Craig
Alan & Marlene Gustafson
Alan Jamieson
Alan Wood
Alastair Maxwell
Alex & Vivian Ramsay
Alex Ramirez
Alfred Achuh
Alice Glanville
Alison Gibson
Allan & Leila Campbell
Allen Brandt
Allisa Karvonen
Amar Sidhu
Amber Stope
Andre Vignola
Andrea Eaton
Karen Kennedy
Karen Robin
Karen Sinclair
Karenza T. Wall
Kari Hewett
Karin Vengshoel
Karl W. McKusick
Kathie Zeilstra
Keith & Judith Walsh & Pauline Walsh
Keith & Ethel Kirkpatrick
Keith & Monique Salchenberger
Keith Egger
Kelly Smith
Kelly Werbowski
Ken & Jane Rainford
Ken Cooper
Ken Lytle
Ken Paris
Ken Wilkening & Tokiko Kashiwagi
Kenneth H. Marsh

Exhibit No.	Description
	Andrew Morgan
	Angela Mays
	Angus Stuart
	Anita & Ken Klatt
	Ann Harvey
	Anne Legg
	April Davidson
	April Macleod
	Arlene Chow
	Arnold Ranneris
	Art & Pam Allen
	Art Sutherland
	Arthur & Janice Lee
	Axel Krieger
	Barbara Grant
	Barbara H. Weston
	Barbara Hourston
	Barbara Laprise
	Barbara Ross
	Barry Beaulac
	Barry Black
	Barry Black
	Barry G. Kensall
	Barry Todd
	Barry Whelan
	Betty & Stan Watchorn
	Betty Edwards
	Betty Gilgoff
	Betty Murray
	Bev & Rob Mallett
	Bev Farkas
	Bev Waldron
	Beverly Harvey
	Bill & Joyce Ness
	Bill & June Stowell
	Bill & Pat Savage
	Bill Harrison
	Bill MacGougan
	Bill Waldstein
	Bjorn Nitting Family
	Bob & Anne Duthie
	Bob & Linda Belter
	Bob Tippett
	Brad Bettke
	Brad Clark
	Brian & Lucille Bishop
	Brian Downey
	Kerry Doucette
	Kevin Amboe
	Kim Kilpatrick
	Kim Steger
	Kimberly & David May
	Kimberly Rice
	Kinsey, Barbara & Larry Bonnar, Arnold & Margaret Blake, Bill Blake, Joyce Sutton, Patricia & Mike Kinsey
	Kris McLean & Majid Rohani
	Kris Wallin
	Kristan Fehr
	L.K. Vodnak
	L. Robinson
	Landis Warner
	Laura O'Shea
	Laurie Boytzun
	Laurie Gray
	Leah Christensen
	Lee Caufield
	Len & Mary Lou Westnedge
	Len Chong
	Les Steinke
	Lesley Hornby
	Lesley Willows
	Leslie Carson
	Leslie J Fawkes
	Leslie Welin
	Levy Graham
	Lil Jones
	Linda Pallot
	Linda Rea
	Lindi Frost
	Lisa Stary
	Liz Down
	Loraine Fry
	Lorene Penner
	Lorene Penner
	Lorraine & Bill Kastelen
	Lorraine Kirkham
	Lou & Trudy Hoover
	Louise Hickey
	Ludovic Duran
	Lyn Harlton
	Lynne & Paul Freeman
	Lynee Irwin

Exhibit No. **Description**

Brian Kooi
Bruce Griffiths
Bryon Hall
Waldie
Campbell Sweeny
Carey Adams & Mark Barteski
Carl & Barbara Eifler
Carl, Tricia, David and Lisa Enzenhofer
Carmen Fjeld
Carmen Stephen
Carol & Grant Giffin
Carol Daponte
Carol Hubbard
Carol-Ann F. Dwyer
Carolyne Zimich
Cat l”hirondelle
Catherine Jordan
Cathy Fend
Cathy Paquin
Charlene Fontaine
Charles C. Parkhurst
Charles Tsai
Charmayne Mailloux & Tadmore farms
Chas C. Mclean
Cheryl Baron
Chris Couch
Chris E Schmidt
Christian Evans
Christina Larson
Christine McAlister
Christopher Day
Cindy De Paoli
Clayton & Roberta Osbourne
Colleen Omstead
Coral Taylor
Corinne Loft
Corona
Cory Greenlees & Allen Specht
Cynnamon Schreinert
D.M. MacKenzie
Dale Macdonald
Dan Cramer
Dan Sandhar
Dana & Tony Sammartino
Daniel Theal
M. J. Cloarec
Madeleine Saw
Malcolm Wellington
Marcel Schoenenberger & Monika Schoenenberger & Benjamin Schoenenberger & Aaron Schoenenberger & Jordan Schoenenberger & Herbert Keller & Markus Keller & Margrith Keller
Margaret A. Carlson
Margaret Melnick
Maria Dagg
Marie Baigent
Marie Kjarsgaard
Marie Vermeulen
Marilee Fisher
Marilyn Barre
Marilyn E. Thom
Marion & James Stang
Marion Northcott
Mark Clarke
Mark Haley
Mark Richards
Marlynn Hardwick
Marnie McLaren
Maron Ward
Mary Ann Skoll
Mary Knudsen
Max Larson
Megan Rhodes
Melanie Bridle
Melissa Daniels
Mervyn Fehr
Michaeal Eyre
Michael Gordon
Michael Johnston
Michael Lamppu
Michael Pratt
Michael Riemann
Michael Tarbotton
Michelle Margerison
Mike & Jacqueline Ward
Mike Friesen
Mike Renz
Mike Rhodes
Mike Smith
Miriam Borys

Exhibit No. **Description**

Danielle McDonagh
Darilynn & Doug Butler
Darilynn & Doug Butler
Darlene & Ian Farquharson
Darlene Donald
Darlene Pouliot
Darrel Scott Bisgrove
Darrell Shibley
Daune Johns
Dave Parsons
Dave Shaw
David Cumming
David Hope
David Huang
David Ravensbergen
David Ritchie
David Roberts
David Thorkelson
David Ward
Dawne Martin
Dean from Paperhaus Vancouver
Deborah Mehes
Deborah Peck
Deni James
Denis Goddard
Denise Tessier
Dennis Bowles
Dennis Galandy
Dennis W. Roberts
Derek Dunkwoody
Derry & Molly Cloarec
Devon Hanley
Diana Tuffley
Dianne Remple
DKTC[dktc@axion.net]
Don & Bridgett DeBuysscher
Don Carrier
Don Munroe
Don Vinish
Donald & Leota Fedorak
Donald N. Gardiner
Donald Oswald
Donald Rivers
Donald Spratt
Donna Beattie
Donna Burgess
Donna Ellaschuk
Miriam Fitzsimmons
Monica Mondin
Monica Wong & Ryan Loo
Monique & Gordon Shoblom
Mr. & Mrs. F.E. Paul
Mr. & Mrs. R. Hall
Murray & Tanis Phillips
Myles Saunders
N. Panchyson
Nadine Nesbitt
Nancy Boyd
Nazrin Hussain
Neil Pegram
Nick Holland
Nicol Bortnick
Nicole Fitzgerald
Nicole McLardy
Nona M. Archibald
Nora Denning
Norman LW Chu
Norman Zeer & Bryan Siver
oldradiojock@hotmail.com
Olive Gevans
Onesia Granger
Otto Bokemper
Owen & Sarah Roberts
P.K. Page
Pam Blackstone
Pam Shaw
Pat Cameron
Pat Contant
Pat Hickey
Pat Russell
Patricia O'Toole
Patrick Mahood
Patrick McCarthy
Paul Bray
Paul Haley
Paul Jordan
Paul Nilsen
Paul O'Doherty
Paul Thompson
Paula Jardine
Pauline Wong
Peggy Chapman
Penny Polden
Penny Rogers

Exhibit No. **Description**

Donna Roadhouse
Donna Watkins & Paul Lainson & Dorothy Watkins & George Strazicich
Doreen Sheaves
Doris & John Baskerville
Doug Davies
Dr. Allen Ciastko & Valerie Mackay Greer
E. Ritch
Earl Skaarup
Ed Fader
Eda & Graziano Favaro
Edward Campeau
Eileen Nehra
Eileen Sawracki
Elaine & Paul Ransom
Elaine Hauck
Elaine Perry
Elaine Steckler
Elizabeth Bennett
Elizabeth Mathers
Eric Butler
Ernie Berger
Eronne Ward
Eugene Leeson
Evelyn Leclair
Fannie Schiller
Faye Cooper
Faye Smith
Fertuck & Martin Rurka
Fran Moore
Frances Collett
Frank Crockett
Fred Roberts
Fred Storgeoff
Frederic Gagne
Freeman Newton
Frocia Pyper
Gail Glover
Gail Slatten
Gary Fontaine
Gary Price
Gayle & Jock Bennett
Gayle & Dale Newham
George Robb
Georgina & Jerry Bamping & Brad
Pete & Adrianna Hodge, Sean & Janette Service, David & Christine Hodge, Marg & Gord Braund
Pete Steeves
Peter Hamilton
Peter Kieser
Peter Simmons
Peter Smolders
Philip Downey
Philomena McCallum
PJ Pentney
Pretti Saini
R.L. Booths
Rachel Eby
Raff Baker
Raghu Bans
Raging Grannies- Vancouver Chapter
Randy Guo
Ray Austin
Ray Howard
Raymond Melnick
Rbrodie Smith
Rebecca Wickens
Redge Leepart
Reg Lipsack
Regine Kutzner
Rhys Del Valle
Rich Nichol
Richard Czech
Richard H. Fahlman
Richard Ng
Richard Wright
Rick & Patty Turner
Rick Davidson
Rik Kiviaho
Riley Brabner
Rinda Robb
Rita Shimozawa
Rob Cameron
Robert G. Long
Robert Gibson
Robert Haines
Robert Muscroft
Robert Payne
Robert R. Thompson
Robert Southcott

Exhibit No. **Description**

& Leona Bamping & Tannis Nore
Gerlyn Westman
Gerrit Hunink
Gilles Arseneau
Glen & Hana Larson
Glen & Margaret Carlson
Glen Roscovich
Glenn Caseley
Gloria Laird
Gord Lepsenyi
Gordon & Pat McCabe
Gordon & Carol Ashdown
Graeme Manson
Graham Gould
Graham Henderson
Greg Warkentin
Gwen C. Mackinder
H.J. Francis
Hans Smedbol
Harley Lockhart & Susan Greenwell
Harold Rutledge
Harpreet Aulakh
Hartmut & Mary Kieser
Heather & Peter Schwartz
Heather Halpape
Hedley M. Bodley
Hilary Ounpuu
Ida & Doug Oberg
Illene Yu
Irene Openshaw
Isabelle Southcott
J. Reed Pozer
Jack & Sherry Goebel
Jack Whyte
Jacquie Carrier
Jalal Jaffer
James Little
James Watson
James Wilms
Jan Kennett
Jane McCall
Janet Billon
Janet Lynch
Janis Armit
Janis Randall
Jason Chan
Roberta Latham
Rodney Polden
Rodolfo Tommasi
Rolando Hernandez
Romayne Gallagher
Ron & Donna Gobin
Ron [jrsheaves@shaw.ca]
Ron Pascoe
Ronald J. Moffat
Ronald Sorensen & Melanie Steele
Rosa Smedley
Rose & Erv Serediuk
Rose Jorundson
Roy Ewing
Sam Saprunoff
Samadhi Osho
Sandra Clark
Sandra Latreille
Scott Jackson
Selwyn & Joyce Lewis
Shamsher Pannun
Shannon Ling
Sharell Carney
Sharon Wilson
Sharron D Hughes
Shihong Mu
Shirley Cragg
Shirley Fletcher
Shirley Murray
Shirley Roberts
Sigrid Albert
Sigrid Singleton
Silvia Heinrich
Stacey Turner
Stan Bowles
Stephan Caissie
Sterling Glover
Steve Cunningham
Steve Frost
Steve Pelman
Stewart Brinton
Sue & Roshan Cader
Susan Greenwell
Susan Horikiri
Susan Karamessines
Susan Kenney
Susan Kirk

Exhibit No.	Description
	Jason Minard
	Jayne Hawkins
	Jean & Neville Damato
	Jeff Gruber
	Jeff May
	Jeff Weissler
	Jennie Stinson
	Jennifer O'Reilly
	Jennifer Webb
	Jennifer Yeager
	Jill Schroder
	Jim & Judy Phillips
	Jim & Grace Baugh
	Jim & Karen Pennell
	Jim Ranta
	Jim Renney
	Jim Whitehead
	Jocelyn Harder
	Joe Bezanson
	Johan de Vaal
	Johanna Moore
	John Adams
	John Brocklehurst
	John Cochran
	John Coombe
	John E. Parrott
	John Hosh
	John M. James
	John Meyer
	John R. Paterson
	John T Attwood
	Jonathan Mackee & Stephanie Kiesling
	Jonathon Berghamer
	Joyce Bobowski
	Judy Olsen
	Judy, Gordon & Aidan White
	Julie Scarfe
	K. Robertson
	K. & P. A. Lomax
	Kaarina Talvila
	Karen Ho
	Susan Mcdonald
	Susan Merkeley
	Susan Miller
	Susan Petrusa
	Susan Scrafton
	Sylvia Brown
	Sylvia Moffatt
	Ted & Joan Eagles
	Ted & Tricia Blightt
	Terry & Barbara Kushniruk
	Terry & Genevieve Tobin
	Tess Kitchen
	The Mitchell Family
	The Penners
	Thelma Mahaits
	Thomas C. Campbell Family
	Tim Bartoo
	Tim Bartoo
	Tim Holmes
	Tom & Mim Fitzsimmons
	Tom Holmes
	Tom Laing
	Trina Waller
	Ummer B. Stamberg
	Valana Strandberg
	Velda Fjeld
	Vicky Jaremko
	Vivian Oswald
	W.A. Dean & Family
	W. J. Revie
	Walter Bain
	Walter Dionne
	Wayne and Wendy Vernon
	Wayne Reeves
	Wayne Thornberg
	Wayne Waters
	Wesley Raven
	Wilf Chernesky
	William H. Leppard
	William S Taylor & Family
	William Wilkinson

Exhibit No.	Description

E-82 Letters of Comment received October 6, 2005 via Canada Post/Facsimile from the following:

Alexandra Betson
Ann Pollock
Annette Murray
Annette S Wegner
Anonymous – Vancouver
Anonymous - White Rock
AS Muir
B. Lewis
Baillie
Barbara Templeman
Brad & Catherine Berry
Brenda Broughton
Brenda M Stonham
Bruce Wood
Cameron Storie
Carmen Miranda – Barrios
Catherine Carter
Catherine Toplass
Ceclia Rogers
Charmayne Mailloux
Christine Lechowski
Clare Marie Belanger
Clarence & Gayle Cleese
Dale Leiske
Dale Raymond
Daniel & Karen Kasowitz
Darcey Lacasse
David N.H. Smith
David Shipway
Debra A. McNaught
Dilys M. Smith
Doreen Waiz
Douglas T. Graham
E Stevens
Elizabeth Stevens
F. Steinert
Geo E Baker
Gladys Hall
Grace & Christian Hamaan
Gwen Monteith
H. Cole
Helmut Brokop
Judy Scott
Julie Maloney
Kelley Thompson
Ken & Yvonne Wright
Ken Timewell
Kristine Zgutko
Lawrence Fox
Lesley Fell
Leslie M. Smith
Lorrane Polsen
M. Gawlak
Marie Vermeulen
Mark Andreassen
Mary Anderson
Maya L. Begg
Michael Balakshin
Mike Sheehan
Mr. & Mrs. George Gosse
Nancy J May
OJ Benoit
Pamela Hawthorn
Pat Hickey
PC Komal
Penelope Nickels
Randell Knight
Ray Eyton
Rhea Clements
Rick & Rhonda Johnson
Robert Lindstein
Rosemarie Daoust
Rosemary Buss
Rosemary Mauley
Ruth C. Duncan
RW Johnson
RW Ketterer
Sherwin L. Harris
Shirley E. Harper
Skelton,Taykkala, Miltimone, Miltimore, Heery, McDonough.
Mollister
Sowden
Stacey Webb

Exhibit No. **Description**

Henry Smith
Ian Dowdeswell
James Ian Turnbull & Family
Janic Evin
Jean Law
Jim Shrubsole
Joan Fleischer
Joan Foreman & R. Foreman
John & Mataya Varsek 2
John Rypien
Joseph Tam & Lay Yan Quek
Susan Smith
TA Jose
Tammie Langley
Theo & Rosemary Manley
Thomas Milne
Trudi Coblenz
Vina Van der Velde
Walter Dionne
Wendy & Fraser Gibson
Werner & Dietmot Grimm
William G Foulkes
William Roberts

E-83 Letters of Comment received October 7, 2005 via Canada Post/Facsimile from the following:

Alan & Fred Stranger
Alex Yakunin & Lanette Morden
Alexander & Lorna Kuhlmann
Alfred Champion
Alison Hume
Alvin & Dorthy Bernards
Anne & Tah Ling Chow
Anne Nelson
B Cernia
B Semak
Barbara Hennings
Barrie N Black
Bayers
BC Resident
BD Olafson
Betty Massey
Bryon Lehman
Caroline & Robert Mason
Charlotte Hoffman
Claude & Sandra Rougean
Clifford David Phillips
Colin Allen
Croft & Rosemary Stanfield
D Greem
D Therien
Daryl Gibbs
DB Kennedy
Debra Cunet
Denise & Garry Efonoff
Derek AJ Murray
Diane Fitzner
Jim & Jean Shirley
Joan Osborne
Joan Williamson
Jo-Anne Hodkinson
John & Mataya Varsek
John Compton
Joyce & Colin Menzies
Julianne Stetler
June & Denis Matteazzi & D Fore Bunbey
June & James Pearson
K Bellamy
Karen Atkinson
Karl Preuss
Laura & Steve Herox
Len Osborne
Les Ennis
Linda Stamm
Lois Carole Allen
Lunda Pauesen
Lynette Baldock, Chris Catton, Tessa Webber, Ray Johnston, B Williams, Shirley Dennis
M Rezai
Maggie & Bruce Evans
Margaret Pepplewel
Margaret Sullivan
Margaret & Brian Holliday
Margaret C Selinger
Mary Cote
Mary Learmouth

Exhibit No. **Description**

Doris M.
Doris MacDonald
Dr. & Mrs. Charles Y. Brown
E Tossell
Edward Chibber
Eileen Patrick
Ernie & Jen McEmoney
Erwen Smith
Eve Rennie
Evelyn Wilson
Fay Zens
Fred Kirk
Fred Stanyer
FS Stewart
Gebeer Deliel
Gilbert Lee
Gisela Wilhelm
Grant Frame
Gwynneth Davies
H Ogden
Hal Murphy
Hall
Harold Wolverton
Herbert Dunk
Idelen Lehman
J D McIntosh
J Guy Weston
James & Julie Keene
James Sloboda
James Warren Miller
JC & HR
Jeanne & Jim Lipkovits
Jenny & Eugene Shkurhan
Mari McIntosh
Mary & Peter Murray
Maureen Cuthbert
ME Logan
Mel Clayton
Mr. & Mrs. A Hawthorn
Murray & Margaret Hartley
Murray Hall
Norm & Jean Verna
Norm Garson
Patricia Barnes
Patricia Brown
Paul & Lorraine Penner
RD Ellis
Renwick Day
Rob Atkinson
Robert & Gloria Colter
Robert McDermid
Robert McKinnon
Ron Therrien
S Callum
S Turner
Shannon Moneo
Sheila & Ray Zerr
SL
Susan Taylor
T Kore
Tia Callihoo
V Kriax & George Inclay
Vac & Pearl Koven
Vincent Greco
W James Fedorak
Walt Volk
Walter & Dora Ronaghan
WC Fawcett
Winifrid M Exley

E-84 Letters of Comment dated October 7, 2005 from the following:

A.J. Hardy
A.J. Nicholson
AC
Agnes Forster
Al Smickersgill
Al Tuck
AL
Alan Cole
Judith Thompson
June Kline
K. Frank
Kai Bellows
Karen Nielsen
Karen Tsang
Karen
Karen-Lee Bradley

Exhibit No. **Description**

Albert & Dawn Romanell
Alex Graham
Amrit Pannun
Amy Vilis
Amy Y. Lee
Andrea Kwaitkowsky
Andy Thomsen
Angela Forth
Angela Ross-Fehr
Anne M. Ayre
Annette Brown
Ariel Holtz
Armel Castellan
Art & Lois Powell
Arthur W. Copp & Family
Audrey & Boris Karpoff
Audrey Greve
Audrey
Barbara Sherman
Barbara Wilkinson
Ben Jakobsson & Rosilda Albinati
Benita Spencer
Betsy Bodor
Bill & Eileen Hughes
Bill & Mrs. Joan Kelly
Blair Lister
Bob S. Braden
Bobby O'Kane
Brad Lambert
Brenda Christensen
Brett Millard
Brian Harvey
Brian McLaurin
Bruce & Diane Mould
Bruce & Pat Cowley
Bruce M. Watson
Bruce Penich
Bryan Boyda
Kahl
Richard Webb
Calvin Cairns
Captain James K. Steele
Carol Johnson
Cathie Baskett
Chanika
Charles Buholzer
Charles Hill
Karima Penman
Kate Pattison
Katie Stein Sather
Keith Moton
Kelly Monjazeb
Kelly Wolfe
Kelly, Barry & Amanda Fuller
Ken & Pat Armstrong
Kevin Gillard
Kevin O'Brien
Kim Barrett
Kim Brandt
Kiyo Breiting
Kris Andrews
Krista Drommer
Krista Lees
Kristi Yuris
Kristina Fairholm Mader
Kristy Ilic
L. Franco
Larry Berger
Larry Cooper
Laura Barker
Laurence Martinson
Leanne Turnbull
Lee
Leo & Rita Turcotte
Les & Gerry Erickson
Lesa Moriarity
Lia Grundle
Lillian McIntyre
Lindsay Brownsey
Lisa Wong
Liz Gaige
Lori Henry
Lorne Avery
Lorraine & Bob Emery
Lorraine Frazer
Louise Jullion
Louise MacMaster
Louise Newman
Luriann Downing
Lynda Drury
Lynn van der Vlist
Lynne
M. Hewlett
Mael Castellan

Exhibit No. **Description**

Charlotte Inglis Gottschau
Charmaine H.
Chris Braden
Chris Cameron
Chris McGill
Christine & Eric Greenwood
Christine Callihoo
Claire Preston
Claus Grewsmuehl
Colin Hamm
Conor Brandt
Conor Reynolds
Craig & Frances Hamilton
Craig Elliot
Craig W. Norton
Curtis R. Curtis
& K. Ruel
Dan K. Brown
Daphne Langis
Darlene Karst
Dave Harder
David Christopher
David Fairholm
David Jones
David, Elise, Oliver Ou Time
Dean H. Jagger
Dean Hodgson
Debbie Beaulne
Debbie Cowan
Denise Goodkey
Denise Kenney
Dennis Bryant
Dennis Morrison
Derek Barry
Dewey Liew
Diane Girard
Diane Merriam
Dianne Borthwick
Dianne Damer
Dion D. Doepker
Dixie Dumonceaux
Donald Wills
Donelda Parker
Donna Jones & Frances Henry
Doreen & Earl Phelps
Doug Hockley
Doug Murdoch
Maggie Murray
Maiwenn Castellan
Marc Beaudry
Mardi Dolfo-Smith
Marg Lochhead
Margaret Case
Margaret Cazzador
Margaret Marriott
Margaret Pearson
Marguerita Thorslund
Marianne Kaplan
Marie Barratt
Marie Walmsley
Marilyn Parliament
Marilyn Sparkes
Marius Friedlander
Mark Shepherd
Marlene Triggs
Marten.m.a. Devries
Martin Dick
Mary Gavan
Mary Lou Stansfeld- Jones
Mary Lynne Jewell
Mary O'Donovan
Mary O' Donovan
Maureen Mounzer
Maureen Wake
Maureen Wakefield
Max & Sharon
May Tong & Stephan Au
Megan Harvey
Mehdi Naimi
Melanie & Colin Horel
Michael Baynham
Michael Nowak
Michael Scott
Michael W. Pidgeon
Michele Stasiuk
Mieke Bray
Mike Jones
Mike Renz
Mike Repp
Mike Schwarz
Monika Melvin
Moores Family
Mrs. P. Maclennan, Mr. Keith Brown
& Mr. Michael Brown

Exhibit No. **Description**

Douglas & Barbara Mansell
Douglas & Ruth Jones
Douglas G. Bowering
Douglas Johnstone
Dr. A. K. & Ms. M. Mackworth
Dr. Gillian Thompson
Dr. Rigler
Ed & Arlene
Ed & Maureen Field
Ed Pitt
Edward Bolecz
Edward G. Davis
Edward H. Downing
Edward
Eileen M. Proctor
Elaine Leonard
Elizabeth Johnson
Elizabeth Pedersen
Elizabeth Peeters
Ellen Lewis
Elva Stoelers
Emilie Cameron
Eric Arnold
Evelyn Zaklan
Eward & Doreen M. Wilschek
Fern & Grant Roberts
Fern Munroe
Fran Marcotte
Frances Mettes
Francine Page
Frank Buonanno
Frank Dorsey
Frank Hughes
Frank Taylor
Frank Waddell
Fred Masaro
G. Bekei
G. Kinswater
G.G. Coulter
G.R. Grante
Garfield Lindsay Miller
Garry Broeckling
Gary Adams
Gary Dunn
Gary Winkelman
Gayle Black
George & Deanne Turner
Murray Speer
Naman Wiesel
Nance Charron
Nancy McKay
Nancy Skjonhals & Peter Trembley
Nicholas & Judy Edberg
Nick
Pam Stevenson
Pam Taylor
Para R.
Pat Chester
Pat Kehler
Pat Maxwell
Patricia Lindsay
Patrick Dubois
Paul Birch
Paul Sutter
Pauline Gendron
Pauline Mott
Pauline Veto
Perry Crann
Peter Campbell
Phil Cove
Phil Glerum
Priscilla F. Buck & Wayne J. Buck
R. Maas
Randall McQueen
Ray Mulrooney
Rebecca Clarke
Regina & Garry Stevens
Reta Lemaster
Rev. Georgia Kutt
Ric B. Edberg
Richard & Jennifer Hoen
Richard & Michele Vandekamp
Richard Davis
Richard France
Richard Maki
Richard Williams
Rick & Lorrie Rhodes
Rick Fence
Rick Folka
Rick J Gusland
Rick Wallach
Rino & Emma Manarin
Rob Shelley
Robert Bagamery

Exhibit No. **Description**

George & Sylvia West
Gerard Picher
Gerri Ormiston
Gerry Walsh
Gillian Gibbs
Glenn Parkes
Gloria Magnussen
Gloria Mitchell
Goetz & Gudrun Wochinger
Gordon Leaman
Graham & Shirley Mitchell
Grant Fraser
Greg Coram
Greg Evans
Gretchen Robinson
Gretta Shannon
Gwendal Castellan
H A Gillespie & E E Jenner
Halina Mitton
Happy Metcalfe
Harry Kurita
Hazel Farrell
Heleen Sandvik
Helen Haines
Hendrika Devries
Henrietta Renaud
Herman Bakker
Hugh Aitken
Hugh Murray
Hugh Patterson
Ian Wardle
Inger Visser
Ingrid & Albert Broch
Ivan Hunter
J. A. Rush
Jackie Morton
Jacqua Pratt
Jacque Morrow
James Case
James Spencer
James
Jan Slakov
Jana, Frank and Caylie DeLuca
Jane Mossop
Jason K Hilliard
Jean Autiero
Jean Louis
Robert Doll
Roberta Blakeman
Robin Malahoff Family
Robin Malahoff
Rod McRae
Ron Sweett
Roni Wocknitz
Rosalie Macdonald
Rose Brown
Ross Green
Russell Chartier
Russell Morrow
Ruth MacDonald
Sadie E. Patterson
Salim Lakhani
Sam Fielder
Sandra Silvester
Sandra Simmons & Lynda V. Belter
Sandra Somers
Sandy Brinson
Sandy Wiens
Scott & Angie Thitchener
Sean Cuthbert
Sharon Brink
Sharon Krause
Sheryl Moore
Sheryl Stewart
Shirley A. Cox
Shirley Bell
Shirley Binder
Shona Collison
Simon Gabriel
Soili Reid
Spadabc
Spencer Bailey
Stacey Gleddie
Stan Young
Steven Bradley Lonneberg
Sybil Wyles
Sylvia Mantyka
Sylvia Verdinho
Tania Lo
Terry Cooke
Thanh Tazumi
Tim Adams
Tod McNab
Todd & Tami Leskie

Exhibit No. **Description**

Jenifer Dion
Jessie Coleman
Jim Wallace
Joan Bell
Joan Courte
Joan Hansell
Joan Rea
John Gilliatt
Johh & Annemarie Haberland
John & Lorraine Bergen
John & Pat Brechin
John Defalque
John Harper
John Hyndman & Family
John Salvador
Joseph Benkhe
Joseph Cassidy
Josette Wier
Joyce Bradshaw
Jsewing
Tom Bethune
Tom Nichols
Tony & Lorraine Ferguson
Tony Cottrell
Trevor Crean
Trevor Gray
Trudy
Vicki Hunter
Vicki-Lynn Dutton
Vicky Alcantara
Warren Cocking
Wayne Schmuck
Wayne Shave
Wendy Banting
Wendy London
Will Ready
William Glen
William Joiner
William King
William Wilson
Wilna Capostinsky

E-85 Letters of Comment dated October 8, 2005 from the following:

Abigail Brown
Aimee Werbowski
Al Bradshaw
Aleks Vilis
Alexis Nery
Allan Smith
Andrea Brennan
Andrea Rosic
Andy Pham
Anita Swing
Anna Ceolin
Anna Warren
Anne Grube
Anne Loxley Baker
Anthony McMorran
Aribert
Arnold & Jewel Maunula
Arthur Thompson
Barb & Ross Hutchison
Barb Stolz
Barbara Pell
Bev Greenwell
Beverly Parrish
Jo Anne Christopher
Jo Vella
Joan Astrope
Joan Toone
John & Claire Dressler
John & Louise Brajcich
John & Shirley Lee
John Da Costa
John Hunter
John M. Moore
John Quong
Jon Beekman
Joni Stevens
Josephine Hrynkiw
Jovana Jankovic
Joyce McBeth
Judith Westman
Julie & Ron Flatman
Juni Williams
Karen & Terry Wong
Karen Lepine
Karen Szakal
Karl & Gisela Hirsch

Exhibit No. **Description**

Bill & Anna van Geel
Bill Kennedy
Bonnie Fallowfield
Bram Goldwater
Brenada L Bowman
Brenda Seaman
Brendan Sydney Hughes
Brent Cameron
Brian McKay
Bruce Godin
Calvin Myatt
Cara Mackenzie
Caroline Dennis
Celeste Audette
Charles de Montigny
Charmaine Chretien
Cheryl Hanna
Cheryl Paris
Chris Froom
Christian Maas
Christina Carne
Christine A MacVeigh
Christine Price
Colleen Spitzig
Courtney Smith
D Baillie
D.R. & N.R. Scott
Daniela Alborn
Dan Reid
Darlene Chernyk
Daryl & Cathy Grunlund
David Breen
David Dudeck
David L. Keogh
David M. Chernyk
Dawn Hemingway
Deanna Boomhower
Debby Hoffart
Deborah Martin
Debra Cornish
Deepa Filatow
Dennis Burnham
Derek Morrison
Desmond & Shirley Payne
Diana Caldwell
Diane P. & Raymond G. Fish
Dieter Mueller
Kathryn Shaw
Kay M. Vinall
Kaye & Garnet Mowatt
Keith Brinson
Keith Lillyman
Kelly Rowland
Ken Douglas
Ken Simpson
Kevin & Kim McKenzie
Kris Adler
Krista Hurton
Kristen
Kristie Smolne
Lael Sleep
Lance Ryan
Larry La Rouqe
Larry Pasch
Laszlo J. Veto
Laurie Anderson
Leah Main
LeeLane Asher
Len & April Haggstrom
Len Burri
Leo Aitken-Mundhenk
Leona Forcier
Lew Innes
Lisa Davis
Liz Pro
Lorraine Mackay
Lynne Bruce
M. Bailey
Margaret Maxson
Marge Klassen
Margot Hessing-Lewis
Marianne Smith
Mark Berard
Mark Hunter
Marne St. Claire
Mary Gail Ahern
Maxine Harrop
Melody L. Walker
Michael Mundhenk
Michael Poole
Michael R. Laycock
Ms. Laney Stolle
Mungo Shuley
Neil Huestis

Exhibit No. **Description**

Don Newell & Lisa May
Donald Nguyen
Donna Lochhead
Donovan Cavers
Dorothy Morse
Douglas Alder
Douglas L. Tedrick
Douglas M Ross
Dr. Robert Offer
Dr. Al Schulze
Dr. F. Andrew Davis
Dr. Gerald Thomson
Dr. Randal Tonks
Dr. Robert McDonald
Dr. Roger & Marian Gustafson
Dulce B. Fry
Edward & Diane Johannson
Elaine Smith
Ellen Hepting
Emile Esteves
Emile Scheffel
Emily Wisden
Emma Bourassa
Emma Kendall
Eric & Jill Hummerstone
Eric & Kathleen Love
Eric Blais
Ervin Schaad
Ev Fairbrother
Eva Nellis
Florence Thomson
Fran Omelaniec
Fred Bradley
Frederick Heartline
Freemanabroad
Gill Picard
Gloria Cleve
Gloria Scott
Grace & Shel Gould
Greta Rae
H Ray Croker
Hal Prittie
Heather Scott
Heather Ward
Helen Mears
Helena & David Oswald
Howard & Sheila Pearson
Nick Cradock-Henry
Norma Primiani
Norman D. Heaslip
Orma Baker
Pat & Norm Greenwell
Pat & Norm Greenwell
Pat & Sue Dyer
Pat Cooper
Patricia Breen
Patrician Grace
Patrick Breen
Paul Cordy
Paul Kusch
Paul Ng
Paul Shuley
Peter & Nancy van der Leelie
Peter Jolly Sechelt
Pierre Blancard
R.A. Spencer
RA Haack Supports TGI Sale
Ralferd & Harriet Freytag
Reinhold & Ursula Zuehlke
Rene & Valerie Riske
Renee Anderson
Richard Hyatt
Richard Pearson
Richard Sharplin
Rick & Linda Nicholls
Robert Eacrett
Robert Waldie
Roberta Jean Colwell
Ron Haack
Ron Hatch
Ronald J Hutchinson
Ross
Sandra MacDonald
Sandy
Sharon Woodworth
Shauna Gray
Shelley Rintoul & Family
Sherrie Tyson
Sherry Ferguson
Sinikka Holbrook
Soile Silander
Stephen Keary
Steve Cooper
Susan Sutfin

Exhibit No. **Description**

Ingrid Rose
Irene Rigler
Ironisokratic
Ivy Jeffers
James Gordon
Jan Blades
Jan Valair
Janet & James Gratton
Jason Haight
Jason McMillan
Jason Nummikoski
Jason Wingham
Jeff
Jennifer Prowse
Jennifer Tremain
Jerry & Julie Swaney
Jill M. Tompkins
Susanne Bonny
Terry Batchelor
Theresa Disney
TJ Houston
Trent Semeniuk
Valerie A. Powers
Vera Kervin
Vicki Yen
Victor Mitchell
Walter Peachey
Walter Deutschlander
Warren
Wayne G. Taylor
Wen Jun Yi
Wendy Wall
William L. Roberts
Yanni Giftakis
Yvonne Tham, Ednan Abdelgina, Darlye Wilson & Dennis Markin

E-86 Letters of Comment dated October 9, 2005 from the following:

Alan Franey
Alisa Morton
Allan Rempel
Alzbeta
Amber Morton
Andrea Albanese
Anita Couvrette
Anshu Arora
Arlene Brownhill
Arthur M Roberts
B. Donald
Barbara Lung
Betty & Thomas Nonay
Betty Moore
Bev Daniels
Bill & Barb Ringrose
Bill Rodden
Bill Uhrich & Jill Anholt
Brian Jones
Brian Wright
Bud Carroll
Cailin Boyle
Carol & Don Munro
Carol Hilliard
Carole Fawcett
Karrmen Crey
Keith & Corry Johnstone
Ken Hill
Kevin Thompson
Kim & Karen Larsson
Klothilde Grose
Krista Precosky
L.M. Westbrook
Lani Wong Sommerville
Larry Blackhall
Larry Houston
Laura Chessor
Laura Lea Lollipots Cook
Leigha M. Briscoe
Leo Lavigne
Lillian Dunbar
Linda Cuch
Lyle Davis
Lynn Bursaw
Marg Ablitt
Marilyn Belak
Marion Lea Jamieson
Marlee Clingan
Marlene Dams
Mary Tremain

Exhibit No. **Description**

Carole Lesage
Catherine McNeely
Cathy Bruchet
Colleen Allison
Connie Towson
Cora May Lewisch
Craig Davis
Cythia Wright
Cyril Meusy
David Burns
David Ray
Denis A. Feldman
Dennis Gendron
Diana Davidson
Djoke Byleveld
Don Coan
Don Sweet
Donna Barnes
Donna Lee
Dorothy Yamich
Doug & Joyce Cox
Doug Taylor & Joyce Taylor
Dr. Neil Tessler
Dr. Ronald B. Hatch
Duane Janzen
E. B. Little
E.M. Sanderson
Edgardo Sanchez
Edward Robertson
Eileen Leier
Eleanor Beaton
Ellen Gilroy
Erin Hall
Evelyn Watchmanm
Finn Hestdalen
Frances Lumsden
Freeman A. Dryden
Gale Thomas Keating
Geni Nolin
Geoff Buck
George Alatrash
Gerald Arksey
Gladys Hambrook
Gordon Jackson
Graham Cunningham
Greg Ferguson
Helen Derewenko
Matthew Hanon
Maureen McAllister
Meesa Chungfat
Michael Bernier
Michael Fischer
Michael Hawley
Michelle Mills
Mrs. Mary Jones
Nicky Byres
Nihal Maligaspe
Nola Barry
Norm Martin
Norman Lumsden
P.A. Brown
Pat Dayman
Pat Powell
Patricia Brown
Patricia Grace
Paul Binkley
Paul Hughes
Paul Richard & Dinah Tiessen
Peter & Irene Gout
Ray Campbell
Raymond E. Brassel
Renee Bellefleur
Richard Cuch
Richard Gaston
Richard Murphy
Rob Green
Rob Oostlander
Rob Smith
Robin Redman
Roger & Lois Mackinder
Ron Haack
Ronsdale Press
Ross & Sheila Patricia Parcher
Roy & Val Chabot
Sam Storness-Kress
Sarah Holder
Scott Gillis
Sean Rodgers
Sheila Wallace
Shelley McNaughton
Shirley J. Rowland
Shirley McNamara
Stephen Harrison
Steve LeClair

Exhibit No. **Description**

I. Rewers
Jan & Robert Carroll
Jane Bachman
Janet & Chuck Monkley
Jason Blackstock
Jay Manyk's Petition
Jerrilyn Schembri
Jessica Van der Veen
Jill Nygard
Jim & Della Bulpit
Joanna Wilkinson
Joanne Wesley
John Carrita
John Grose
Julie-Anne Le Gras
Justine Billon
Kari Heese
Suzanne Munroe
Suzy Stever
T Bryant
Ted Bowles
Thomas Kryzanowski
Tim Nickason
Todd Wells
Tom & Les David
Tom & Evelyn Stanley
Tom Baldwin
Tom Dagg
Tony Warren & Margaret Bellmaine
Verna Cavers
Victor & Alice Souliere
W. Alex Burton
W.E. Gross
Wesley Holme
Zvonko Polak & Family

E-87 Letters of Comment dated October 10, 2005 from the following:

A R Warner
Ada Glustein
Adrian Armstrong
Agnes Boswell
Alan Brandoli
Alex Dedovic
Alexandra Steib
Alfred Tam
Ameen Kanji
Amir Fallah
Andrea-Lee Smith
Andrew Barber-Starkey
Andrew J. Bobyn
Andy Rohner
Angharad Moorcroft
Angie Wiseman
Ann Radford
Anne & Bob Smerdjian
Anne & Keith MacKinnon
Anne Gagliani
Anne Lang
Anne-Marie Meunier
Annonymous-Langley
Arlette Hatcher
Arnold Ranneris
Arthur Hinksman
Kathryn & Destry Jones & Dennis Beaulieu
Kathryn Swift
Katie Frigault
Katie Frigault
Kaye & Ron Neale
Keith & Ethel Kirkpatrick
Keith Elvers
Keith Gumley
Kelly Beriault
Kelly Werbowski
Ken Foster
Ken Merkley
Ken Northcote
Ken & Colleen Smith
Kent Ellaschuk
Kenton Young
Keri Sherman
Kerri Groves
Kevin Brett
Kevin Smyth
Kim Baker
Kim Hudson
Kimberly Needham
Klaus & Mary Paetsch
Kristina Porter

Exhibit No. **Description**

Audrey Glynn
Audrey Mabley
B. G. Gormican
B. Staffan Lindgren
Barb Metheral
Barbara Budd
Bertha Lindvik
Betty Lee Cummings
Bev & Christian Weber
Bev Kanji
Bill & Irma Hamilton
Bill Gingell, Pat Gingell, Keitha Gray, Cyndy Armstrong & Irene Fiel
Bill Jamieson
Bill Wiseman
Blair & Christy Wood
Bobbi Hoadley
Bonnie Tanner
Brad Willman
Brenda Floyd
Brenda Hoyer
Brendan
Brent O'Connor
Brett Heneke
Brian McConnell
Brian Smith
Brigitte Sutherland
Bruce Godin
Bruce Tanner
Bryce Hamre
C.L. Sleeman
Carol Armstrong
Carol L. Falconer
Carol Shea
Carol Spencer
Carol Wharrie
Carolyn Stevens
Carrie A. Murdoch
Catherine Lloyd
Cec Hardy
Celia Laval
Charmaine Murray
Cheri Lowden
Cheri Westlake
Chistina Smith
Chris Francis
L. Benzley
L. Cole
L.N. Riddell
Lana Cadham
Larisa Schirba
Larry Nielsen
Laura Basaraba
Laura Wong
Lauren Phillips
Laurie M. Friskie
Lawrence Williams
Leanne Bourassa
Leanne Enns
Lee Davis
Lee de Rosenroll
Lee Murray
Les Lindhout
Lesley Woodward
Leslie Ikeda
Leslie J Hart
Linda Bauchman
Linda Gallo
Lisa Lightheart
Lisa Puharich
Lloyd Taggart
Lorna Merson
Lorna Wright
Lorne Goldman
Lorraine Impey
Lorraine Landry
Lorraine van Haren
Lucy Wyse
Lyall & Sheila Reimann
Lyle Fenton
Lynn Popoff
M Jackson
M.McAllister
Madeleine Vandenbeld
Marcel J. Chouinard
Margaret E. McMurchy
Margaret Landstrom
Margaret Mani
Margo Christie
Marie-Claude Tremblay
Mariette & Fred DeJong
Marilyn Bueckert & Richard Ward
Marilyn Kelm

Exhibit No. **Description**

Chris Gooliaff
Chris White
Christina
Christine J.
Clive England
Clive Michael (CM) Justice
Connie Lebeau
Corinne Taylor
Curtis, Michelle & Michael O'Donnell
Cynthia Giesbrecht
D M Judge
D. Wessler
Dan A. Wadge
Dan Pears
Daniela Ciuffa
Darek Duch
Darlene Kalesnikoff & Family
Daryl Paul
Dave & Ingrid Attenborrow
Dave & Andrea Clyne
Dave Southern
David Ames
David & Paulette Hagel
David Hutniak
David Jackson
David N.G. Savage
Deb Lesuk
Debi Wilson
Deoborah Solberg
Deborah Tan
Deni James
Dennis & Aldie Hockley
Denny Williams
Derwyn & Flo Dew
Diana Pringle
Diane Rae
Diane Somers
Dianne Tomada
Don & Linda Holt
Don & Linda Miller
Don B. Carmen
Don Gorby
Don Henderson
Don Lott
Don Olsen
Donna & Doug Alexander
Mark Biagi
Marten Lettinga
Mary & Ed Palleson
Mary Goulding
Mary Lofgren
Mary Savage
Mary
Maureen A. Adams
May Tong & Stephen Au
Meherun Kassam
Melissa White
Michael & Anne Jones
Michael Jovanovski
Michael Kent
Michael Kerr
Michele Stobie
Michelle T. Fell
Mike & Bev Lynnes
Mike Lebrun
Mike Miller
Mike Scott
Mohamed Hussein
Mona Curzon
Mr. & Mrs. R. H. Beerling
Mr. J. Staniewicz
Mr. Martin van Haren
Muriel Cue
Nicholas Pilfold
Nola Doiron
Noni Stremming
Noreen Talbot
Norm Ryder
Norm Yanke
Norman J. Loiselle
Norman Wygand
O.H. Bekker
Pam Gabriel
Pamela Welgan
Pat & Roger Crowther
Pat Gingell
Pat Malahoff
Pat Mccalib
Pat Teti
Patricia & Robert Freedman
Patricia Chadsey
Patricia Moss
Patricia Tieleman

Exhibit No. **Description**

Donna & Tony de Castro
Doreen Bowman
Dorothea Hoffman
Dorothy Moore
Doug Hening
Dr. Laura Doyle
Dr. Ron Gibson
Edward Ho
Edward Leach
Elaine McAndrew
Eleanor Wright
Emillie Parrish
Eric Wikjord
Erna Pruckl
Ernie Kaesmodel
Ethilda Cross
Eva Oldham
Eveline
Evonne E. Strohwald
Ewan French
Faye Saxon
Frances Bull
G. N. (Jerry) Lloyd
Gail Haddad
George Holm
Georges Gagnon
Georgina Jones
Gerry Penner
Gerry Wong
Geselle Y. Worobetz
Gillian Cobban
Gladys Elson
Glen Dunn
Gord Bell
Gordn Bull
Gordon & Barbara Blakey
Gordon Brown
Gordon Chow
Gordon Cooper
Gordon Nash
Gordon W Klick
Grant
Greg & Donna-Marie Milne
Greg Innes
GWH Jenrossek
Harish Mahendru
Heather Erxleben
Patrick Miller
Paul Borchert
Paul Ingram
Paul Reimer
Paul Richardson
Peggy Robinson
Peter Dennis
Peter Hackett
Peter Stockdale
R Forrest Smith
R Kahlon
R. L. Sterling
Raddis James
Rae Armour
Raj Persram
Rebekah Bell
Renee Gillis
Rhiannon
Ria Hodgson
Ria Nagelhout
Richard Chew
Richard de Pfyffer
Richard L. Shorten
Rick & Karen Staub
Rick Georgetti
Rob Dainow
Rob Nicholson
Robert & Audrey Wild
Robert Hatch
Robert Moorhouse & Karin McClain
Robert S. Scott
Robert Shemko
Robert Weiner
Robin Lyndon, Alayne Lyndon, Audrey Marty, Scott Marty, Ken Marty & Elizabeth Brundin
Robyn & Les Wettstein
Rod & Anne Schleppe
Roger & Lillian Gardener
Roger Knott
Ron Gildart
Ronald & Cynthia Shields
Roy Cabot
Roy Roope
Ruby Mannila
Rudolf Maros
S. Heese

Exhibit No.	Description
Heather Halpape	S. Lim
Heather Inglis	S. Nahm
Heather McCallum	Sally Halliday
Helge & Theresa Jensen	Sam & Mary Kozak
Henrick Senghaas	Sandra Bouchard
Hoffert	Sandra Hajdu
I. Robinson	Sandra Harvey
Ian Macpherson	Sandra Head
Inez Smith	Sandra Kalmakoff & Lezlie Wagman
Ingrid Steenhuisen	Sandra Murray
Iris Cooper	Sandra Nichols
Irmgard I. Dommel	Sandy McGechaen
Ivan & Bev Charette	Sarah
J. Callaghan	Scott Ducharme
J. Graham Mann	Selma D. Sheldon
J. Brett	Shari Laliberte
Jack Crerar	Sharon Thomson
Jack Heppell	Shary & Ben Stephen
Jack Miller	Shauna Martin
Jack Tearne	Shawn Lowrey
Jackie Hendrix	Shawna Soles
Jacqueline Iverson	Shelley Porter
Jacqueline McGarry	Sheri Macleod
Jagdeep	Sheri Thornton
Jake Williamson	Sheri Watson
James Davis	Sherrie Procopio
James Ludvigson	Sherry Butler
Jan en Elly Wilke	Sheryl Stanton
Jane & Michael Bland	Shira Moir-Smith
Jane Birkbeck	Stan Barker
Jane Camfield	Stefa Makauskas
Jane Stack	Stella Dodge
Janelle Simpkins	Stephen Kronstein
Janet Morgan	Steve Olliffe
Jeff & Carolyn Bateman	Stuart Duncan
Jeff Saby	Sue
Jenn Chow	Susan Ackerman
Jennifer Michel	Susan Deering
Jeremy Hessing- Lewis	Susan Komoroci
Jesse Miller	Susan Summers
Jim & Della Bulpit	Sylvia Johnson
Jim & Patricia Ryder	Taj
Jim Neudorf	Tara Kennedy
Jim Osborne	Ted & Leigh Moore
Jim Pearmain	Teresa Hagan
Jim Ratzlaff	Teresa Yep
Jim Russell	Terri Havill RN

Exhibit No.	Description
	Joan Carr
	Joan E. Andre
	Joan Fedoruk
	Joan Kenrick
	Joanne Cram
	JoAnne Leslie
	Joanne Marks
	Joe Badali
	John & Katherine Konrad
	John Butler
	John K. Gilbert
	John Moir
	John Parkes
	John Spicer
	John Stegman
	John Whittaker
	Jolayne Chaster
	Jose Lau
	Jose Luis Chavez
	Joyce Bobowski
	Jrplanninsic
	Judith Comfort
	Judy Kubrak
	Judy Montgomery
	Judy Peterson
	Julia P Lavell
	Julian Mais
	Julie
	June & Brad McAleese
	June & Dick Noble
	June Wells
	Jurgen Flemming
	K. & H. Fynn
	K. Campbell
	K.W. (Ken) Martens
	Kara L. Schick Makaroff
	Karl van Roon
	Karyn Gouldhawke
	Kate Chandler
	Kathleen Morrissey
	Kathleen Ross
	Terry & Wendy Killoran
	Terry Joyce
	Terry Lockett
	Terry W. Hughes
	Terryl Faulkner
	The Myrah Family
	The Tremblay Family
	Thomas J. Moore
	Thomas Woodman
	Tibor Kalamar
	Tim Botsford
	Tim Suddaby
	Tina Vos
	Tolling Jennings
	Tom Astley
	Tom Gray
	Tony May
	Trish Crawford
	Val Burke
	Valdine Michaud
	Valerie MacAulay
	Veronica MacInnes
	Vic & Joan Chaisson
	Victor Vollrath
	Vijay Morancie & Michael Robertson
	Vincent Trasov
	Virginia Casey
	Vivian Davidson
	Wade Hordal
	Wally Peake
	Warren Kohlhaas
	Wayne & Donna Morris
	Wayne & Gale Yip
	Wayne Dallamore
	Wes & Gail
	William R. Eaton
	Yvonne Ranks

Exhibit No. **Description**

E-88 Letters of Comment dated October 11, 2005 from the following:

A. W. Burt
A. Milani
A. Viitanen-Szefer
Agnes Forster
Al Campsall
Al Ens
Albert & Patricia & Cailen Caputo
Alex Au-Yeung
Allen Stanton
Amy White
Andrea Gillis
Andrea Langlois
Andrew Merilees
Angelo Fengler
Anne Wiebe
Anneliese Schultz
Ashley Hamilton-MacQuarrie
Blessman
D. Hodgkinson
Barb Yates
Belinda Larsen
Ben Humphreys
Bennett Mitten
Bernett Cody
Betty Jo Critchfield
Bev Elchuk
Beverley Bonnington
Beverley McKeen
Bianca Gunther
Bianca Nieken
Bill Spence
Bill Upward
Bill W.
Bob Andrews
Bob Brown
Bob & Lylia
Bonnie Brunke
Bonnie Kopp
Brendan Whelly
Brian Henry
Brian Robinson
Brigit K. O'Leary
Brigitte M. Thumbler
John de Boer
John Eerkes-Medrano
John Wong
Joy Thorkelson
Joyce
Judith Clark
Judy Capes
Judy Charles
Jules E Smith
Julie Berks
June Wells
K.M. Kiechle
Karen Addison
Karen Graham
Karen Regan
Kari & Jodie Chyzyk
Katharina A. Byrne
Kathy Stevens
Kathy Woolverton
Keith Geier
Keith Miller
Keith Potter
Kelli Lawrence
Kelly Beriault
Ken Heighington
Kenneth E Hopkins
Kenneth Malin
Kerry Lambert
Kerry Lathwell
Kevin Joyce
Kimberly Morhalo
Korla Cooke
Kris Klaasen
Kristen Jang
Kyler Storm
Larry & Maureen Meyer
Larry Blackhall
Larry Hunter
Laura Rutherford
Laure & Marcel Lafond
Laurel
Lawrence Kumar
Leah Dallamore

Exhibit No. **Description**

Brooks Towson
Bryan & Janet King
C. Falconer
C. J. Barton
Calvin Peterson
Cameron Shute
Candace Hudson
Candice Shaw
Carole Davis
Carole Wood
Caswell, Douglas George
Cate Atkinson
Catherine Miller
Cathi Kitzenberger
Cathie Douglas
Cathy O'Connor
Celesttina Hart
Charles Burslem
Charles Hays
Chelsea Corsi
Chris Corless
Chris Gooliaff
Cindy Neilson
Colin Bryant
Colleen Hermanson
Colleen Spitzig
Connie Karst
Corry LeGear
Councillor Linda Campbell
Courtney Komonasky
Cynthia Foreman
Conrod
Dan & Mae
Dan Cruikshank
Dan Fillion
Dan Hingley
Darcy Boyd
Dave Wharf
David Goldman
David Grant
David Massey, Patricia Massy
Davis Bawtinheimer
Dawn Waswick
Deb Thiessen
Debbie Johnston
Deborah Barnett & Mr. Alastair Barnett
Leah Mellott
Lee-Ann Hooper
Leigh-Rishman
Leila s. Lustig
Lennie Olafson
Lillian Zaremba
Linda & Michael Wiles
Linda & Ron Comeau
Linda Bartlett
Linda Chobotuck
Lindy Lynes
Lisa Flintoft
Lisa Muri
Liz Crawford
Lois & Ed Jarvis
Lori-Ann Barraclough
Lorne McRae
Lorraine Webber
Lydia Kwa
Lynne Boardman
Madison Stephens
Maelene Fodor
Marcel P. Fillion
Margaret E. Szerepi
Margaret McGowan
Marguerite Ancell
Marilyn S. Weland
Mark Gloumeau
Mark Schwark
Mark Zuehlke
Mark bayrock
Marlene Glover
Marlene Hough
Matthew Laberee
Matthew Pilfold
Matthew Sasaki
Melvin & Barbara Peters
Michael Callaghan & Renate Weber
Michael Woloszyn
Mike Bourassa
Mike Cannon
Mike Mckoryk
Moira Perlmutter
Mona Zilkie
Monica, Mary & Lyle Craver
Morgan Geisler
Mr. Iain Marrs

Exhibit No.	Description
Deborah Brown	Mr. Sandes Ashe
Deborah Loren	Mrs. Jacquie Melito
Dena Reimer	Mrs. M. Russell
Denise & Peter Kinvig	N. Mostowy
Denise Churchill	Nancy Van Veen
Diana Kilgour	Neil Hengel
Diane Jolly	Neil Robertson
Diane McLaren	Nettie Adams
Dianne Fasshauer	Nicki Hokazono
Dick & Pat Campanella	Nicole Bermbach
Dina Hanson	Nicole Linnell
Dominic Prince	Noella Stewart
Don & Jean Wickett	Ogi Elliott
Don Blakey	Olga Coello-Robinson
Don Robyn	Pamela Berg
Don Davidson	Pamela Bittinger
Don Graham	Patrick M. Balfry
Don Haaheim	Patsi Longmire
Don Mutala	Paul Bolan
Don Skelley	Pauline Johnson
Don Steinhauer	P Doyle
Donna Robb	Pearl Busch
Doreen McConachie	Penny Powers
Doris Nymann	Peter Holmes
Dr. Anne D. Forester	Peter Jones
Dr. Anne Gagnon	Petra Robinson
E Slemp	Phil Watson
Edna Welburn	Polly Rudderham
Edward Cannell	R. Rockerbie
Elaine Cue	Rachel Frazier
Elizabeth Cheu	Rachelle Robertson
Elizabeth Hall	Rayone Christante
Elizabeth Roberts	Rio Bates
Elizabeth Schatz	Robbie Chesick
Ellen Gonella	Robbie Newton
Ellen Vaillancourt	Robert Riedlinger
Elsie	Robert Spibey
Ernie & Louise Lorentz	Robert Tarplett
Ervin Redekop	Rod & Jan Lewis
Ev Reade	Roger Uhrynowich
Eva-L. Kangas	Ron & Gloria Kinley
Evelyn G. Johnstone	Ron Mulholland
Florence Roy	Ron Swift
Frances Backhouse	Rory Mahood
Frank McGreal	Rose Fortier
G. Digna Olyslager	Ross Arbo
Garnet Martens	Roxanna M. Wong

Exhibit No. **Description**

Gary Stasiuk
Geoff Pappas
George Clement
Georgia Bell & Steve Williams &
Harold Kerpan
Geraldine Doyle
Geri James
Gordon & Sue Bailey
Gregg Rogers
Guy Vallieres
Hal McDonald
Hana & Marcus Wosk
Hans Karow
Harold J. Williams
Heather
Heidi Greco
Hello
Helma Rainey
Helmut Wartenberg
Ishbel Galloway
Ian & Cindy Morrison
Ina Thornton
Irene Bjerky
Irene Suyin Lee & Douglas E.
Rickson
J Reale
J. A. (Al) Cosar
J. M. DeWolf
Jack & Ellie
Jadine Kennelly
Jai Sequoia
James Bjork
James Currie-Johnson
James Dalsvaag
James Garton
James Hughes
James Pell
James Riordan
Jamie Weinstein
Jan Coyle
Jana Konkin
Jane Larsen
Jane Petch, Lyle Petch
Jane Super
Jarod McCullough
Jatinder Ram
Jean & Rudie Slieker
Roy Mills
Ruth Anne Berg
Samy Shenouda
Sandra Fernandes
Sandra Larson
Sandy Vollo
Sara Frederking
Scot Merriam
Sean Penney
Shannon Hendrickson
Sharon Viola Mooney
Sheena Campbell
Sheila Gaunt
Sheila McFadzean
Shelley Wood
Sherazad Jamal
Sherri Shon
Sherry Hudson
Sheryl & Kirk Salloum
Shoshana Gutman
Simon Hunt
Simon Seah
Steve Johnson
Steve Mercier
Stu Thomas
Sue Soo
Susan Barois
Susan Upton
Susan Wallace
T Veloccia
T. Boarding
T. Mario
Tammy Sawatzky
Tannis Hugill
Tanya Davidson
Tasha Nijjar
Terri Munro
Theresa C. Lidster
Timothy Baril
Timothy Welsh & Liza Bautista
Todd Johnston
Tomina de Jong
Tony & Gay Mortimer
Tony Depasquale
Tracey Stokes
Tracy Bayley
Trevor C. Warren

Exhibit No. **Description**

Jean Humphreys
Jeanette & Kenneth Magee
Jen Dowdeswell
Jennifer Allore
Jennifer Bazett
Jennifer James
Jennifer Scott
Jesse Hohert
Jesse Winfrey
Jill Sheppard
Jim Beguin
Joan E. Crosbie
Joan Eccles
Joan Janzen
Joan Sutherland
Joey Miller
John & John Combes
John & Paulette Stubbs
John Allen
John & Marilyn McVicar
Trudy Aldridge
V. Grant
Valerie Elliott
Vicki Suddaby
Virginia Derksen
Warren Bell
Wayne Carter
Wayne Marston
Wayne & Sharon Rodgers
Wendy Bice
William Muir
William Owen
Wilson Syyong
Yvonne Rydberg

E-89 Letters of Comment received October 11, 2005 via Canada Post/Facsimile:

A. Chin
A. Stuart
A.S. Muir
Addie & Clifford Murphy
Adrian & Jean Wightman
Agnes Limbo
Aimee Palomares
AJ Cairns
Al & Marion Dallamore
Alida Penner
Allen & Janey Morgan
Andrew Murray
Andrew Walker
Angela Barron
Angus McDougall
Ann Castro
Anna Koochin
Anonymous 2
Anonymous 3
Anonymous 4
Anonymous – Belcarra
Anonymous – North Vancouver
Anonymous
Anonymous – Millrook Lane
Joan StoneHouse
John – Surrey BC
John Ames & Katharinia Byrne
John & Oie Richards
John Forbes
John Hough
Jonaine Ernst
Josie Dal Ponte
Joyce & Ken Cook
Joyce M. Stubb
JP West
June Binkert
K. Eleanor O'Neill
K. Tordoff & M. Tordoff
K.N. Moorhouse
Karen Thorstenson
Karen-Gloria-Alf-Judy Magnessen
Karin Houton
Katherine Clark
Kathleen Grootendorst
Kathleen Wilding
Kathy Grinwis
Katrina Maxwell
Keith & Joan McLean

Exhibit No.	Description
	Burnaby
	Arelene Konrad
	Arlene Rogers & Beverley Woodburn
	Art Ruymer
	Arthur Carballo
	Arum Dhalakin
	B. Christie
	B. Pedersen
	Barbara Dashwood
	Barbara Tanguay
	Barbara Volgmann
	Beth Allen
	Betty Gurney
	Betty J. Hanson
	Beverly J. Campbell
	Beverly Robinson
	Bill & Faye Ormsby
	Birgit Okoth
	Brian R. Larsen
	Bruce E. Ralph
	C. Lindhoest
	C. Slorendo – Burnaby
	Carol L. Thomson
	Carolyn Alexander
	Catherine Clutchey
	Chandra Collett
	Charles & Velma Alford
	Christine Hoffmann
	Christine Robertson
	CM Buhler
	Colleen A. McEachern
	Cristina Madeiros
	D & M Arstad – Petition
	D. Anthony Hughes
	DA Moyes
	Dalton Jones
	David Fortunat
	David Gold
	Davin A. Deelman
	Dawn Trimble
	Debbie Reynolds
	Deborah Charrios
	Dee Mitchell
	Delphine & E. Lowe
	Dennis Ableson, Carol Helland, Elaine Dithurbide, George Kelly
	Ken & Vanessa Isilt
	Ken & Rose Branscombe
	Kenneth J. Orleski
	L. Perko
	L.D. & K.G. Farquharson
	LC Brown
	Lee Cruso
	Leonard & Shirley King
	Leonard & Betty Smith
	Leslie Haynes
	Leslie M. Smith
	Lillian B. Van der Mark
	Linda DeMerchant
	Linda Ostubchuck-Ft St. John
	LM & RS Trail
	Lois A. Arnesen
	Lola Backeland
	Lola M Allen
	Loretta Wales
	Lorna Jackson
	Lou Drage
	Luz Caron-Dean
	Lydia Waytook
	Lynn Brown
	Lynn Lagace
	M. Ghadim
	M. Heppner
	M. Kotilla
	M. McPhee
	Margaret Gerk
	Margaret H. Henderson
	Marie Gazda
	Marilyn Bateman
	Marilyn Boston
	Marilyn Goodridge
	Marjorie Hammond
	Marjorie McNichal
	Marnie Peet
	Martha Hett
	Mary Reed
	Mary Sandeski
	MC Rushton
	Melanie Leckovic
	Merle Eldredge
	Michelle Dersch
	Michelle Okoth

Exhibit No. **Description**

Dithurbide, Ron Dithurbide & John Stix
Dennis Cook
Diane Poole
Dianne Kibbins
DM Sarter
Don & Dorothy McDougall
Don & Muriel Dunn
Don Gorby
Donald F. Pearson
Donald H. StoneHouse
Donn Moffat
Donna Jones
Doris Marley – Petition
Dorothy Martin
Douglas A. Ainsworth
Dr. Arthur Carballo
Dr. Douglas Coupland
Dr. John M. Boston
Dr. Mackenzie Brooks
Duncan DeLorenzi
E. Anne West
E. Brenda Prynn
E. Ikzaszyn
Ed Mann
Ed Senger
Edith Senger
Edith J. Parkyn
Edith Monet
Edmundo Davis
Edna Arcille
Edward D. Atkinson
Eileen Koochin
Elaine Hindson
Elaine McAndrew
Elizabeth McIntosh
Emerson & Robert Fox
Emil Ray
Emilia D. Valen
Ervin & Norma Ratch
Esther Harrison
Eugene & Adela Bergquist & Doug Thompson & Shonni Iverson
Eunice Parker
Eva Fernandez
Frances Cammiade & A.E. Wall
Frank Buday
Mildred G. Robinson
Monica Skinner
Mr. & Mrs. A. Marsh
Mr. & Mrs. A. L. Schalkx
Mr. & Mrs. G. Discher
Mr. & Mrs. J. Space
Mr. & Mrs. L. W. Johnston
Mr. & Mrs. Murray Ray
Mr. & Mrs. Roy Sandberg
Mr. & Mrs. Stewart Castle
Mr. Kelley Thompson
Mrs. J. Watson
Mrs. Valle Lunzmann
Mrs. W. Ross Morton
Mrs. Willy Vandelft
Mr.s. Y. Mori
N. Barber
Nigel C. Taylor
Norm Labourne
Norma & E. O. Taite
Olga Khodyrenal
Olivia Padilla
Parkwood Mall PrGeorge Petition
Pat Rurge
Pat Sexsmith
Patricia Darling
Patricia Meadows- Petition
Patricia Young
Patti Glynes
Paul J. Dwyer
Paulette Mercier
Pauline Pringle
Peggy Ebuin
Petition dated October 11
Phyllis M. Lake
Phyllis & Wilf Collington
Prudence Moore
R.K. Kelly
R.H. Phineys
Rae Lewis
Raffle – Langley
Ralph Ingram
RE Smith
Regina Gibbons
Rhamona S. Vos-Browning
Rhonda Nelson
Richard H. Prinsep

Exhibit No. **Description**

Fred & Sheila Marsh
Fred A. Young
Fred Ludwig
Freda Easy
Fredrick Lewis
Gale Penhall
Garry Kuse
Garvin Nyen
George Prokopich & Peggy Terisk & Elizabeth Abbott
George Whaite
Gerald & Ellen Conway
Gertrude Irving
Gilles Giguene
Gladys Spafford
Glenn Irwin
Goldie McDougall
Goldie Pedersen
Gordon & Ann Semple
Gordon & Kathleen Jones
Grace Baines
Grace Rajala
Graeme & Hazel Baurne
H. Cole
H. Greenaway
Harold Dieno
Harry Galon
Heather Horsley
Hedley Lewis
Helen & Bill Crawford
Helen Nobel
Helen Porter- Petition
Helen Roberts
Hugh B. Young
I.& M. Chesson
I. Thielemann
Irene Shepherd
Iris Estabrooks
J. Christie
J. Cope
J. LePage
J. Stirling
J.H. McBride
Jackie Gilmour
James & Rosemary Kerr
Jane Brouwer
Janette Downes-Springer
Richard Harrison
Richard Roussin
Rita & Vernon Mohr
Rita Denis
RL Booth
Rob Nairne
Robert & Ethel Hackett
Robert & Joan Brown
Robert D. Strong
Robert W. McLaren
Robin MacGregor
Ronda Westergaard
Rowena Jimenez
Roy Cooke
Roy Stark
RW Anderson
S. Turner
S. Wilson
Sandra Horgans
Sandra Smeds
Sharon Sharp
Shayna Hornstein
Sheilagh Foster
Sonja & William Zambik
Stacey Blackwood
Stan & Betty Lilley
Steven Clutchey
Stu M. McIntosh
Stuart Berry
Susan Bege
Susan Cousineau
Susan L. de Roode
Susan Loadman
Susan Upton
Sylvia Perkins
Tania Elliott
The Kelfmauns – Quesnel
Thea & Duggen Gray
Theresa & Leon Gieselman
Tia Callihoo
Trevor Wright
V&E Roth
Valerie Seager
Velma Rhodes
Victor Ivan Carlson
Virginia Young
W.J.O'Donnell

Exhibit No. **Description**

Jean & Gerry Richardson
Jean M Henderson
Jean Walker
Jeanette O'Donnell
Jennifer Evin Jones
Jennifer Wengrowich
Jerry L'ttomme
Jessie Kereaway
Jesusa Ebrahimzadeh
Joan Moyes
Walley P. Lightbody
Walter & Ellen Gill
WE Woodbrey
William J. Wilson
William Koochin
Winnifred Gooding
WR Kelton

E-90 Letters of Comment dated October 12, 2005 from the following:

Aftab Nuraney
Alan Cole
Alex Pepper
Alexandra Birch
Alistair J. Borthwick
Allen Arthur
Alma Lewis
Amanda Semenoff
Amelia Humphries
Andrea & Barry Toporowski
Andrea Halvorsen
Andrew & Kathy
Andrew Lissett
Ann Mortifee
Anne Andrews
Arjen Hulstra
Arne & Maureen Axen
Arnold McCutcheon
B. and W. Richards
Barbara Hodgson
Barbara Macnaughton
Barbara Mizgala
Barbara Sage
Barbara Tomasic
Basi Stuart-Stubbs & Brenda Paterson
Beryl & Ron Cartwright
Beryl Wilson
Beth & Mike Horne
Bianca Lechner
Bill & Eileen Doherty
Bill & Betty Geier
Bill & Marjorie Stager
Bob & Pat Cannon
Jordan Levine
Josette Williams
Josh Murray
Joyce Tomm
Judith Swan
Judy Westacott
Julia MacKenzie
June McKain
K Perry
Kai Taylor
Karen Hale
Karen Jordan
Karen McLennan
Karen Young
Katarina Krc.
Kelly-Kenyon
Kelly Pearson
Ken & Mary Gibbs
Keri Roberts
Kevin Higgins
Kevin M Nicholson
Kevin Wallace
Kim Lane
Kjell & Lucy Hurlen
L Karow
L. Hewitson
L. Motchman
Ladislav William Krc
Lance & Sally
Lance Vrabek
Larry & Anita
Larry Helfrich
Laura Hahn
Laura Solberg

Exhibit No.	Description
Brenda Blakely	Laurel G Keating
Brenda Harfield	Lauren Ollsin
Brenda Nelson	Leah Thom
Brian & Sylvia Bell	Leila F. Jensen
Brian Thomson	Leslie Dyson
Bruce A H McRae	Linda & Marc Limacher
Bruce Dolsen	Linda Jones
C.F. Doyle	Linda Mills & Stefan Carson
Candice Rideout	Linda Schiman
Carey Hill	Lois M. Gendron
Carla Burton	Lorraine Koren & Michael Moriarity
Carol Bjarnason	Lorraine Prafke
Carol Cartmell	Louise Greene
Carol-Ann Frances Dwyer	Louise Scheuer
Carole Benner	Lucille Guiney
Carole Youds	Luella Iwasiuk
Carolee Boivin	Lynda Denier
Caroline Mewis	Lynda Mears
Catherine Hammer	Lynn Wittenberg
Chad Danyluck	Lynyja Howse
Charles & Helen Tiers	M. Uni
Charlotte Bonin	Mandy Glanville
Chelle Brewer	Marc Bowes
Chris Breadner	Marcel
Chris Tamm	Marcella Tiggewerth
Chris Yates	Marcia Francis
Christina	Marea Larsen
Christy McTait	Margaret & David Gramlich
Chuck Alsberg	Margaret Birley
Cindy & Terry Lessard	Margaret Resin
Cindy Savoy	Margaret Schubart
City Clerk	Marian Vogel
Clay Ewings	Marilyn
Clifton Cann	Marilyn Leslie Kan
Clay Ewings	Marilyn Pasztor
Clifton Cann	Marina Gryde
Clive Wilson	Marina Smidesang
Colin Weavers	Mark Biles
Colleen Austin	Mark Hanson
Colleen Garbe	Marnie Wiffen & Ron Kohnke
Connie Phenix	Mary Billick
D.Jaeger	Mary I. Richardson
D.North	Mary Jo Abata
Dana Kirkwood	Mary Lachapelle
Dane Roberts	Mary Olson
Daniel Rondeau	Masami Yamanouchi
Danielle	Matreya Monro

Exhibit No. **Description**

Danika Dinsmore
Dareck Gorecki
Darren & Heather Miller
Daryl Armstrong
Dave & Linda Brown
Dave & Deanne MacMillan
Dave Miton
David Beneteau
David E. Cass
David Funk
David Money
David Usselman
David Williamson
Deborah Cameron
Debra Fallek
Debra Rafnkjelson
Delia von Schilling
Denise Grams
Dennis Clive
Derek C. LaCroix QC
Derek Dovale
Diana Ralston
Diane & Mervin Bjorgaard
Dianna Hurford
Dianne Haag
Dianne Woodman
Dick Soman
Diego Rodriguez
Dina Tsao
DJ Nutikka
Don & Ann Reynolds
Don Richardson
Donald Murray & Andree Galbraith
Donn & Viviaan Hall
Donna Harper
Donna Randazzo
Donna Young
Doug Turner
Douglas & Rebecca Scott
Dr. P. Severy
Dr. Deneen Baron
E.Anne Little
E.Cecill
E.Clayden
Earl Skaarup
Earle Tatlow
Earlene Fordeczka
Maureen Hanak
Mehrun Kassam
Mel Stangeland
Melanie Coath
Melba Thomas
Michael Annandale
Michael Baynham
Michael J. Fallon & Claudette
Michael Wall
Michele McCabe
Michele Turgeon
Michelle Yu
Mickey Lee & Jackie Bennett
Mike & Teresa Reid
Mike Puhach
Mirissa Farias
Morganne Keplar
Mr. D. Ashcroft
Mr. & Mrs. R. Harriott
Mr. Andrew Kineshanko & Mrs. Yvonne Kineshanko
Mrs. Barbara Stampfl
Mrs. Elizabeth Huml
Mrs. R. Jones
Mrs. Susan Tate
Ms Sharon Lund
Ms. Lorenna Pardy
Murray Shoolbraid
Myna Lee Johnstone
Myrna Martin
N.Wigen
Nancy Cavin
Naseem
Neil Brown
Neil Harnett
Nick Walker
O.I. Johnson
Oscar & Noreen Johnson
P.Supeene
Pam O'Donnell
Pat & Jamie Scott
Pat Munroe
Patricia & Roman Woroch
Patricia A Hall
Patricia Ann Donahue
Patricia Maskell
Patricia Morris

Exhibit No.	Description
	Ed Cavin
	Eden Bishop
	Edith & John Hilton
	Eileen Little
	Eileen Wttewaall
	Elaine Miller
	Eli McGinty
	Elinor Warkentin
	Elizabeth Rocha
	Elizabeth Boates
	Elizabeth Close
	Elizabeth Ley
	Ellen Pond
	Ellen Runnalls
	Emilia Rivas-Rivas
	Emma Tanis MacEntee
	Eric Proter
	Erin Brownlee
	Erin Sim
	Erin Yakiwchuk
	Ernest & Pauline Seth
	Ernie Davis
	Ernie & Bonnie Smallenberg
	Erwin Diener
	Esther Harrison
	Estrellita Gonzalez
	Evonne Dolphin
	Fay Tomlinson
	Fran Waldie
	Frances Monro
	Frank Borsa
	Frank Collinson
	Frank Schulte
	Fred & Judy Roman
	Fred Busch, Mayor
	G Popoff
	G.Campbell
	G.Oliver
	Gabrielle Newman
	Gail Woodward
	Garry Greene
	Gary & Linda Johnson
	Gerald E. Van Sickle
	Gerri Patriquin-McKee
	Gerry & Jean Kromm
	Gina Green
	Gina Main
	Patricia Roemer
	Patricia, Paul & Reid McGregor
	Patrick Huband
	Patti Outram
	Peggy Hansen
	Penny Aquino
	Percy Folkard
	Peter Frinton
	Philip Lake
	R.D. Keir
	Ralph Marryatt
	Randy Kanigan
	Ray Mar
	Rennie Hooley
	Resa & Lance Birley
	Rev. Sharon Cooke
	Richard & Gail Kent
	Richard Andrews
	Richard Voitic
	Rino Manarin
	Rita McCormick
	Robbie Roberts
	Robert & Noreen Weston
	Roberta Russell
	Roberta Wong
	Roger Norum
	Roman Hildebrandt
	Rosemarie Green
	Rosemary Brosseau
	Rosemary Morris
	Rupert Adams
	Russell Metcalfe
	Ruth Grasby
	S Hayes
	S.H. Runquist
	S.M. Ryan
	Samaya Ryane
	Sandra Chartrand
	Sandra Henson
	Sandra Paulsen
	Sandra Wray
	Sandy Liston
	Sarah Laundy
	Scott Nichol
	Seungsoo Jung
	Shannon Stewart
	Shari Borger

Exhibit No. **Description**

Glenn Parkinson
Gordon & Helen Galbraith
Gordon
Greg Gerwing
Hal Richardson
Harold Steiman
Harry & Nora Jukes
Harry & Louise Kirkpatrick
Heather Collins
Heather Frankson
Heidi Sohm
Helen Sandberg
Hilary Friesen
Hilda & Bill Miller
Honey Levanel
Ian Monro
Ilona
Irene & Gordon Shaffer
Irene Williams
Irma Sewerin
Jack & Barbara Lyngard
Jack Thornburgh
Jaclyn-McPhadden
James Arpe
James Millar
Jamie Alexandre
Jamie Mair
Jan Driessen van der Lieck
Jana & Ken Abramson
Jane Macdonald
Janet M Jans
Janet Mierau
Jayne Raffie
Jean & Chris Hahn
Jean MacIntosh
Jeff Hooker
Jennifer Bishop
Jennifer G. Keefe
Jennifer Groen
Jennifer Heath
Jennifer Heath-Cass
Jennifer Low
Jennifer Meier
Jerry & Pat Desjarlais
Jill Goudriaan
Jim Paul
Jim Swain
Sharon Ashe
Sharon Bovee
Sharon Grisdale
Shaun August
Shauna McGarrahan
Sheelagh O'Donnell
Sheila Harris
Shelley Johnson
Sheri Thornton
Sherri Kearns
Simone Green
Sondra MacLeod
Steve Toomey & David Hicks
Steven Luscher
Suan H. Booiman
Sue Bond
Sue Long
Sue Menzies
Susan & Joe Driussi
Susan Chepelsky
Susan Cross
Susan Lovejoy
Suzanne Fairley
Suzanne Rees
T Searles
Tamara Sweet
Tanis Helliwell
Ted Rashleigh
Ted Rodonets
Terry Chantler
Terry Marr
The Juren Family
Thomas Heath
Tim Yuswack
Todd Nelson Brekko
Tom Cockrell
Tom Douglas & Jan Lyle
Tom Dowker
Tom Heath
Tom Osborne
Tom Reinarz
Trevor Nicklason
V.W. Scholl
Vera Gottlieb
Vernon Neis
Victor Petit
Victoria Robinson

Exhibit No. **Description**

Joan & Bryon McGaughey
Joan Cass
Joan Russow
Jo-Anna Logan
Jody & Brad Hesse
Joe Newton
Joe Randazzo
John & Bernice Fortunat
John Alton
John Baldwin
John Humeny
John M. Moore
John Smalley
John Stockton
John Theobald
Vincent Amendolagine
Virginia Christopher
Virginia Normandeau
W. Spalding
Wayne & Wendy Zambik
Wayne Murray
Wendy Belter
Wilfred C. Janes
William Gross
William K. Gross
William P. Jans
Wright
Zan Romeder
Zayda Ahmad
Zeus Bailey

E-91 Letters of Comment received October 12, 2005 via Canada Post/Facsimile:

Anonymous 1
Anonymous 2
Barbara Kershaw
Carol D. Reynolds, Trevor Reynolds & K. Reynolds
Carol Stein
D.F. Bruce
D.Macdonald
D.Wood
David L. Mcinnes
Dorothy Szabo
H.A. Beck
Leif Iverson
Patricia Senps
Paul Knowles McInnes
Petition 1
R.V. Lewo
Ric Chapwick
Richard Moose & Dorothy Ann Moose
Robert D. Ewing
Robert R. Wall
Robin Suchy, W.R Preece, G. Preece

E-92 Letters of Comment dated October 13, 2005 from the following:

A.Hassanali
A.Moerman
Abdul M. Mousa
AC Austin
Adelle Nelson
Adrian Smith
Adrienne Longworth
Al Zylstra
Alastair Wilson
Alexandre Babeanu
Alf Nad Nancy McGuire
Alice Purdey & Fred Douglas
Alice Siu
Alice V. Berry
Aline LaFlamme
Joyce E Munn
Joyce McLees
Joyce Schimelfenig
Joyce Yee
Judith & Jean Paul Guy
Judith E. Rinta
Judith F. Monroe
Judith McLellan
Judith Price
Judy Gaylord
Judy Gill
Judy Jones
Judy Marshall
Julie Anne Ames
Julien Thomas

Exhibit No.	Description
Alison Bird	Julieta Criollo
Allen Savoy	Julius & Shelagh Stroller
Amanda Dhalla	June Danielson
Amber Hockin	K Dyson
Amber Mann	K Fan
Amber Sommerfeldt	K. Skov
Amelia Humphries	Karen Froebe
Anita O'Flaherty	Karen Laskey
Ann & John Waller	Karin Bachman
Anna Lee & Family	Karin S. Trapnell
Anne-Marie Long	Karl Froschauer
Annie Radisic	Katarina Kolar
Anonda Berg	Kate Siddal
Anthony Bosecke	Katherine Bonathan
Arnold Porter	Kathie Putt
Ashly Nicol	Kathleen Wallace-Deering
Avis Seads	Kathy Kebarle
B Hillier	Kathy McLean
B.De Borggraef	Keith W. Steeves
B.Gail Riddell	Kelly Booth
B.Yeates	Kelly Mitchell & Cliff Haman
Barb Elmore	Ken McClelland
Barbara Kaye	Ken Sinclair
Barbara Nash	Kendall Kyle
Barbara Parsons	Kim & Richard Fisher
Barbara Porco	Kim Cole
Barry Tucker	Kim Lafferty
Barry	Kim Zinke
Ben Hudson	Kirsten Mason
Berni Solhiem	Kirsten Skov
Bert Klaver	Kirthi Roberts
Bertha J. Lawrence	Klaus Gattner
Betty MacPhee	Kristina Mitchell
Betty Skakum	L.A. Robison
Bev Neilson	L. Sichkar
Bev Richards	Lana Panko
Bill & Maevene Lahowy	Laura Bishop
Bill Klompas	Laura Passenger
Bill Michaux	Laura Symmes
Bill Tieleman	Laura, Brian, and Niklas Iwan
Bill Verbeek	Laurel & Mark Axam
Blair & Wendy Trousdell	Lawrence Babcock
Bonnie Coltman	Lee Carter
Bonnie Schultz-Lorentzen	Lee Darling
Brenda McLuhan	Lee Endersby
Brenda Salloum	Lenore D. Lecy
Brendan F. Mongeon	Lesley-Ann Rolls

Exhibit No. **Description**

Brent Henry
Brian Giesbrecht
Brian Redman
Brigitte & Edward Bogan
Brooke Burke
Bruce McLeod
Bruce Trites
Bruce Wilkinson
Calvin Martin
Carl Drugge
Carmen Norrish
Carmen Pelletier
Carol & Stewart Boyce
Carol Attenborrow
Carol Flynn
Carol Lynka
Carol Matchette
Carol Moore
Carol Winthrope
Caroline Baker
Caroline Brown
Caroline Stokl
Carolyn Harris
Carolyn Masson
Catharina & Horst Leidel
Catherine Duncan
Catherine Hammer
Catherine Jacobsen
Cathy Maniwa
Cathy Reckenberg
Charity Tulak
Charlene Ponto
Charlene Waters
Charles Rea
Charlotte Brown
Chris Barratt
Chris Bates
Chris Bayliss
Chris Campbell
Chris Driussi
Chris Marshall
Christine A. Muise
Christine Birdseye
Christine Green
Christine Ho
Christine Palinko
Christine Spencer
Leslie Eburne
Lianne Smithaniuk
Lily Derksen
Linda Bartlett
Linda Samland
Linda Smith
Lisa Bilchik
Lisa Brideau
Lisa Moffatt
Lisa Raison
Lisa Schwabe
Lisa Ellyin
Lori Peterson
Lorne Hanis
Lorne Hunter
Lorraine Bishop
Lorraine Roberge
Louise & Art Talbot
Louise Grant
Lucille Bates
Luke Family
Luke Sales
Lurene & Doug McNicol
Lyle Brydon
Lynda McInnes
Lynn Douglas
Lynn Ketch
Lynnette Lettinga
M. Jones
Maggie Aronoff
Malcolm W. Corey
Mallory Pred
Manon Gartside
Maragaret Brew
Marcia Harrison
Marcus Clark
Margaret Foden
Margaret Leibbrandt
Margaret McLean
Margaret Mostowy
Margo Mercier
Marie Cooper
Marilyn Schoenberger
Marilyn
Mark C. Roberts
Mark de Bruijn
Marlene Smith

Exhibit No. **Description**

Christopher Adkins
Cinzia Dalgarno
Claire Sicherman
Clevanel
Cliff Haman
Clive Bethel
Colin & Carolyn Lee
Colin Morgan
Colin Thompson
Constantin Chira – Pascanut
Corinne Staver
Craig Costantino
Crystal & Gerry Foerster
Crystal
Curtiss Vaselenak
Cynthia Howden
Cyril Henderson
D.Brown
D.Hansen
D.McKee
D.E. Maris
Dale Dybhavn
Dalit Holzman
Dan Mason
Dana Shoesmith
Danaan Dallas
Danaca Ackerson
Darcie Peel
D'Arcy Oliver
Darren Campbell
Darren Peets
Dave & Shelley George
Dave Barrett
Dave Jarvis
Dave Turner
David A Danyluck
David & Carolyn Simmons
David & Gail Chartres
David Bishop
David C. Cooke
David C. Williams
David Dolsen
David Elmy
David Esteban
David James
David Labistour
David R Knight
Martin Fournier
Martin Healey
Marvin D. Friesen
Mary Catherine & Andre Ruel
Mary Hinchliffe
Mary Janeway
Matt Offer
Maureen Boissy
Maureen MacDonald
Maye Tsuida
Melinda Straight
Meredith McLeod
Michael Owens
Michele Joel
Michelle Huisman
Michelle K.
Michelle Paquette
Michelle
Mike Anderson
Mike Chapman
Mike Hanson
Mike O'Brien
Mike Ross
Mr. & Mrs. MacDonald
Mr. K. Parker
Mrs. Sferra
Ms. Darlene Deutch
Ms. Montgomery
Ms. Pat Row
Nadine Chambers
Nadine Wright
Nairn Albrecht
Nancy & Glen Adams
Nancy Crozier
Nancy Robertson
Nancy Vincent
Natasha Audy
Neil West
Nicole Shaw
Nigel Halsted
Nikki Roulston
Nina Westaway
Nory Esteban
Orlis Morgan
Otto Lim
Oz Northstar
P & R Haw

Exhibit No.	Description
David Stary	P. Smith
David Tracey	Pam Freir
DB	Pamela Cop
Deb Sawatsky	Parry Z
Denise Stapleton	Patricia Barclay
Dennis Gerace	Patricia Faurot
Dennis Johnson	Patricia Houston
Dennis Schmidt	Patricia Ross
Dennis	Patrick Rogers
Diana Dowsley	Patti Gardner
Diane Faurschou-Wong	Paul E. Moes IV
Diane Gariepy	Paul Sanborn
Dianne Milsom	Paul Sheldrake
Dick Smallenberg	Paul St. Amand
Dn Pettipas	Pauline Thompson & Robert Eberle
Don & Sylvia Currie	Penny Johnson
Don Ball	Peter Talbot
Don Chalmers	Peter Tweedie
Don Fodor	Peter Vaisanen
Donald Kreye	Peter
Donna Cameron	Phil & Carol Brooks
Donna Murphy	Phyllis Irving
Doreen Bonin	Pierce D. Graham
Doreen McCullock	R. Hellard
Dorothy Carmichael	R. Maclean
Dorothy Lee	R. Mathews
Dorothy Young	R.A. Ralston
Doug & Dana Howe	Raasveldt Anna
Doug Catley	Rachel McDonnell
Doug Lacina	Ralf Niemzik
Doug MacDonald	Ralph Behrens
Doug McFee	Ralph Moore
Douglas Carter	Ramona Scheiding
Dr. Charity Mewburn	Randy Dubbert
Dr. Tim Robinson	Randy Haw
E.Battistella	Ray A. Matthews
E.Larry Berkey	Rena Hood
E.A Turner	Rennie Holley
E.Carlson	Revd Dr. A. J. Pell
Edith Levey	Rhea Ravanera
Eileen Farrer	Richard Zajchowski
Elaine & Ken Potter	Richard (Rick) A. Sieben
Elaine Esteban	Richard & Adella Matthew
Elaine White	Richard Drdul
Elisabeth Ambler	Richard Price
Elise Finnigan	RJ Pred
Elizabeth Neil	Rob Roy

Exhibit No.	Description
Elmer D. Witt	Robert & Joan Beddoes
Elsie Balluff	Robert Jamnes Stewart
Emerson Thomas	Robert Melnik
Emily Guy	Robert Penkala
Emily Lehnen	Robert Tsuida
Emma Stokes	Roberta Staley
Eric Evans	Robin Behan
Erin Gibbs	Robin Rombs
Erin Mcdade	Rodger Cove
Erl Fearn	Rodney & Dawn Morris
Ernie Siemens	Roger Rolfe
Ernie Steele	Ron @ Rose Purnell
Eugene Quan	Ron & Judith Rithaler
Eve McLeod	Ron Loewen
F.G. Babuin	Ron Versluis
Felix Kaufhold	Rosemary Carter (Ph.D)
Francois Trahan	Rosemary Fitzgerald
Francoise Brumeaux	Rosemary Phillips
Frauke Wildrich	Ross & Carrie Neggers
Fred & Karin Robins	Rowan Keegan- Henry
Frederick Kranz	Rufina Cua
G.Mah	Russell Plant
Gail Buente	Russell Warren
Garry MacPherson	Ruth Hodge
Gary & Maggi McCartie	Ryan Foster
George McCutcheon	S. Bremner
George Richards	S.J. Shaw
Gerri & Ira Withler	S. Johns & N. Giles
Gillian Brangham	S.K. Northcott
Gillian Sanderson	Samantha Sternberg
Glen	Sandi Collins-Fleming
Glennis Tetrault	Sandra Barnes
Glenys Tidy	Sandra Freeborn
Glynn Crew	Sandy Goettler
Gordon Cool	Sandy Parry
Gordon Shoquist	Sara Golling
Gordon Smeland	Sarah Groves
Gordon Thwaites & Family	Scicol
Graeme Gibson	Sharon Cross
Grant Clubine	Sharon Dueck
Grant Gould	Sharon Habib
Greg Brunette	Sharon Parker
Greg McCallum	Sharon Quaife
Greg Nadeau	Shashi Prasad
Gwen & Rob Myles	Sheila Cockfield
Hans Heringa	Sheila Healey
Harold & Gail Woodford	Sheila Steeves

Exhibit No. **Description**

Harold Neufeldt
Harry & Gillian
Harry Bogden & Francine Tournier
Hayley Stovin
Heather Wilkinson
Helen Carter
Helen Kelsey-Etmanski
Helen Lee
Herb Van den Dorpel
Herbert H. Porter
Hilary Coltman
Honourable Pat Carney
Ian & Jo Stewart
Ingrid Moerman
Irene Kootchin
Irwin (Herb) Baker
Isabel Reinelt
Isobel Farrell
J Earl Chambers Kimberley
J.Benzie
J.Jacobsen
Jack Beveridge
Jack Rowland
Jack Wong
Jackie Bradley
Jackie Rawlings
Jadwiga Downarowicz
James A Waldie
James Arpe
James Ong
James Wilms
Jamie Donatuto
Jan Mazereeuw
Jane Macdermot
Janet M Jans
Janet M Jans
Janet M. Greenwood
Janet Simpson
Janice McCann
Jason Holmes
Jean McLean
Jean Thompson
Jeff Hooker
Jeff Kain
Jeff Kit
Jeffrey Owen
Jennifer Fedorink
Sheila Turner
Sheillah & Bob Scott
Shelly Chvala
Sherrin Perrouault
Shoana Beveridge
Sid Crockett
Sigma Service Club
Simon Eley
Simon Franklin
Slester
Sonja Rawlings
Stacey Boon
Stanley N. Young
Stephanie Schikkerling
Stephen Davis
Stephen Hamada
Steve & Kris Gabbott
Steve & Sadie Haison
Steve Denroche
Steve Matovic
Steve Milum
Summer Stewart
Susan Chapman
Susan Minchin
Susan Raposo
Susan Whiting
Suzi Haskell
Tammy Hulstra
Tara Ramdin
Ted & Claire Rathbone
Ted Brand
Teresa L. Brown
Terra Marini
Terri Alcock
Terri Driedger
Terry Hunter
The MacKenzies
Thelma Mahaits
Theo Riecken
Thomas B. Friedman
Thomas N Behan
Tom Hedekar
Tom Newberry
Toren Barnes
Tracy Sutherland
Tricia McDonald
Trout

Exhibit No. **Description**

Jennifer Niece
Jennifer Sweeney
Jenny Biem
Jeremy Balog
Jeremy Hale
Jerry Palo
Jerry Rolls
Jim Goddard
Jim Harris
Jim Meier
Jim Pilaar
Joan Bunn
Joan Churchill
Joan N Shirley
Joan Nazif
Joanne Oye
Joanne T.
Jocelyn Beaton
Jocelyn Morlock
Joe Ciccone
Joe Silverthorn
John & Lori Tober
John Bakker
John Bennet
John Beresford
John Burnell
John Wainwright
Jonathan Frantz
Josee Corrigan
Josefin Mutter
Josie Kotzo
Joy Reeves
Joyce Bork
Trudy Frisk
Trudy Tinkham
Tyler Ammerlaan
Valerie Evans
Valerie R. Breathet
Vanessa Kapka
Vanessa Van Vliet
Venus Pineda
Veronica Magnusson
Vicky Catchpole
Vincenza Cameron
Violet Moore
W. Anita Braha
W.R. Blair
W. S. Parker
Wayne Froese
Wburkholder
Wendi Saruk
Wendy Thompson
Wesley Doerksen
William Jans
William Jung
William P. Jans
William Spencer
William Turnbull
Willie Carter
Willy VanderGaag
Yoki Matthews
Yuriko Hashimoto
Zohreh Kazemzadeh
Zosia Bornik
Zshu-Zshu Mark

E-93 Letters of Comment received October 13, 2005 via Canada Post/Facsimile:

A. Davies
A. Nugent
Act Gould
Al Grant
Albert Caputo & Family
Alfred L. Ogilvie
Alicia Jameson
Alison Kendall
Allan & Irene Grant
Allan & Hazel Galloway
Anonymous 2
Lee Davidson
Leila I.Varga
Leslie Coy
Linda Lavigne
Lisa Blackburn
Lloyd Koshi
Lois Jones
Lori Featherstone
Lorraine Smith
Lucille Whyte
Lynn Falk

Exhibit No. **Description**

Anonymous 3
Anonymous 4
Anonymous 5
Anonymous 6
Anonymous 7
Anonymous – Langley BC
Anonymous – Maple Ridge BC
Anonymous – Nelson BC
Anonymous – Penticton BC
Anonymous – Richmond BC
Anonymous – Vancouver BC
Anonymous – Vancouver BC 2
Anonymous
B. Bodenhoff
B. Ehman
Barb & Garnet Hunt
Barbara Luman
Benjamin & Phyliss Bisset
Betty Stretch
Bevan Hemsworth
Bibi M. Chin, Ronald Chin & Rene Grayer
Bob & Donna Nicholson
Bruce Thackeray
C. Fallis
C.C. Mills
Carly Reisig
Carol & Allen
Carolyn Bromby
Catherine Stephans
Catherine Stephens
Charmaine Mayes
Cheryl Davis
Chris & Marilyn Ingleby
Christy Couttz
Cindy Moreno
Colin Dover
Constantce Sherb
Cynthia Paterson
D. B. Walton
D. Campbell
D. Kennedy
Daloris Dawson
Darren N. Paterson
Dave Doran
David & Pamela Sherwin
David R. Hill (University Of Alberta)
M. Westerlund
Madge L. Rattray
Margaret McDonald
Margaret Neilson
Marie Schurman
Mark Davis
Marnie Rideout
Mary Ann Thomson
Mary Donnelly, Sandra Donnelly & Robert Donnelly
Mary E. Jolin
Mary Kendall
Mary Nash
Mary Yoshimi Natrano
Mats Tholin
Maude Krokusz
Maureen LaBelle
Maureen Mosher
Mavis & Ralph Shulz
Melva Grant
Michael Poole
Michael Riis – Christianson
Michael Roy Campbell
Mr. & Mrs. A. Miron
Mr. & Mrs. Colin & Diane Matheson
Mr. & Mrs. G.Aishizawa
Mr. & Mrs. Kirilenko
Mr. & Mrs. Louis G Sorrenti
Mr. & Mrs. William Harris
Mr. Chang
Mr. Nash
Mr. & Mrs. Palfenier, J. Palfenier & D. Palfenier
Mrs. Frances Kennedy
Mrs. M. Fedden
N.M. Williams
Nancy L. Marrion
Naz
Neville Beddome
Nikole Macdonald
Nili Pisch
Nina Watts
Nora Blanck
Oliver & Dave Bjerstedt
P. Cottengham
P. Heinsdman
P.G. Leahy

Exhibit No. **Description**

Dean Quiring
Debbie Wiebe
Delfa Syeklocha
Devin Reisig
Diane Salter
Dianne Ritchie
Diemeon & Anne Robertson
Don J. Rouse, Elena M. Rouse, Darren F. C. Rouse & Becky D. Rouse
Donna Denger
Donna Johnstone
Dr. Gregor
E. McLachlan
E.H. Stephens
Ed & Margaret Ruf
Edward & Gladys Slotylak
Edward & Shirley Miller
Eileen Downs
Elaine Ten –Pow
Elizabeth Beck
Ella Pahl
Eveline VanHaastent
Evelyn McClung
Evelyne Forbes
F. Wells
Fay Zens
Florence & Frederick Van Essen
Folicia Mareels
Francine Brown
Frank & Enis Anselmo
Fred Ramos
G.M Norton
Geoffrey Whitaker
Gordon Humeny
Graeme & Hazel Bourne
Gwen Jackson
Gwendoline M. Stuart
H. Brown
H.Cantelon
H. Chadwick, Linda Chadwick & CC Powell
H. Veghedel
H.A. Devries
H.B Powell
Hal Prittie
Heather Dominelli
Pat Easterbrook
Patricia D. Landahl
Patricia Meadow
Patricia Smith
Patrick Fawkes
Patrick Teti
Paul Gurski
Peter Carson's Petition (Cansteel Machine Works LTD.)
Petition 1
Petition 2
Petition 3
Petition 4
Petition 5
Petition 6
Petition 7
Petition 8
Petition 9- Owners of Strata Title
Petition 10
Petition 11
Petition 12
Petition 12
Petition 13
Petition 14
Petition 15
Petition 16
Petition 17
Phyllis Fisher
Phyllis Kerr
Quinton Lam
R. Scott & Denise Graham
Rachel Hamilton
Randell Knight
Robert & June Ferguson
Robert Clifford
Robert D. Armstrong
Roman & Catherina Pelech
Ron & Gloria Tucksen
Ron Woodcox
Ronald & Shirley Smith
Rosanne Rumley
Rosemary Puefer
Roy & Lois Webb
Ruth Miller
S. Harrison, S.E. Harrison
Samson Yap
Sandra Bjarnason

Exhibit No. **Description**

Helen & Gilbert Findlay
Helen Beaugrand
Henri & Heidi Frioud
Henry Yates
Hubert Culham
I. Anderson
Ian Neville
Isabel Trozzo
J. Collins
Jack Murphy
James & Katherine Green
Jane Moloughney
Janet Ray
Jean Hughes
Jim & Kathy Stonehouse
Jim Panter & Joy Panter
Jocelyn Morlock
John Shaw
Josephine Chataway
Joyce Kereliuk
Julia O'kane
June Latin
Karl Jensen
Katherine Hemsworth
Kathleen Murphy
Kathleen Tompkins
Ken & Mary Gibbs
Ken & Vanesa Isitt
Kristine Bougie
Kurt Mosebach
L.D. Travis
Larry & Eleanor Then
Sasha Crittaro
Scott Durham
Sharon Dueck
Sharon Rosk
Sheila Fry
Shelly Robertson
Shireen Habib
Shirley & Lorne Fleming
Shirley K. Bailey, J.K Bailey & Jerry Bailey
Shirley Streich
Stephen C. Kershaw
Steve Chambers
Steve D. Chambers
Sue-Ellen Logue
Susan Bain
Sushila Deol
Suzanne Mah's Petition
Suzanne Reisig
Ted Armstrong – Cariboo Region
Ursula Schmidhause
Varya Taylor
Vera Schmedding
Victoria Scharaf
W. and M. Reimer
W. J. Nepplewhite
Wayne Cullen
Wayne Peppard
Wendy Powley
William Boyd
William & Margaret Prior

E-94 Letters of Comment dated October 14, 2005 from the following:

250-402-1200
250-402-1625
A.Sirk
Aaron and Maja Malks
Ada Glustein
Adele Astorino
Adriane Weller
A.Glass
Agnes Forster
Aleta Fowler
Alex Nicholl
Alexis Nothstein
Judy Harris
Judy Walsh
Julian Fikus
Julie Issac
Julie, Geoff, Kayley and Beebop Hollyer
Karen L. McNabb
Karen
Karin Clarke, Erick Lange, Roland Lange, Aline Lange
Karl Koerber
Karol
Kasia Smolko

Exhibit No.	Description
Allison Neill	Kate Burrows
Amanda Seth	Kate Onos-Gilbert
Amelia Grant	Katherine J. Maas
Andrew Williamson	Kathleen Rose Brand
Andy Hui	Kathy and Peter Brown
Angela Mah	Kathy Burrell
Angela Pegg	Kathy Daunais
Anita Wotschel	Katrina McGonigal
Ann	Keiko
Anna C. Reilly	Keith Burnett
Anne Beesack	Keith Larkin
Antigone Dixon-Warren	Kele Fleming
Artemesia Minichiello	Kelly Kennedy
Audrey McClellan	Kelly Mossman
B.Chretien	Ken & Eadie Thorsland
B.Gurr	Ken Anderson
B.Masson	Ken Anderson
B.Ulmer	Ken MacAllister
B.Ohlke	Kenn, Chris, Lonnie, Bob and Alleen
Barbara Maxwell	McLaren
Barbara Small	Kevin Buchanan
Barry Fleming	Kevin Dunphy
Barry Shelton	Kevin J. Hardy
Beatrice Varley	Kevin Stranack
Ben Skarbo	Kim Elchhorn
Bern Salvidge	Kimiyo Kamimura
Bernadette Kowey	Kira Gerwing
Bette & Wilf Hoskins	Kirsti Vitanen
Betty & Jack McKinnon	Kurt Belliveau
Betty Ediger	Kyle Crawley
Betty Geier	Larry Knoesel
Bev Cutler	Larry Stevenson
Beverley Holmes	Larry Young
Beverly Gunnell	Laurence McLaughlin
Bill Kobrosli	Laurie MacDonald
Bill Leaman	Lawrence Clayton
Bill Richards	Leah DeBella
Bill Sadar	Leah Kelley
Bill Shellard	Leanna Peters
Bob Little	Lee Klassen
Bob Nucich	Leri Davies
Bonita Allen	Lesley Hesford
Brenda Dahlie	Lesley Kemp
Brenda Henuset-Point	Leslie Marining
Brent Hardy	Lester M. Jones
Brian & Deborah McGukien	Libby Wingrove
Brian De Paoli	Lin Hammill

Exhibit No.	Description
Brian Harrison	Linda Acosta
Brian Kelly	Linda G. Krahn
Bruce Anderson	Linda McKoryk
Bud Brausen	Linda Sklazeski
Burt Cohen	Linda Theodosakis
C.Hendrickson	Lindsie Tomlinson
C.Wilson	Linell Sterns
Camerom Grant	Lisa & Brand Geary
Carl Chinn	Lisa Barrett
Carla Graebner	Livio Susin
Carol Barry	L Jhindle
Carol Forcier	Lois Schultz
Carol J. Turner	Loraine Stephanson
Carol Kelsay	Lorna McBride
Carol Roberts	Lorraine Hagen
Caroline Hendry	Louise & Douglas Gibson
Caroline Young	L.Sheppard
Caroline	Lynn Falconer
Carolyn Carpenter	Lynn Tryon
Carolyn Stevens	M.Gilhespy
Carri & Lawrence Grant	Maja Malks
Caspar Davis	Majid Ghorbani
Catherine Lloyd	Marcia Stewart
CEC Hardy	Margaret Feehan
Celine Mauboules	Margaret Marshall
Chantel Mebs	Maria Rego
Charlene Powell	Marianne Hall
Charles Newson	Marilyn Joyce
Charmaine Murray	Marion Morrison
Chester Brown	Marion Straker
Chris Bouris	Mark Christie
Chris Caswell	Mark Preston
Chris Meyers	Mark Reddekopp
Chris Skonberg	Mark Woloshen
Chris Villarruel	Marliese Dawson
Chris Trunkfield	Marnie Watson
Chrissy da Roza	Martin Fisk
Christine Kufner	Marvin Wideen
Christine Turner	Mary Golinsky
Christopher Coward	Maureen Gielty
Clair W. Wakefield	Max and Joan Ongaro
Cliff du Fresne	Meg Holdsworth
Colleen Brown	Megan Hunter
Colleen Power	Megan L. Crouch
Connie Lam	Melissa Linteris
Connie McGregor	Meredith Hunter
Constance Fogal	Micah Waskow

Exhibit No. **Description**

Corinne & William McDill
Corinne MacGillvray
Cristina Tognon
D.Mahony
D.Aird
Dale Saunderson
Dan LaRocque
Dan Mason
Dan Sirk
Danielle Bruneau
Danna Upper-Shuamon
Darlene Kalesnikoff and Family
Dave & Andrea Clyne
Dave Kelly and Michael Rosaine
Dave Mattson
Dave Neilson
David A. J. Irwin
David and Anne Stacey
David and Deanna Hawley
David Crook
David Ellingsen
David Kuntz
David McGee
David Mebs
David Wah
David Woolacott and Monique Kamokoff
Dena Ponto
Debbie Kemp
Deborah Allain
Dejon Costello
Delton Fallis
Dena Skalin
Denis and Margo Whyte
Denis O'Gorman
Dennis Barberree
Diana Wood
Diane Singleton
Dianne Lane
Dick France
Don and Elaine Kelley
Don Ball
Don Haythorne
Don Lawrence
Donna and Jim
Donna Cochran and Greg Spendjian
Michael Bjornson
Michael Mouat
Michael Wood
Michelle Bjornson
Mike and Moira Hourigan
Mikw Wheater
Mindy Ulmer
M.J. Embury
Morag Cochrane
Morrison
Mr. J. Staniewicz
Mr. R. Bertrand
Mrs. Kelly Gibbons
Mrs. Monica Grant
Ms. Webb
Mushtaq Jaffrey
Myriam Laberge
Nadine Classen
Nadine Katz
Nancy & Russell Barad
Nancy Henry
Nancy Kane
Nancy Yee
Neil Bauder
Nelson Webster
Neysa Finnie
Nicki Stieda
Nicole Yeung
Niel C. Thiessen
Nigel Banks
Nina Heidtke
Norma Carrie
Norman Bursey
Norman C. Conrad
Normandy Daniels
Nyomi Ross
Ole Anderson
P. Ryan Madder
Pamela Meling
Pat Bayes
Pat Higinbotham
Patricia Barry
Patricia Wiggins
Paul Gaston
Paul Reimer
Paulette Hucul
Penny Johnson

Exhibit No.	Description
Donovan Ashby	Peter and Yolande Lissett
Doran Osterhold	Peter Moogk
Dorothy Goldstein	Petrick and Bradley
Dorothy Thomson	Phi
Dorothy Watts	Philip Clement
Doug Fetherston	Pirjo Raits
Doug Sloan	R.Foster
Doug Turner	R.Grass
Dr. Jeanette Smith	R.Hicks
Dr. John M. Shaw	R.Saumur
Dr. Fernand Ellyin and Mrs. Suzanne Ellyin	R.W. Adams
Dr. William S. Havens	Randy Davis
E.Alexander	Randy Dubbert
E.Leroux	Randy Kamp, M. P.
E.Omaga	Randy Loski
Ed & Karen Susheski	Ray Smith
Egbert Plug	Ray Tracy
Egil Lyngen	Reid O'Flaherty
Elizabeth Eakin	Rhonda Burr
Eric Lorenz	Richard Mahoney
Erika Syvoks	Richard Nadeau
Erin Embley	Rob Boyce
F.D. Manchester	Robert Beckwermert
Faye Graham	Robert Kelly
Flo Ryan	Robert Mogensen
Frances East	Robert Slaven
Frances Pickett	Robert Weatherwax
Frances West	Roberta Clair
Francisco Luna	Rod & Mrs. June McKellar
Frank A. Pelaschuk	Rod Heenan
Frank Narrow	Roderick Wong
Frank Standeven	Roger and Lillian Gardener
Fred Ott	Rosa Pearson
Fred P. P. Turner	Rosanne Wozny
G. Stephen Denroche	Rosemary Harrison
Gail Leslie	Rosie Bratovenski
Gail Newell	Roslyn Henderson
Garry Barsalou	Roz Powell
Garry Fletcher	Ruth and Albert Galinis
Garth Richter	R.W. Claridge
Gary Buglioni	Ryan Hamilton
Gary D. Elsdon	Rylo Santan
Gary MacDonald	S. Cobden
Gary N. L. Lawrence	Sam Anderson
Geoffrey Way	Sam Hannah
Gerry Nesbitt	Samantha Anderson
	Samuel Mustone

Exhibit No. **Description**

Gill & Jerry Wood
Gillian M. Palejko
Glen Edwards
Glenn and Loretta Barr
Gordon and Audrey Fairbairn
Gordon Gauthier
Gordon Reid
Grant
Guy A. Duperreault
H. & J. Vurzinger
Hans & Ursula Litzcke
Harald Riffel
Heather & Don Boyle
Heather Copeland
Heather Stewart
Helen Radomske
Helen Row
Helene Dufour
Henry Chow
Holly Paris
I.Ulmer
Ian Birch
Ian Hutcheson
Ian Maas
Inderpal Diocee
Ingrid Steenhuisen
Irene Barker
Irene Eaves
Irene McKerlich
Ivan Antoniw
J.Mah
J.A.C. Derham-Reid
J.Anctil
J.Cochrane
J.Houlden
J.Hutcheson
J.McKay
J.Smith
Jacqueline Clark
Jacqulin McNicol
Jamie law
Jan Maxey
Jane MacDonald-Duval
Jane Roher
Janet Rippingale
Janice Baker
Janne Perrin
Sandra Jones
Sandra Wright
Sarah Chester
Sarah Weber and Adrian Litz
Sean McIsaac
Senja Palonen
Sequoia Publications
Shane Simpson
Shannon Young
Shannon
Sharon Harder
Sharon Treanor
Sheila Clarke
Sheila Fidler
Sheila Roth
Shelley Prince
Shera Shivji
Sherri Kajwara Bjorsnson
Sheryl Smith
Shohreh Hadian
Sigrid Willett
Silvia Farlinger
Simon Earl
Simon Warby
Sonya Wilson
Stefan Brunhoff
Stephanie Lawrence
Stephen Pickett
Steve Bede
Steve Breker
Steve Oulet
Steve Schoenhoff
Susan Adams
Susan and Shelby Deglan
Susan E. Gauthier
Susan, Edna and Chapin Key
Susan Lucas
Susan Raposo
Susan Wood
Sylvia And Donovan Downton
Sylvia Richardson
Sylvia Roberts
Tamara Orr
Tania Stacey
Tanis and Murray Phillips
Tazmeen Ismail
Teri Dyer

Exhibit No. **Description**

Jason Conn
Jason Farra
Jean King
Jean Logan
Jeananne Brehon
Jean-Claude Ndungutse
Jeannine Scott
Jen Witmer
Jennifer & Chris Woudstra
Jeremiah Baker
Jeremy Walls
Jerry Constant
Jill Inglis
Jill McGlenen
Jill McIntyre
Jill Stainsby
Jillian Skeet
Jim Sheehan
Jim Woodward
Joan and Steve Debella
Joan Carter
Joan Harding
Joan Morgan
Joan Roe
Joan Toews
Joanna Wood
JoAnne M. Kirk
Jodie Cuervo
Joe Cheng
John Lunam
John Tregilges
John Woods
Jordan Hoffman & Adam Durakovic
Jorge G. Puyssegur
Judith E. Giles
Judith Hodgson
Terry & Wendy Buchamer
Terry and Pauline Cross
The Myrah Family
Tina Svreck
Tjitske Nijdam
Todd M. Mundle
Tom Pickett
Tracey Moir
Tricia Sharpe
Ursela Stephane
Ursula Pfahler
Valerie Rampone
Van and Evie Gale
Vera Smart
Verita van Diemen
Vernice & Geoff Drewery
Vickki Montigny
Vincent J. Sofra
Walter Hardy
Warren and Susan Painter
Warren Kohlhaas
Wayne and Olga McDonald
Wayne Bovee
Wayne Gibbsons
Wayne Macleod
William and Lorraine Allison
William Howe
Wing Sun Simon Hong
Yuki Matsuno
Yvonne Kowalyk
Yvonne M. Pigott
Zane Kushnirak
Zshu-Zshu Mark

E-95 Letters of Comment received October 14, 2005 via Canada Post/Facsimile:

A.Grant
Abigail Lyne
Alane E. Cole
Amy R. Strickland
Anand Gandhi
Anonymous 2
Anonymous 3
Keith Larkin
Keith Miles
Ken Dresen
L.Grigg
Laszlo J. Veto
Lawrence & Helena Laursen
Leonard J. & Patricia Toye

Exhibit No. **Description**

Anonymous 4
Anonymous 5
Anonymous – North Vancouver
Anonymous
Arliss A. Kehoe
Arnold & Sylvia Peterson
Audrey & Graham
B.Loughlian
B.K. Roberton
Bansi Gandhi
Barb Reardon
Barbara & Jullat
Barbara E. Catto
Barbara Viczian
Barry Shelton
Bernice May
Bev Day
Beverley Bonneyte
Beverly Dorman
Bob Edwards
Carolyn Schacher
Catherine Chimenti
Christine J. Durack
Christopher Coward
Clarice E. Hall
Cosmas Manousiadis
D.Bailey
D.Chatatway
D.Pederson
Dan Makes
David Quigg
Deborah Pirzek
Denise & Loine Westfield
Dennis & Deborah Courtiff
Devlin Desrocher
Diane St. Louis
Dianne Boucher
Don Diesing
Don Strickland
Dr. Edward Gibson & Marianne Gibson
Dr. Satya Brown
Ed & John Travers
Edgar Streich
Edward Ken Wong
E.J. Gordon
Elaine Golds
Lillian Fullen
M.J. Mackenzie
M.Glenn Barr
M.F. Neelands
Malcolm McLaren – Allied Shipbuilders Ltd.
Margaret Main
Margaret Richardson
Margaret Walker
Marie Gazda
Marie Pirzek
Marjorie Hougham
Marread Sikkes
Mary Davison
Mary Jordan
Megan Charlton
Michael Hryniuk
Monika Kingsbury
Mr. & Mrs. Smith
Mrs. Judy Nelson
Ms. Collins
Ms. H. Hawthorne
Ms. Rukshana
Ms. Sooroo
N.G. Maclean
Nana Hashimots
Nancy Hailliwell
Patricia Darling
Paul P. Fraser
Paul Wainwright
Peggy – Jean Simpson
Penny Stirling
Peter Chataway
Peter Wainwright
Petition 1
Petition 2
Petition 3
Petition 4
Petition 5
Petition 6
Petition 7
Petition 8
Petition 8 Part 2
Petition 8 Part 3
Petition 8 Part 4
Petition 8 Part 5
Petition 9

Exhibit No.	Description
	Ernest Desrosiers
	Ernie and Donna Holbech, Joy-Anne Hope, Jeannette Townsend and Victor Holbech
	Erwin Smith
	F.Geoghegan
	Frances Moorcroft
	G.&D. Cooper
	G.Parole
	Gaila L. & Arthur L. Foort
	George Hope
	George Poncelet
	Greg Chapman & Karen Marotz
	Gregory Todd Babcock
	Guy Smeeth
	H.(Andy) & Vicki Andersen
	H.M. Gilan & Family
	Heide Brown
	Getal Gandhi
	Hilda Roddan
	Ian Gartshore
	Irene Rathbone
	J.Burns Petition
	J.Roher
	Jalpa Ruparelia
	Jean Roberts
	Jean Stilwell
	Jeff Wong
	Joe LesBlanc
	John & Leslie Rowlands
	John Humeny
	John Pirzek
	Joy Chase
	Joy Christian
	Joy Robinson
	Joy Darnall
	Joyce M. Ballantyne
	Judy Myrfield
	K. Rockliffe
	Karle Foli, Sylvia Sy & Isabelita Liabore
	Kay Carter
	Petition 10
	Petition 11
	Petition – Household of Malahat Place
	Petition
	Phil Christensen
	Pratrap Gandhi
	Priya Gandhi
	R.Lane
	R.Morgan
	Randy Kamp, M.P.
	Ray Cherniak
	Raymond & Elsie Luporini
	Reverend Michael Piddington
	R.Glashan
	Richard McPartlin
	Robert & Patricia Carroll
	Robert Cichocki
	Robert Reisig
	Robin Barker
	Rodger & Jane Aiers
	Ronak Ruparelia
	Sandy Duke
	Shirley Wong
	Sophie Semchuk
	Stephanie Brady & Roman Rudnicki
	Stuart McKirdy
	Susan Snell
	T.Werner
	T.D. Nicoll
	Ted & Linda Munroe
	Velia Laval & Lars Anderson
	Veronica Naickel
	Vi Wilde
	Victoria Uberall
	W.H. & M.A. Lowden
	Walt Hardy
	Walter Vokradsky
	Wendy Duke
	Wendy Rosnimi
	Wisdom
	Letters of Comment received via Canada Post/Facsimile:
E-96	
	J. Loeh
	J. Saunders
	E. Kolko
	E.T. Horabin

Exhibit No.	Description
N. Pearson	S. Clement
Lehmann	M. Hamilton Clarke
Gordon Moore	City of Rossand
H. Turk	City of Burnaby
Anonymous	City of Duncan
Margaret Penticton	Town of Smithers
R. Sherwin	Mary Blumer

Roderick Macdonell *Appellant*

v.

Attorney General of Quebec and National Assembly *Respondents*

and

Commission d'accès à l'information, Paul-André Comeau, Court of Quebec and the Honourable Jean Longtin *Mis en cause*

INDEXED AS: MACDONELL *v.* QUEBEC (COMMISSION D'ACCÈS À L'INFORMATION)

Neutral citation: 2002 SCC 71.

File No.: 28092.

2002: January 22; 2002: November 1.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Standard of review — Commission d'accès à l'information — Standard of review applicable to Commission's decisions under ss. 34 and 57 of Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1.

Access to information — Documents held by public bodies — Restrictions on right to access — Protection of personal information — Journalist requesting disclosure of document concerning expenses of Members of National Assembly prepared by Assembly's services — Commission d'accès à l'information refusing disclosure under ss. 34 and 57 of Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information — Whether Commission's decision unreasonable — Whether document requested is a document produced "for" a Member of the National Assembly within the meaning of s. 34 — Whether a Member of the National Assembly may be considered to constitute a public body within the meaning of s. 57 — Act Respecting Access to Documents Held by

Roderick Macdonell *Appelant*

c.

Procureur général du Québec et Assemblée nationale *Intimés*

et

Commission d'accès à l'information, Paul-André Comeau, Cour du Québec et l'honorable Jean Longtin *Mis en cause*

RÉPERTORIÉ : MACDONELL *c.* QUÉBEC (COMMISSION D'ACCÈS À L'INFORMATION)

Référence neutre : 2002 CSC 71.

N° du greffe : 28092.

2002 : 22 janvier; 2002 : 1er novembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit administratif — Contrôle judiciaire — Norme de contrôle — Commission d'accès à l'information — Norme de contrôle applicable aux décisions de la Commission rendues en vertu des art. 34 et 57 de la Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, L.R.Q., ch. A-2.1.

Accès à l'information — Documents des organismes publics — Restrictions au droit d'accès — Protection des renseignements personnels — Journaliste demandant la divulgation d'un document relatif aux dépenses des membres de l'Assemblée nationale préparé par les services de l'Assemblée — Divulgation refusée par la Commission d'accès à l'information en vertu des art. 34 et 57 de la Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels — La décision de la Commission est-elle déraisonnable? — Le document demandé est-il un document produit « pour le compte » d'un membre de l'Assemblée nationale au sens de l'art. 34? — Un membre de l'Assemblée nationale peut-il être assimilé à un organisme public pour l'application de l'art. 57? — Loi sur l'accès aux documents des

Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1, ss. 34, 57.

The appellant, a journalist, made a request under the *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information* for access to a document concerning the expenses of Members of the National Assembly. This document was prepared by the National Assembly's accounting department for each Member and describes the total payroll available to the Member, and the Member's expenses for employing full-time or casual staff and for paying for professional services. Relying on ss. 34, 53 and 57 of the Act, the person in charge of access to information at the National Assembly denied the request. The Quebec Commission d'accès à l'information upheld that decision. The Commissioner concluded that the document requested had been prepared "for" a Member and could not, under s. 34, be disclosed without the Member's consent. With respect to s. 57, the Commissioner found that the information sought in the access request could not relate directly to the staff or contractors employed by the Member since a Member himself or herself is not considered to constitute a public body. The Court of Québec denied leave to appeal that decision. The Superior Court granted the appellant's application for judicial review of the Commissioner's decision. It found that the Commissioner had erred in law and had made a patently unreasonable decision by interpreting s. 34 in a way that was inconsistent with the Act and the Regulations as a whole. The majority of the Court of Appeal set aside that decision, concluding that the Commissioner's interpretation of ss. 34 and 57 was not unreasonable.

Held (Major, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci and Arbour JJ.: As found by the minority, the standard of review applicable to the Commissioner's decision under s. 34 is that of the reasonable decision. With respect to s. 57, the pragmatic and functional approach shows that the standard that must be applied is also the reasonableness standard. The nature of the decision made under s. 57, the presence of the privative clause and the relative expertise of the Commission show that the legislature intended to rely on the Commission to interpret s. 57 and to identify the documents that are covered by that section, subject only to a right of appeal, with leave, to the Court of Québec on a question of law or jurisdiction, to the exclusion of any other remedy.

organismes publics et sur la protection des renseignements personnels, L.R.Q., ch. A-2.1, art. 34, 57.

L'appelant, un journaliste, présente une demande en vertu de la *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels* en vue d'obtenir un document relatif aux dépenses des membres de l'Assemblée nationale. Ce document est préparé par le service de la comptabilité de l'Assemblée nationale pour chaque député et décrit la masse salariale dont il dispose et ses dépenses faites pour engager du personnel régulier ou occasionnel et pour le paiement de services professionnels. Se fondant sur les art. 34, 53 et 57 de la Loi, le responsable de l'accès à l'information à l'Assemblée nationale rejette la demande. La Commission d'accès à l'information du Québec confirme cette décision. Le Commissaire conclut que le document demandé est préparé « pour le compte » d'un député et ne peut, en vertu de l'art. 34, être divulgué sauf sur autorisation du député concerné. En ce qui concerne l'art. 57, le Commissaire estime que les renseignements dont on demande la divulgation ne peuvent pas viser directement le personnel ou les contractuels embauchés par le député puisque ce dernier n'est pas lui-même assimilé à un organisme public. La Cour du Québec refuse la permission d'en appeler de cette décision. La Cour supérieure fait droit à la demande de révision judiciaire de la décision du Commissaire déposée par l'appelant. Elle conclut que le Commissaire a commis une erreur de droit et rendu une décision manifestement déraisonnable en interprétant l'art. 34 d'une manière incompatible avec l'ensemble de la Loi et des règlements. La majorité de la Cour d'appel infirme cette décision et conclut que l'interprétation des art. 34 et 57 faite par le Commissaire n'est pas déraisonnable.

Arrêt (les juges Major, Bastarache, Binnie et LeBel sont dissidents) : Le pourvoi est rejeté.

Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci et Arbour : Il y a accord avec les juges de la minorité pour dire que la norme de contrôle applicable à la décision du Commissaire rendue en vertu de l'art. 34 est celle de la décision raisonnable. En ce qui concerne l'art. 57, l'approche pragmatique et fonctionnelle indique que la norme qui s'impose est aussi celle de la décision raisonnable. La nature de la décision rendue en vertu de l'art. 57, la présence de la clause privative et l'expertise relative de la Commission indiquent que le législateur a voulu s'en remettre à la Commission pour l'interprétation de l'art. 57 et l'identification des documents qu'il vise sous la seule réserve d'un droit d'appel sur permission à la Cour du Québec sur une question de droit ou de compétence, à l'exclusion de tout autre recours.

The Commissioner's decision respecting s. 34 is reasonable. While exceptions to disclosure have generally been narrowly construed, that rule of interpretation applies only where the Act needs to be construed. Here, the wording of s. 34 makes no distinction between documents that are purely administrative and documents that are associated with the decision-making process. That section requires that a person seeking access obtain the consent of the Member concerned for all of the documents covered by the section. Given the clear wording of the provision, the need to reconcile the two fundamental rights provided in the Act — namely access to information and the independence of Members — and the different treatment that the legislature provided for Members' documents, it was reasonable for the Commissioner not to limit the exception in s. 34 to functions associated with Members' legislative activities. The only question that the Commissioner had to ask was whether the document in question had been produced "for" a Member. Even though the National Assembly's financial resources management branch also verifies, using the documents that are the subject of this case, that the Member's total payroll has not been exceeded, it was reasonable for the Commissioner to conclude that the documents were produced for the Member. The document, which is provided directly to the Member, is produced for the Member so that the Member may keep his or her own books and know what his or her own financial margin of manoeuvre is. It is irrelevant that the document may also be used by the services of the National Assembly, or even belong to it. Since the conditions in s. 34 have been met, the document is exempt from access, unless the Member consents.

The provisions of the Act relating to the confidential nature of nominative information cannot be overridden by the consent given by the Member. The Commissioner construed the meaning of s. 57 reasonably in concluding that Members are not "public bodies". Members are not covered by the definition of public body provided in s. 3 of the Act and s. 34 provides for a special procedure for Members' documents. The Act contains numerous distinctions between the National Assembly, as a public body, and Members, as components of that body, and a Member, acting alone, therefore cannot be confused with the National Assembly. It is reasonable to understand that Members are subject to the Act not because they are classed as a public body, but because the legislature has provided that the Act will apply to them within the limits prescribed. Moreover, even if we agreed that each Member is a public body, the very large majority of the information in the document requested should be exempted from disclosure owing to its confidential nature.

La décision du Commissaire relative à l'art. 34 est raisonnable. Bien que les exceptions à la divulgation soient généralement interprétées de manière limitative, cette règle d'interprétation n'est valable que dans la mesure où il y a nécessité d'interpréter la loi. En l'espèce, le libellé de l'art. 34 ne fait pas de distinction entre les documents purement administratifs et les autres liés au processus décisionnel. Cet article oblige le demandeur d'accès à obtenir le consentement du député concerné pour tous les documents visés par l'article. Vu le libellé clair de la disposition, la nécessité de concilier les deux droits fondamentaux prévus dans la Loi — soit l'accès à l'information et l'indépendance des députés —, et le traitement distinct prévu par le législateur pour les documents des députés, il était raisonnable pour le Commissaire de ne pas limiter l'exception de l'art. 34 aux fonctions liées aux activités législatives des députés. La seule question que le Commissaire avait à se poser était de déterminer si le document visé avait été produit « pour le compte » d'un député. Même si la Direction de la gestion des ressources financières de l'Assemblée nationale s'assure aussi, à l'aide des documents faisant l'objet du litige, que le député ne dépasse pas sa masse salariale, il était raisonnable pour le Commissaire de conclure que ces documents sont produits pour le compte du député. Le document, remis directement au député, est produit pour son compte afin qu'il puisse tenir sa comptabilité et connaître sa marge de manoeuvre financière. Il importe peu que ce document serve aussi aux services de l'Assemblée nationale ou même lui appartienne. Puisque les conditions de l'art. 34 sont remplies, le document est inaccessible, sauf si le député y consent.

Le consentement du député à la divulgation ne saurait écarter l'application des dispositions de la Loi ayant trait au caractère confidentiel des renseignements nominatifs. Le Commissaire a interprété raisonnablement la portée de l'art. 57 en concluant que les députés ne sont pas des « organismes publics ». Les députés ne sont pas visés par la définition d'organisme public prévue à l'art. 3 de la Loi et l'art. 34 prévoit une procédure particulière pour les documents des députés. La Loi contient de multiples distinctions entre l'Assemblée nationale, comme organisme public, et les députés, comme composantes de celle-ci et le député agissant seul ne peut donc être confondu avec l'Assemblée nationale. Il est raisonnable de comprendre que ceux-ci sont assujettis à la Loi non pas parce qu'ils sont assimilés à un organisme public, mais parce que le législateur a prévu que la Loi s'applique à eux dans les limites prévues. D'ailleurs, même si on acceptait que chaque député est un organisme public, la très grande majorité des renseignements contenus dans le document demandé devraient être retranchés de la divulgation en raison de leur caractère confidentiel.

Per Major, Bastarache, Binnie and LeBel JJ. (dissenting): The standard of review applicable to the Information Commissioner's decision under s. 34 of the Act is that of the reasonable decision. In this case, the privative clause is only partial since it provides for an appeal on any question of law or jurisdiction. Furthermore, the Commissioner's special expertise is needed, for the interpretation of s. 34, only when findings of fact are involved. The decision concerning the application of s. 34 is a question of mixed law and fact. This is also not a case in which different interests must be weighed. With respect to s. 57, it is not necessary to examine the standard of review of the reasonable decision that was adopted by the Court of Appeal in view of the finding that the Commissioner's interpretation was unreasonable. If the intermediate standard of the reasonableness of the decision must be applied, it is necessary to examine how the methods of statutory interpretation impact on the concept of reasonableness, which is one of the fundamental components of the current system of judicial review.

The Commissioner's decision relating to s. 34 is unreasonable. His broad interpretation of a rule providing for an exception is inconsistent with achieving the purpose of the Act. By interpreting s. 34 without taking into account the purpose of the Act as a whole, the legislative context, and the specific purpose of the exception set out in s. 34, the Commissioner made an error that affected his analysis so seriously that it made it unreasonable. The Commissioner should have kept foremost in his mind the purpose of the Act, as set out in s. 9, which states the fundamental principle that access may be had to government information. He then had to consider the meaning and scope of the exceptions to the general rule that are set out in s. 34 by examining the category of exceptions in question, that is, the category in the subdivision of the Act dealing with information affecting administrative or political decisions. The purpose of those exceptions, including s. 34, is to guarantee the independence of the Member in performing his or her duties. Section 34 relates solely to the documents of individual Members. A narrow interpretation of the exceptions that is consistent with its underlying objective could not reasonably have led to the conclusion that s. 34 applied to the document requested since that document is essentially an accounting statement prepared for the accounting service and not for the Member. The expression "for" in s. 34 suggests that the document has a specific purpose that relates directly and specifically to the individual Member and the performance of his or her role. It does not seem essential to a Member's ability to perform his or her role that the manner in which the Member spends the public funds made available to him

Les juges Major, Bastarache, Binnie et LeBel (dissidents) : La norme de contrôle de la décision du Commissaire à l'information eu égard à l'art. 34 de la Loi est celle de la décision raisonnable. En l'instance, la clause privative n'est que partielle puisqu'elle prévoit un appel sur une question de droit ou de compétence. De plus, l'interprétation de l'art. 34 ne fait appel à l'expertise particulière du Commissaire que dans la mesure où elle porte sur des conclusions de fait. Or, la décision relative à l'application de l'art. 34 est une question mixte de fait et de droit. Il ne s'agit pas non plus d'une affaire qui fait appel à la pondération d'intérêts différents. En ce qui concerne l'art. 57, il n'est pas essentiel de revenir sur la norme de contrôle de la décision raisonnable adoptée par la Cour d'appel vu la conclusion que l'interprétation du Commissaire est déraisonnable. Dans la mesure où la norme intermédiaire de la décision raisonnable doit être retenue, il faut examiner l'impact des méthodes d'interprétation législative sur l'articulation du concept de rationalité, qui est un des éléments fondamentaux du système actuel de contrôle judiciaire.

La décision du Commissaire relative à l'art. 34 est déraisonnable. Son interprétation large d'une règle d'exception est incompatible avec la réalisation de l'objectif de la Loi. En interprétant l'art. 34 sans tenir compte de l'objet de la Loi dans son ensemble, du contexte législatif et de l'objet spécifique de l'exception visée par l'art. 34, le Commissaire a commis une erreur qui affecte si gravement sa méthode d'analyse qu'elle lui donne un caractère déraisonnable. Le Commissaire devait en premier lieu considérer l'objet de la Loi inscrit à l'art. 9 qui exprime le principe fondamental du droit d'accès à l'information gouvernementale. Il devait ensuite s'interroger sur le sens et la portée des exceptions à la règle générale inscrites à l'art. 34 en portant attention à la catégorie d'exceptions visée, soit celle relative à la sous-section de la Loi qui traite des renseignements ayant des incidences sur les décisions administratives ou politiques. Ces exceptions, y compris l'art. 34, ont pour but d'assurer l'indépendance du député dans l'exercice de ses fonctions. L'article 34 ne concerne que les documents des députés eux-mêmes. Une interprétation restrictive des exceptions, conforme à l'objectif qui les anime, ne pouvait raisonnablement mener à la conclusion que l'art. 34 visait le document demandé puisqu'il s'agit essentiellement d'un état comptable préparé pour le service de la comptabilité et non pour le compte du député. L'expression « pour le compte » à l'art. 34 implique que le document a une finalité précise visant directement et particulièrement la personne du député et l'exécution de sa fonction. Il ne paraît pas essentiel à la fonction du député de garder le secret sur la façon dont il dépense les fonds publics

or her, the use of which is subject to specific terms and conditions, be protected from disclosure.

The Commissioner adopted the reasoning of the Court of Québec in *Québec (Assemblée nationale) v. Sauvé*, [1995] C.A.I. 427, to explain his position concerning the application of s. 57 of the Act. The reasons in that decision suffer from the same defect as the Commissioner's reasons with regard to s. 34. The court analysed the Act literally, without considering its purpose, the justification needed for the exceptions to the principles it lays down, or what is actually required with regard to the Member's independence pursuant to s. 57. It did not refer to any rule of interpretation and did not do any contextual analysis. By adopting those reasons, the Commissioner thus adopted a reasoning that does not meet the requirements of the standard of reasonableness. The analysis and reasoning of the dissenting judge in the Court of Appeal are preferable. A Member is recognized as a public body for the purposes of s. 57. Section 34 would be largely pointless if the Member was not subject to ss. 55 and 57.

Cases Cited

By Gonthier J.

Referred to: *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230; *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421, 2001 FCA 254; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3; *Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Québec (Assemblée nationale) v. Sauvé*, [1995] C.A.I. 427; *Plastiques M & R inc. v. Bureau du commissaire général du travail*, [1992] C.A.I. 372; *Marchildon v. Commission d'accès à l'information*, [1987] C.A.I. 96.

By Bastarache and LeBel JJ. (dissenting)

Québec (Assemblée nationale) v. Sauvé, [1995] C.A.I. 427; *Université Laval v. Albert*, [1990] C.A.I. 438; *Québec (Procureur général) v. Bayle*, [1991] C.A.I. 306; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997]

qui sont mis à sa disposition et dont l'utilisation est soumise à des modalités précises.

Le Commissaire a adopté le raisonnement de la Cour du Québec dans *Québec (Assemblée Nationale) c. Sauvé*, [1995] C.A.I. 427, pour expliquer sa position concernant l'application de l'art. 57 de la Loi. Or, les motifs dans cette décision souffrent du même défaut que ceux du Commissaire relativement à l'art. 34. La cour a procédé a une analyse littérale sans tenir compte de l'objet de la Loi, de la justification requise pour les exceptions aux principes qu'elle formule ou des exigences réelles de la notion d'indépendance du député eu égard à l'art. 57. Elle ne mentionne aucune règle d'interprétation et ne procède à aucune analyse contextuelle. En souscrivant à ces motifs, le Commissaire a donc adopté un raisonnement qui ne satisfait pas aux exigences de la norme de la décision raisonnable. Il est préférable d'adopter l'analyse et l'approche du juge dissident en Cour d'appel. Un député est assimilé à un organisme public pour l'application de l'art. 57. L'article 34 serait largement inutile si le député n'était pas assujetti aux art. 55 et 57.

Jurisprudence

Citée par le juge Gonthier

Arrêts mentionnés : *U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890; *Dayco (Canada) Ltd. c. TCA-Canada*, [1993] 2 R.C.S. 230; *3430901 Canada Inc. c. Canada (Ministre de l'Industrie)*, [2002] 1 C.F. 421, 2001 CAF 254; *Lavigne c. Canada (Commissariat aux langues officielles)*, [2002] 2 R.C.S. 773, 2002 CSC 53; *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3; *Rubin c. Canada (Ministre des Transports)*, [1998] 2 C.F. 430; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Québec (Assemblée nationale) c. Sauvé*, [1995] C.A.I. 427; *Plastiques M & R inc. c. Bureau du commissaire général du travail*, [1992] C.A.I. 372; *Marchildon c. Commission d'accès à l'information*, [1987] C.A.I. 96.

Citée par les juges Bastarache et LeBel (dissidents)

Québec (Assemblée nationale) c. Sauvé, [1995] C.A.I. 427; *Université Laval c. Albert*, [1990] C.A.I. 438; *Québec (Procureur général) c. Bayle*, [1991] C.A.I. 306; *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982; *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557; *Ross c. Conseil scolaire du district n^o^ 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Pasiechnyk c.*

2 S.C.R. 890; *Commission de la santé et de la sécurité du travail v. Autobus Jacquart inc.*, [2000] C.L.P. 825; *R. v. Lohnes*, [1992] 1 S.C.R. 167; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Kelly*, [1992] 2 S.C.R. 170; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Conseil de la magistrature du Québec v. Commission d'accès à l'information*, [2000] R.J.Q. 638; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015; *Héroux v. Groupe Forage Major*, [2001] C.L.P. 317.

Statutes and Regulations Cited

Access to Information Act, R.S.C. 1985, c. A-1.

Act respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1, ss. 1, 3, 9, 34, 53, 54, 55, 57, 114, 122, 123, para. 3, 124-133, 146, 147, 154.

Act Respecting the National Assembly, R.S.Q., c. A-23.1, ss. 1, 43, 120, 123, 124.2.

Code of Civil Procedure, R.S.Q., c. C-25, arts. 834 to 850.

Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11].

Interpretation Act, R.S.Q., c. I-16, s. 41.

Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels, National Assembly, Règles administratives du Bureau, décision n^{o} 092, 16 mai 1984 (mise à jour 1er novembre 1990), ss. 2, 3, 4, 7, 8, 9, 10, 12, 16-20, 61, 62, 63.

Authors Cited

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Duplessis, Yvon, et Jean Hétu. *L'accès à l'information et la protection des renseignements personnels*, vol. 2. Brossard, Qué.: Publications CCH, 2001 (feuilles mobiles).

Ontario. Commission on Freedom of Information and Individual Privacy. *Public Government for Public People*. Toronto: The Commission, 1980.

Zander, Michael. *The Law-Making Process*, 4th ed. London: Butterworths, 1994.

APPEAL from a judgment of the Quebec Court of Appeal, [2000] R.J.Q. 1674, [2000] C.A.I. 467, [2000] Q.J. No. 1764 (QL), reversing a decision of the Superior Court, [1997] R.J.Q. 132. Appeal dismissed, Major, Bastarache, Binnie and LeBel JJ. dissenting.

Saskatchewan (Workers' Compensation Board), [1997] 2 R.C.S. 890; *Commission de la santé et de la sécurité du travail c. Autobus Jacquart inc.*, [2000] C.L.P. 825; *R. c. Lohnes*, [1992] 1 R.C.S. 167; *R. c. Zundel*, [1992] 2 R.C.S. 731; *R. c. Kelly*, [1992] 2 R.C.S. 170; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Conseil de la magistrature du Québec c. Commission d'accès à l'information*, [2000] R.J.Q. 638; *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015; *Héroux c. Groupe Forage Major*, [2001] C.L.P. 317.

Lois et règlements cités

Code de procédure civile, L.R.Q., ch. C-25, art. 834-850.

Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I.11].

Loi d'interprétation, L.R.Q., ch. I-16, art. 41.

Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1.

Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, L.R.Q., ch. A-2.1, art. 1, 3, 9, 34, 53, 54, 55, 57, 114, 122, 123, par. 3^{o}, 124-133 146, 147, 154.

Loi sur l'Assemblée nationale, L.R.Q., ch. A-23.1, art. 1, 43, 120, 123, 124.2.

Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels, Assemblée nationale, Règles administratives du Bureau, décision n^{o} 092, 16 mai 1984 (mise à jour 1er novembre 1990), art. 2, 3, 4, 7, 8, 9, 10, 12, 16-20, 61, 62, 63.

Doctrine citée

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto : Butterworths, 1983.

Duplessis, Yvon, et Jean Hétu. *L'accès à l'information et la protection des renseignements personnels*, vol. 2. Brossard, Qué. : Publications CCH, 2001 (feuilles mobiles).

Ontario. Commission on Freedom of Information and Individual Privacy. *Public Government for Public People*. Toronto : The Commission, 1980.

Zander, Michael. *The Law-Making Process*, 4th ed. London : Butterworths, 1994.

POURVOI contre un arrêt de la Cour d'appel du Québec, [2000] R.J.Q. 1674, [2000] C.A.I. 467, [2000] J.Q. n^{o} 1764 (QL), qui a infirmé une décision de la Cour supérieure, [1997] R.J.Q. 132. Pourvoi rejeté, les juges Major, Bastarache, Binnie et LeBel sont dissidents.

Mark Bantey, for the appellant.

Claude Bouchard et *René Chrétien*, for the respondents.

English version of the judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci and Arbour JJ. delivered by

GONTHIER J. —

I. Introduction

The main issue in this case is the privilege granted to Members of the National Assembly not to disclose certain documents under the *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1 ("*Access Act*"). More precisely, we must determine whether the Commissioner's decision that the documents showing the expenses of a Member of the National Assembly are documents produced for a Member within the meaning of s. 34 of the *Access Act* is reasonable. As well, the Court must decide whether the Commissioner's decision that the information in the documents requested includes nominative information that is exempt from disclosure is reasonable.

I would refer to the description given by my colleagues of the facts in this appeal and of the decisions below, except the attribution to the Commissioner, Paul-André Comeau, of the statement that all that needs to be found in order for the s. 34 exemption to apply is that the information in the document requested relates specifically to the Member. The Commissioner actually asked whether the document was produced for the Member.

II. Analysis

1. *Applicable Standard of Review*

I agree with the approach taken by Bastarache and LeBel JJ. in applying the standard of the "reasonable decision" to the decision of the Commissioner concerning s. 34 and s. 57 of the *Access Act*. However, they do not provide a definitive answer to

Mark Bantey, pour l'appelant.

Claude Bouchard et *René Chrétien*, pour les intimés.

Le jugement du juge en chef McLachlin et des juges L'Heureux-Dubé, Gonthier, Iacobucci et Arbour a été rendu par

LE JUGE GONTHIER —

I. Introduction

1 Le présent litige porte principalement sur le privilège accordé aux membres de l'Assemblée nationale de ne pas divulguer certains documents en vertu de la *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, L.R.Q., ch. A-2.1 (« *Loi sur l'accès* »). Plus précisément, il nous faut déterminer si la décision du Commissaire voulant que les documents faisant état des dépenses d'un membre de l'Assemblée nationale sont des documents produits pour le compte de ce membre au sens de l'art. 34 de la *Loi sur l'accès* est raisonnable. De même, la Cour doit décider du caractère raisonnable de la décision du Commissaire selon laquelle les renseignements contenus dans les documents demandés comprennent des renseignements nominatifs à exclure de la divulgation.

2 Je m'en remets à l'exposé que font mes collègues des faits du présent pourvoi et des décisions rendues sauf toutefois l'attribution au Commissaire, Paul-André Comeau, de l'affirmation qu'il suffit de constater que l'information apparaissant sur le document demandé est spécifique au député pour que l'exclusion prévue à l'art. 34 s'applique. Le Commissaire s'est plutôt demandé si le document a été produit pour le compte du député.

II. Analyse

1. *La norme de contrôle applicable*

3 Je partage l'approche des juges Bastarache et LeBel appliquant la norme de la « décision raisonnable » à l'égard de la décision du Commissaire portant sur l'art. 34 et l'art. 57 de la *Loi sur l'accès*. Ils ne se prononcent toutefois pas de manière

the question of the standard applicable to the decision under s. 57. While implying that it is the "correct decision" standard that applies, they consider that the Commissioner's decision was unreasonable and find it unnecessary to pursue the matter. I do not believe it is necessary to reiterate my colleagues' analysis in its entirety. I simply add a few observations relevant to determining what standard of review applies to a decision made under s. 57 and a few comments on some of their analysis. I shall briefly examine some of the elements in the pragmatic and functional approach — the nature of the decision involved, the presence of a privative clause, and the expertise of the tribunal — that make it possible to determine the intention of the legislature (*U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048).

4 I believe that my colleagues minimize the impact of the privative clause in the *Access Act*. They are of the view that it is a partial private clause since it provides for an appeal on any question of law or jurisdiction. In my view, this is a special privative clause specific to the Commission d'accès à l'information and drafted so as to limit the scope of the superior courts' intervention:

114. No extraordinary recourse provided for in articles 834 to 850 of the Code of Civil Procedure (chapter C-25) may be exercised nor any injunction granted against the Commission or any of its members acting in their official capacity.

Two judges of the Court of Appeal may, on a motion, summarily annul any writ, order or injunction issued or granted contrary to this Act in relation to a document.

122. The object of the Commission is to hear, to the exclusion of every other court, the requests for review made under this Act.

The Commission shall also exercise the functions conferred on it under the Act respecting the protection of personal information in the private sector (chapter P-39.1).

146. Every decision of the Commission on a question of fact within its competence is final.

définitive sur la norme applicable à la décision rendue sous l'art. 57. En effet, ils laissent entendre que c'est la norme de la décision correcte qui s'applique mais, considérant que la décision du Commissaire est déraisonnable, ils ne jugent pas opportun de poursuivre leur démarche. Je ne crois pas nécessaire de reprendre en entier l'analyse de mes confrères. J'ajouterai seulement quelques observations utiles pour déterminer la norme de contrôle applicable à une décision rendue en vertu de l'art. 57, et quelques commentaires sur certaines parties de leur analyse. Je reprends brièvement quelques éléments de l'approche pragmatique et fonctionnelle — la nature de la décision touchée, la présence d'une clause privative et l'expertise du tribunal — qui permettent de déterminer l'intention du législateur (*U.E.S., Local 298 c. Bibeault*, [1988] 2 R.C.S. 1048).

Je crois que mes collègues minimisent l'impact de la clause privative contenue dans la *Loi sur l'accès*. Ils considèrent qu'elle est une clause privative partielle puisqu'elle prévoit un appel sur une question de droit et de compétence. À mon avis, il s'agit d'une clause privative particulière adaptée à la Commission d'accès à l'information et rédigée de manière à circonscrire la portée de l'intervention des cours supérieures :

114. Aucun des recours extraordinaires prévus par les articles 834 à 850 du Code de procédure civile (chapitre C-25) ne peut être exercé, ni aucune injonction accordée contre la Commission ou un de ses membres agissant en sa qualité officielle.

Deux juges de la Cour d'appel peuvent, sur requête, annuler sommairement tout bref délivré et toute ordonnance ou injonction prononcée à l'encontre de la présente loi relativement à un document.

122. La Commission a pour fonction d'entendre, à l'exclusion de tout autre tribunal, les demandes de révision faites en vertu de la présente loi.

La Commission exerce également les fonctions qui lui sont attribuées par la Loi sur la protection des renseignements personnels dans le secteur privé (chapitre P-39.1).

146. Une décision de la Commission sur une question de fait de sa compétence est finale et sans appel.

147. A person directly interested may bring an appeal from a decision of the Commission before a judge of the Court of Québec on any question of law or jurisdiction.

In no case may an appeal be brought except with leave of a judge of the Court of Québec. The judge shall grant leave if in his opinion the question ought to be examined in appeal.

154. The decision of the judge of the Court of Québec is final. [Emphasis added.]

The legislature has provided for the possibility of an appeal to the Court of Québec on a question of law and jurisdiction, and that possibility suggests that this is a partial privative clause that necessitates less deference, as this Court stated in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 17:

A "full" or "true" privative clause is one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded. See *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 332, and *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 590. [Emphasis added.]

However, the appeal provided for in the *Access Act* is limited to questions of law or jurisdiction, and leave for the appeal must be given by a judge of the Court of Québec. The right of appeal is therefore limited. The decision of the Court of Québec is the final step in the decision-making process, since no appeal lies from it. The legislature has created a closed circuit between the Commission and the Court of Québec. Section 114 of the *Access Act* precludes any opportunity to rely on arts. 834 to 850 of the *Code of Civil Procedure*, R.S.Q., c. C-25, which provide for extraordinary remedies. When the Act uses words that purport to limit review, it is up to the courts to determine whether the words used have full privative effect, or whether they create a lesser standard of deference (see *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, *supra*, at para. 17; *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230, at p. 264). The

147. Une personne directement intéressée peut interjeter appel d'une décision de la Commission devant un juge de la Cour du Québec sur toute question de droit ou de compétence.

L'appel ne peut être interjeté qu'avec la permission d'un juge de la Cour du Québec. Le juge accorde la permission s'il est d'avis qu'il s'agit d'une question qui devrait être examinée en appel.

154. La décision du juge de la Cour du Québec est sans appel. [Je souligne.]

Il est vrai que le législateur a prévu la possibilité de faire appel devant la Cour du Québec sur une question de droit et de compétence et que cette possibilité tend à indiquer qu'il s'agit d'une clause privative partielle exigeant moins de retenue, comme l'énonce notre Cour dans l'arrêt *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890, par. 17 :

Une clause privative « intégrale » ou « véritable » est celle qui déclare que les décisions du tribunal administratif sont définitives et péremptoires, qu'elles ne peuvent pas faire l'objet d'un appel et que toute forme de contrôle judiciaire est exclue dans leur cas. Voir *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, à la p. 332, et *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, à la p. 590. [Je souligne.]

Toutefois, l'appel prévu dans la *Loi sur l'accès* se limite aux questions de droit ou de compétence et doit d'abord être autorisé par un juge de la Cour du Québec. La portée du droit d'appel est donc limitée. La décision de la Cour du Québec est la dernière étape du processus décisionnel puisqu'elle est sans appel. Le législateur a prévu un circuit fermé entre la Commission et la Cour du Québec. L'article 114 de la *Loi sur l'accès* exclut toute possibilité d'invoquer les art. 834 à 850 du *Code de procédure civile*, L.R.Q., ch. C-25, prévoyant les recours extraordinaires. Quand la loi utilise des mots qui visent à limiter le contrôle, il appartient aux cours de déterminer si les mots utilisés ont un effet privatif intégral ou s'ils entraînent une norme de déférence moins élevée (voir *Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, précité, par. 17; *Dayco (Canada) Ltd. c. TCA-Canada*, [1993] 2 R.C.S.

privative clause must be analysed having regard to all the relevant provisions, and the true intention of the legislature is to be found in those provisions as a whole. There can be no doubt that the provisions in issue here, when taken as a whole, demonstrate the legislature's intention of limiting intervention by the superior courts. In my opinion, the presence of a clause of this nature calls for deference to the decisions of the Commission.

6 Moreover, unlike my colleagues, I do not believe that the Commissioner's decision under s. 57 is a pure question of law. The question that must be answered under that section involves elements of fact and law. It requires that the specific facts of the case be analysed, and in that respect it is in the nature of a question of fact. In addition, the Commissioner must interpret the enactment, and specifically how it applies to Members and their staff. That aspect of the analysis involves a question of law. As Bastarache and LeBel JJ. observe, a question of mixed law and fact calls for a certain degree of deference.

7 Finally, the Commission d'accès à l'information has relative expertise in respect of protecting privacy and promoting access to information held by a public body. That expertise is apparent from the powers conferred on the Commissioner to achieve the objectives of the Act, and from the Commission's exclusive power to hear requests for review made under the *Access Act* (s. 122). Sections 124 to 133 give the Commission broad powers to enable it to carry out its investigations. For example, the Commission has the power to prescribe conditions applicable to a personal information file (s. 124), to conduct investigations on its own initiative or when a complaint is filed (s. 127), to make appropriate recommendations, and to submit a special report to the National Assembly (s. 133). The Commission also takes part in policy making. In s. 123, para. 3, the legislature has provided that it is the Commission's function to give its opinion on the draft regulations submitted to it under the Act, on draft agreements on the transfer of information and on draft orders authorizing the establishment of confidential files. Plainly, the

230, p. 264). L'analyse de la clause privative doit se faire à la lumière de toutes les dispositions pertinentes et c'est l'ensemble de ces dispositions qui permet de trouver l'intention réelle du législateur. Il ne peut faire de doute que les dispositions sous étude, prises dans leur ensemble, démontrent l'intention du législateur de limiter l'intervention des cours supérieures. À mon avis, la présence d'une telle clause incite à faire preuve de déférence envers les décisions de la Commission.

Par ailleurs, contrairement à mes collègues, je ne crois pas que la décision du Commissaire en vertu de l'art. 57 est une question de droit pur. La question posée en vertu de cet article comporte des éléments de fait et de droit. Elle nécessite l'analyse des faits particuliers de l'espèce et, à cet égard, elle se rapproche d'une question de fait. Par ailleurs, le Commissaire doit interpréter la disposition, notamment son application aux députés et à leur personnel. Cet élément d'analyse comporte une question de droit. Comme le mentionnent les juges Bastarache et LeBel, une question mixte de droit et de fait invite à une certaine retenue.

Enfin, la Commission d'accès à l'information jouit d'une expertise relative en matière de protection de la vie privée et de promotion de l'accès aux renseignements détenus par un organisme public. Cette expertise ressort des pouvoirs confiés au Commissaire pour atteindre les objectifs de la loi et du pouvoir exclusif de la Commission d'entendre les demandes de révision faites en vertu de la *Loi sur l'accès* (art. 122). Les articles 124 à 133 donnent de larges pouvoirs à la Commission afin de lui permettre de mener à bien ses enquêtes. Par exemple, la Commission a le pouvoir de prescrire des conditions applicables à un fichier de renseignements personnels (art. 124), de mener des enquêtes de sa propre initiative ou à la suite d'une plainte déposée (art. 127), de faire des recommandations appropriées et de déposer un rapport spécial à l'Assemblée nationale (art. 133). La Commission participe également à l'élaboration de politiques. Le législateur a prévu à l'art. 123, par. 3° que la Commission a pour fonction de donner son avis sur les projets de règlement qui lui sont soumis en vertu de la loi, sur les projets d'entente de transfert de renseignements, de même

legislature treats the Commission as being expert in certain matters.

Unlike the federal *Access to Information Act*, R.S.C. 1985, c. A-1, the Quebec legislature has provided for an exclusive review by the Quebec Commission d'accès à l'information, a separate body, as Evans J.A. of the Federal Court of Appeal quite accurately observed in *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421, 2001 FCA 254, at para. 30:

> Counsel argued that the Judge had erred by relying for her conclusion almost exclusively on *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245 (T.D). I had held in that case (at paragraphs 12-13) that correctness was the applicable standard of review because, unlike the situation under many provincial access to information statutes, the administrative action typically reviewed in the federal scheme is the refusal of a head of a government institution to disclose a document, not of the Information Commissioner, an officer of Parliament who is independent of the Executive. Heads of government institutions are not disinterested in the interpretation and application of the *Access to Information Act* and are likely to have an institutional predisposition towards restricting the public right of access and construing the exemptions broadly. [Emphasis added.]

The Quebec Commission d'accès à l'information has no special interest in the decision it must make, and so it is able to play its role independently. By virtue of the fact that it is always interpreting the same Act, and that it does so on a regular basis, the Quebec Commissioner develops general expertise in the field of access to information. That general expertise on the part of the Commission invites this Court to demonstrate a degree of deference.

In other words, having regard to the nature of the decision made under s. 57, the presence of the privative clause and the relative expertise of the Commission, I am of the opinion that the legislature intended to rely on the Commission to interpret s. 57 and to identify the documents that are covered

que sur les projets de décrets autorisant l'établissement de fichiers confidentiels. Le législateur traite donc la Commission comme experte sur certaines questions.

Contrairement à la loi fédérale sur l'accès à l'information, le législateur québécois a prévu une procédure de révision exclusive auprès de la Commission d'accès à l'information du Québec, organisme distinct, comme le remarque très justement le juge Evans de la Cour d'appel fédérale dans la décision *3430901 Canada Inc. c. Canada (Ministre de l'Industrie)*, [2002] 1 C.F. 421, 2001 CAF 254, par. 30 :

> L'avocat a soutenu que le juge avait commis une erreur en appuyant sa conclusion presque exclusivement sur la décision *Conseil canadien des oeuvres de charité chrétiennes c. Canada (Ministre des Finances)*, [1999] 4 C.F. 245 (1re inst.). J'ai statué dans cette affaire (aux paragraphes 12 et 13) que la norme de contrôle applicable était celle de la décision correcte parce que, contrairement à ce qui se produit dans le cas de nombreuses lois provinciales sur l'accès à l'information, l'acte administratif habituellement contrôlé dans le cadre fédéral est le refus d'un responsable d'une institution fédérale de communiquer un document et non celui du Commissaire à l'information, un haut fonctionnaire du Parlement, indépendant du pouvoir exécutif. Les responsables des institutions fédérales ne sont pas neutres dans l'interprétation et l'application de la *Loi sur l'accès à l'information* et ils sont susceptibles d'avoir un parti-pris institutionnel les incitant à restreindre le droit d'accès du public et à interpréter libéralement les exceptions. [Je souligne.]

La Commission d'accès à l'information du Québec n'a aucun intérêt particulier dans la décision qu'elle doit prendre, ce qui lui permet de jouer son rôle de façon indépendante. En interprétant toujours la même loi et en le faisant régulièrement, le Commissaire québécois développe une expertise générale dans le domaine de l'accès à l'information. Cette expertise générale de la Commission invite notre Cour à faire preuve d'une certaine retenue.

Bref, considérant la nature de la décision rendue en vertu de l'art. 57, la présence de la clause privative et l'expertise relative de la Commission, je suis d'avis que le législateur a voulu s'en remettre à la Commission pour l'interprétation de l'art. 57 et l'identification des documents qu'il vise sous la

by that section, subject only to a right of appeal, with leave, to the Court of Québec on a question of law and jurisdiction, to the exclusion of any other remedy. It would be unjustified to place the standard of judicial review at either end of the scale. Like the Court of Appeal, I am of the opinion that the standard that must be applied is the reasonableness standard.

2. *Analysis of the Commissioner's Decision Under Section 34 of the Access Act*

10 The document requested was described by Gilles Dumont, a computer and administrative systems analyst in the National Assembly's financial resources management branch, as a document prepared for each Member describing the total payroll available to the Member, and the Member's expenses incurred in employing full-time or casual staff and for paying for professional services. Those moneys are provided under the rules set out in the *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels*, National Assembly, Règles administratives du Bureau, Decision No. 092, May 16, 1984 (updated November 1, 1990). In other words, the document tells the Member what he or she has spent to date.

11 The parties agree that the document entitled "Assemblée nationale, service de la programmation et contrôle budgétaire, état des dépenses engagées pour 1990 et 1991 pour chaque membre de l'Assemblée nationale" is not a "document from the office of a member of the National Assembly". The only question to be answered is whether the Commissioner's finding that the document requested by the appellant is a document produced for a Member by the services of the National Assembly is reasonable:

34. No person may have access to a document from the office of a member of the National Assembly or a document produced for that member by the services of the Assembly, unless the member deems it expedient.

The same applies to a document from the office of the President of the Assembly or of a member of the Assembly contemplated in the first paragraph of

seule réserve d'un droit d'appel sur permission à la Cour du Québec sur une question de droit et de compétence, à l'exclusion de tout autre recours. Il serait injustifié de situer la norme de révision judiciaire à l'une ou l'autre des extrêmes de l'échelle. En accord avec la Cour d'appel, je suis d'avis que la norme qui s'impose est celle de la décision raisonnable.

2. *Analyse de la décision du Commissaire en vertu de l'art. 34 de la Loi sur l'accès*

Le document demandé a été présenté par M. Gilles Dumont, analyste en procédés informatiques et en procédés administratifs à la Direction de la gestion des ressources financières de l'Assemblée nationale, comme étant un document préparé pour chaque député décrivant la masse salariale dont il dispose et ses dépenses faites pour engager du personnel régulier ou occasionnel et pour le paiement de services professionnels. Ces montants sont octroyés selon les règles prévues au *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels*, Assemblée nationale, Règles administratives du Bureau, décision n^{o} 092, 16 mai 1984 (mise à jour 1er novembre 1990). En somme, le document permet de connaître l'état des dépenses déjà engagées par ce député.

Les parties conviennent que le document intitulé « Assemblée nationale, service de la programmation et contrôle budgétaire, état des dépenses engagées pour 1990 et 1991 pour chaque membre de l'Assemblée nationale », n'est pas un « document du bureau d'un membre de l'Assemblée nationale ». La seule question à résoudre est de savoir si la conclusion du Commissaire voulant que le document demandé par l'appelant en est un produit pour le compte d'un député par les services de l'Assemblée nationale est raisonnable :

34. Un document du bureau d'un membre de l'Assemblée nationale ou un document produit pour le compte de ce membre par les services de l'Assemblée n'est pas accessible à moins que le membre ne le juge opportun.

Il en est de même d'un document du cabinet du président de l'Assemblée, d'un membre de celle-ci visé dans le premier alinéa de l'article 124.1 de la Loi sur

section 124.1 of the Act respecting the National Assembly (chapter A-23.1) or a minister contemplated in section 11.5 of the Executive Power Act (chapter E-18), and to a document from the office staff or office of a member of a municipal or school body. [Emphasis added.]

My colleagues say that Commissioner Comeau did not take the purpose of the *Access Act* into consideration in interpreting s. 34. They believe that the Commissioner committed an error that made his decision unreasonable by failing to consider the " fundamental principle that access may be had to government information" set out in s. 9 (par. 62). If he had taken that objective into consideration, he would have interpreted s. 34 narrowly, by limiting the scope of that section to documents that relate to Members' decision-making process. As my colleagues consider that he did not take the proper analytical approach, they find that the decision was unreasonable. With respect, I am not of that opinion.

Access to information legislation usually has two major themes: the right to information and the right to privacy. The Quebec statute, unlike other provincial statutes and the federal statute, also makes Members of the legislature subject to access to information to a certain extent. Section 34 does this in respect of documents from the office of a Member of the National Assembly and documents produced for that Member by the services of the Assembly, provided that the Member consents. This is a separate set of rules, parallel to the general procedure for requesting access set out in s. 9. Before s. 34 came into force, Members were subject only to political oversight in this respect, and the public did not otherwise have access to these documents.

The *Access Act* therefore applies to Members' documents within certain limits. The purpose of s. 34 is twofold: to provide access to certain documents of Members, and to limit that right.

This limited right of access demonstrates the legislature's intention of protecting the free exercise of the parliamentary function from inappropriate and arbitrary pressure, by giving the Member responsibility for the decision not to disclose, in relation both

l'Assemblée nationale (chapitre A-23.1) ou d'un ministre visé dans l'article 11.5 de la Loi sur l'exécutif (chapitre E-18), ainsi que d'un document du cabinet ou du bureau d'un membre d'un organisme municipal ou scolaire. [Je souligne.]

12 Mes collègues affirment que le Commissaire Comeau n'a pas tenu compte de l'objet de la *Loi sur l'accès* dans son interprétation de l'art. 34. Ils croient que le Commissaire a commis une erreur rendant sa décision déraisonnable en ne considérant pas le « principe fondamental du droit d'accès à l'information gouvernementale » (par. 62), prévu à l'art. 9. S'il avait tenu compte de cet objectif, il aurait fait une interprétation restrictive de l'art. 34 en limitant la portée de cet article aux seuls documents liés au processus décisionnel des députés. Considérant qu'il n'a pas suivi la bonne démarche d'analyse, mes collègues concluent que la décision est déraisonnable. Avec égards, je ne suis pas de cet avis.

13 Les lois sur l'accès à l'information s'articulent habituellement autour de deux thèmes principaux : le droit à l'information et la protection de la vie privée. La loi québécoise, contrairement aux autres lois provinciales et à la loi fédérale, assujettit aussi dans une certaine mesure les députés à l'accès à l'information. En effet, l'art. 34 y assujettit les documents du bureau d'un membre de l'Assemblée nationale et les documents produits pour le compte de ce membre par les services de l'Assemblée à condition que le député y consente. Il s'agit d'un régime distinct parallèle à la procédure générale de demande d'accès prévue à l'art. 9. Avant l'entrée en vigueur de l'art. 34, les députés n'étaient soumis à ce sujet qu'à un contrôle politique, et le public n'avait pas autrement accès à de tels documents.

14 La *Loi sur l'accès* s'applique donc de manière circonscrite aux documents des députés. L'article 34 a un double objet : donner accès à certains documents des députés et limiter ce droit.

15 Ce droit d'accès restreint démontre l'intention du législateur de protéger le libre exercice de la fonction parlementaire contre les pressions intempestives et arbitraires en attribuant au député la responsabilité de la non-divulgation et ceci vis-à-vis de

to the National Assembly and to the public, and by defining a sphere of confidentiality in the Member's work. The legislature has made a choice, by distinguishing what is open to public access without restriction from what is subject to the consent of the Member. Section 43 of the *Act Respecting the National Assembly*, R.S.Q., c. A-23.1, demonstrates the importance placed by the legislature on its Members' independence:

43. Every Member is vested with full independence for the carrying out of his duties. [Emphasis added.]

The *Access Act* protects and reconciles two fundamental principles of our democracy: access to information and the independence of Members. The legislature has done this by limiting the scope of each of those. The two rights must be considered together, without elevating one over the other, unless otherwise indicated in the Act, and the intention of the legislature in this regard must be respected.

16 There is nothing unreasonable in the Commissioner's interpretation. The wording of s. 34 makes no distinction between documents that are purely administrative and documents that are associated with the decision-making process. That section requires that a person seeking access obtain the consent of the Member concerned for all of the documents covered by the section. It is written in precise terms: it is concerned only with whether the document is from the office of a Member of the National Assembly or was produced for that Member by the services of the National Assembly. The *Access Act* applies to those documents, but only on the conditions stated.

17 My colleagues rely, *inter alia*, on the wording of the heading of subdivision 5 of the *Access Act*, "Information affecting administrative or political decisions", to distinguish between the functions of a Member that are, properly speaking, legislative or decision-making in nature, and the other secondary activities that a Member may perform. In my opinion, it is reasonable to place more weight on the words of the provision than on the heading of that subdivision. As Forget J.A. of the Quebec Court of Appeal said ([2000] R.J.Q. 1674, at para. 46), before interpreting a statute and looking to

l'Assemblée nationale et du public, et en lui aménageant une sphère de confidentialité dans son travail. Le législateur a fait un choix en distinguant ce qui est ouvert à l'accès du public sans restriction et ce qui est assujetti au consentement du député. L'article 43 de la *Loi sur l'Assemblée nationale*, L.R.Q., ch. A-23.1, démontre l'importance que le législateur accorde à l'indépendance des députés :

43. Un député jouit d'une entière indépendance dans l'exercice de ses fonctions. [Je souligne.]

La *Loi sur l'accès* protège et concilie deux principes fondamentaux de notre démocratie : l'accès à l'information et l'indépendance des députés. Le législateur le fait en limitant la portée de chacun. Il faut considérer ces deux droits en corrélation sans donner préséance à l'un sur l'autre, à moins d'indication contraire dans la loi, et respecter la volonté du législateur à cet égard.

Il n'y a rien de déraisonnable dans l'interprétation du Commissaire. Le libellé de l'art. 34 ne fait pas de distinction entre les documents purement administratifs et les autres liés au processus décisionnel. Cet article oblige le demandeur d'accès d'obtenir le consentement du député concerné pour tous les documents visés par l'article. Son libellé est précis : il exige seulement de déterminer s'il s'agit d'un document du bureau d'un membre de l'Assemblée nationale ou d'un document produit pour le compte de ce membre par les services de l'Assemblée nationale. La *Loi sur l'accès* s'applique à eux, mais uniquement dans les conditions prévues.

Mes collègues s'appuient entre autres sur le libellé de l'en-tête de la sous-section 5 de la *Loi sur l'accès* « Renseignements ayant des incidences sur les décisions administratives ou politiques » pour faire une distinction entre les fonctions proprement législatives ou décisionnelles d'un député et les autres activités accessoires qu'il peut exercer. À mon avis, il est raisonnable d'accorder plus de poids au libellé de la disposition qu'à l'en-tête de cette sous-section. Comme le mentionne le juge Forget de la Cour d'appel du Québec ([2000] R.J.Q. 1674, par. 46), avant d'interpréter une loi et d'avoir recours à

secondary sources, we must first examine the text of the statute:

[TRANSLATION] [B]efore looking for the intention of the legislature having regard solely to the principles underlying the Act, we must consider the text, since it is through the text that the legislature has spoken.

It is true that exceptions to disclosure have generally been narrowly construed (see Y. Duplessis and J. Hétu, *L'accès à l'information et la protection des renseignements personnels* (loose-leaf), vol. 2, c. II, at p. 45 001; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53) and I did say in *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 18, that "when the legislature makes a general rule and lists certain exceptions, the latter must be regarded as exhaustive and so strictly construed". However, that rule of interpretation applies only where the Act needs to be construed. As McDonald J.A. of the Federal Court of Appeal said in applying the *Access to Information Act*, the Act must not be interpreted where no purpose is served by doing so (*Rubin v. Canada (Minister of Transport)*, [1998] 2 F.C. 430, at para. 24):

It is important to emphasize that this does not mean that the Court is to redraft the exemptions found in the Act in order to create more narrow exemptions. A court must always work within the language it has been given. If the meaning is plain, it is not for this Court, or any other court, to alter it. [Emphasis added.]

It was reasonable for the Commissioner not to limit the exception in s. 34 to functions associated with Members' legislative activities, having regard to, *inter alia*, the clear wording of the provision, the need to reconcile the two fundamental rights provided in the *Access Act* and the different treatment that the legislature provided for Members' documents. The only question that the Commissioner had to ask was whether the document "Assemblée nationale, service de la programmation et contrôle budgétaire, état des dépenses engagées pour 1990 et 1991 pour chaque membre de l'Assemblée nationale" had been produced for a Member. What we

des sources secondaires, il faut d'abord s'intéresser au texte de la loi :

[A]vant de rechercher l'intention du législateur à la seule lumière des principes qui sous-tendent la loi, il faut s'arrêter au texte, puisque c'est par celui-ci que le législateur s'exprime.

18 Il est vrai que les exceptions à la divulgation ont généralement été interprétées de manière limitative (voir Y. Duplessis et J. Hétu, *L'accès à l'information et la protection des renseignements personnels* (feuilles mobiles), vol. 2, ch. II, p. 45 001; *Lavigne c. Canada (Commissariat aux langues officielles)*, [2002] 2 R.C.S. 773, 2002 CSC 53) et que j'ai dit dans l'arrêt *Québec (Communauté urbaine) c. Corp. Notre-Dame de Bon-Secours*, [1994] 3 R.C.S. 3, p. 18, que « lorsque le législateur prévoit une règle générale et énumère certaines exceptions, ces dernières doivent être considérées comme exhaustives et dès lors interprétées de façon stricte ». Toutefois, cette règle d'interprétation n'est valable que dans la mesure où il y a nécessité d'interpréter la loi. Comme le dit le juge McDonald de la Cour d'appel fédérale dans son application de la *Loi sur l'accès à l'information*, il ne faut pas interpréter la loi inutilement (*Rubin c. Canada (Ministre des Transports)*, [1998] 2 C.F. 430, par. 24) :

Il importe de souligner que cela ne signifie pas que la Cour doit remanier les exceptions prévues par la Loi afin de créer des exceptions plus limitées. Un tribunal doit toujours travailler avec le libellé qui lui a été soumis. Si le sens est manifeste, il n'appartient pas à la Cour ou à un autre tribunal de le modifier. [Je souligne.]

19 Il était raisonnable pour le Commissaire de ne pas limiter l'exception de l'art. 34 aux fonctions liées aux activités législatives des députés considérant entre autres le libellé clair de la disposition, la nécessité de concilier les deux droits fondamentaux prévus dans la *Loi sur l'accès* et le traitement distinct prévu par le législateur pour les documents des députés. La seule question que le Commissaire avait à se poser était de déterminer si le document « Assemblée nationale, service de la programmation et contrôle budgétaire, état des dépenses engagées pour 1990 et 1991 pour chaque membre de l'Assemblée nationale » avait été produit pour le

must now do is analyse the application of that section to the specific case.

20 Before hiring staff, a Member must first fill out the appropriate form for financial control by the National Assembly's accounting department. The employee assigned to that task must ensure that the total payroll available to the Member of the National Assembly has not been exhausted. The document is prepared using the information provided by the Member, and each month it is sent to the Member. It is treated as confidential by the National Assembly's accounting department and only a few people have access to it. A document is prepared for each Member, and each Member receives the document that relates to him or her personally. Members therefore do not receive all of the documents; they receive only the document that relates to their own expenses. The document that the appellant is trying to obtain is the document that is a compilation of the documents given to the Members individually.

21 The document enables the Member to ensure that the Member does not exceed his or her budget in hiring staff. The Member has complete discretion to choose his or her employees, as s. 43 of the *Act Respecting the National Assembly*, and an analysis of the relevant sections of the *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels*, suggest:

[TRANSLATION]

2. The Member shall hire the necessary staff to assist the Member in the performance of the Member's functions, and shall appoint the staff and determine their status.

3. A Member's staff is composed of advisers, political attachés or support employees. The Member shall determine their duties and responsibilities.

An adviser or political attaché shall perform the professional duties assigned to him or her, which include the functions of press officer, researcher, liaison officer or constituency secretary.

A support employee is responsible for performing administrative support duties.

4. A member of a Member's staff shall be appointed in writing. The appointment document shall state the staff

compte d'un député. Il nous reste maintenant à analyser l'application de cet article au cas particulier.

Avant d'engager du personnel, le député doit d'abord remplir le formulaire approprié pour un contrôle financier par le service de la comptabilité de l'Assemblée nationale. Le fonctionnaire affecté à cette tâche doit s'assurer que la masse salariale à la disposition du membre de l'Assemblée nationale n'est pas épuisée. Le document est constitué à partir des renseignements fournis par le député et, chaque mois, il est envoyé au député. Il est traité confidentiellement par le service de la comptabilité de l'Assemblée nationale et seules quelques personnes y ont accès. Un document est préparé pour chaque député et chacun reçoit celui qui le vise personnellement. Les députés ne reçoivent donc pas l'ensemble des documents, mais seulement celui se rapportant à leurs propres dépenses. Le document que cherche à obtenir l'appelant est celui qui rassemble les documents remis individuellement aux députés.

Le document permet au député de s'assurer qu'il ne dépasse pas son budget dans l'embauche du personnel. Le député jouit d'une discrétion complète dans le choix de ses employés comme le suggère l'art. 43 de la *Loi sur l'Assemblée nationale* et l'analyse des articles pertinents du *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels* :

2. Le député engage le personnel nécessaire pour l'assister dans l'exercice de ses fonctions, procède à leur nomination et détermine leur statut.

3. Le personnel d'un député se compose de conseillers, d'attachés politiques ou d'employés de soutien. Le député détermine leurs attributions et responsabilités.

Le conseiller ou l'attaché politique s'acquitte des tâches à caractère professionnel qui lui sont confiées et qui sont notamment des fonctions d'attaché de presse, de recherchiste, d'agent de liaison ou de secrétaire de comté.

L'employé de soutien est chargé de remplir les tâches de soutien administratif.

4. La nomination d'un membre du personnel d'un député doit être faite par écrit. L'acte de nomination doit

member's home base: one of the buildings occupied by the National Assembly or the Member's constituency office.

7. In addition to a Member's full-time staff, the Member may hire other persons on a contractual basis.

The remuneration and conditions of employment of such persons shall be as provided in their contract of employment. However, their remuneration must be consistent with the provisions for the remuneration of full-time employees.

61. A Member who retains the professional services of a corporation or partnership to handle a specific matter shall be entitled to payment of the fees incurred by the Member.

The Member may also provide for reimbursement of travel expenses at the rates specified in the contract, which may not exceed the rate provided for by Conseil du trésor directive 7-74.

62. Payment shall be made to the corporation or partnership upon presentation by the Member of the contract and vouchers.

63. The expenses shall be paid out of the payroll and the additional payroll, if any. [Emphasis added.]

On October 1, 1992, a Member's total payroll for staff remuneration was $101,200 per year (s. 12 of the Regulations). Although a Member has full discretion in hiring staff, he or she must still comply with certain rules with respect to the maximum salary that may be paid to the persons hired by the Member (ss. 16 to 20 of the Regulations). The document in issue is essential for Members in that it enables them not to exceed the total amount allocated and to make an informed choice when selecting candidates. A Member must be familiar with the figures for his or her expenses in order to be able to adjust the decision as to what candidates are sought to the financial constraints to which he or she is subject. The staff that are hired may be a determining factor in a Member's success, and the hiring process is part of the important duties of a Member.

In my opinion, even though the National Assembly's financial resources management branch also verifies, using the documents that are the subject of this case, that the Member's total payroll has not been exceeded, it was reasonable for

mentionner le port d'attache de ce membre soit l'un des édifices occupés par l'Assemblée nationale, soit le bureau de la circonscription électorale du député.

7. En outre de son personnel régulier, le député peut engager d'autres personnes sur une base contractuelle.

La rémunération et les conditions de travail de ces personnes sont celles prévues à leur contrat de travail. Toutefois, cette rémunération doit être conforme à celle prévue pour le personnel régulier.

61. Le député qui retient les services professionnels d'une corporation ou d'une société pour l'exécution d'un dossier particulier a droit au paiement des frais qu'il a engagés.

Il peut aussi prévoir le remboursement de frais de déplacement au taux fixé dans le contrat sans toutefois dépasser le taux prévu par la directive 7-74 du Conseil du trésor.

62. Le paiement est effectué à la corporation ou la société sur présentation du contrat et des pièces justificatives par le député.

63. Les frais sont payés sur la masse salariale et la masse salariale additionnelle, le cas échéant. [Je souligne.]

22 Le 1er octobre 1992, la masse salariale consacrée à la rémunération du personnel d'un député était de 101 200 $ par an (art. 12 du règlement). Même si le député a toute discrétion dans le choix du personnel qu'il embauche, il doit cependant respecter certaines règles quant au traitement maximum qui peut être accordé aux personnes qu'il engage (art. 16 à 20 du règlement). Le document en litige est essentiel aux députés en ce qu'il leur permet de ne pas dépasser le montant des sommes allouées et de faire un choix éclairé dans la sélection des candidats. Un député doit connaître l'état de ses dépenses pour être en mesure d'ajuster le choix des candidats recherchés aux réalités monétaires qui lui sont imposées. L'embauche du personnel peut être un facteur déterminant dans le succès d'un député et l'exercice d'embauche fait partie des tâches importantes de celui-ci.

23 À mon avis, même si la Direction de la gestion des ressources financières de l'Assemblée nationale s'assure aussi, à l'aide des documents faisant l'objet du litige, que le député ne dépasse pas sa masse salariale, il était raisonnable pour le Commissaire

the Commissioner to believe that [TRANSLATION] "[t]his does not in any way alter the fact that the documents are produced for the Member, that they are treated as confidential by the few members of the staff of the Assembly who have access to them in the course of their duties, and that the Member has complete discretion in choosing his staff and the contracts for professional services that he enters into" ([1995] C.A.I. 222, at p. 227). The document, which is provided directly to the Member, is produced for the Member so that the Member may keep his or her own books and know what his or her own financial margin of manoeuvre is. It is irrelevant that the document may also be used by the services of the National Assembly, or even belong to it. The conditions in s. 34 have been met: the document was produced "for" a member by the services of the National Assembly, and this makes it exempt from access, unless the Member consents. The Commissioner's decision not to disclose is therefore based on reasonable grounds that can stand up to a somewhat probing examination (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 56).

3. *Analysis of the Commissioner's Decision Under Section 57 of the Access Act*

24 The Member for D'Arcy McGee agreed to allow access to the document relating to him that is the subject of the request in this appeal, exercising the discretion given to him by s. 34 of the *Access Act*. The provisions relating to the confidential nature of nominative information, ss. 53, 54, 55 and 57, apply since they cannot be overridden by the consent given by the Member. If we read the document requested, we find that it contains the names and salaries of the persons who were hired or given contracts of employment. Was it reasonable for the Commissioner to find that this was nominative information within the meaning of the Act? The appellant argues that s. 57 of the *Access Act* makes the information in question public: he contends that Members of the National Assembly must necessarily be classed as public bodies for the purposes of the *Access Act* and that persons hired by Members should be classed as members of the staff of a public body, and that this would make the nominative

de penser que « [c]eci n'enlève rien au fait que les documents sont produits pour le compte du député, qu'ils sont traités confidentiellement par les quelques membres du personnel de l'Assemblée qui y ont accès dans le cadre de l'exercice de leurs fonctions et que le député jouit d'une entière discrétion dans le choix de son personnel et des contrats de services professionnels qu'il conclut » ([1995] C.A.I. 222, p. 227). Le document, remis directement au député, est produit pour son compte afin qu'il puisse tenir sa comptabilité et connaître sa marge de manœuvre financière. Il importe peu que ce document serve aussi aux services de l'Assemblée nationale ou même lui appartienne. Les conditions de l'art. 34 sont remplies : le document a été produit « pour le compte » d'un député par les services de l'Assemblée nationale, ce qui le rend inaccessible, sauf si le député y consent. La décision du Commissaire de ne pas divulguer est donc basée sur des motifs raisonnables capables de résister à un examen assez poussé (*Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 56).

3. *Analyse de la décision du Commissaire en vertu de l'art. 57 de la Loi sur l'accès*

Le député de D'Arcy McGee a accepté de rendre accessible le document le concernant et faisant l'objet de la présente demande, conformément à la discrétion qui lui est conférée par l'art. 34 de la *Loi sur l'accès*. Les dispositions ayant trait au caractère confidentiel des renseignements nominatifs, soit les art. 53, 54, 55 et 57, trouvent application puisque le consentement du député ne saurait les écarter. À la lecture du document demandé, on constate qu'il contient le nom et le traitement des personnes engagées ou ayant obtenu des contrats de travail. Était-il raisonnable pour le Commissaire de conclure que ces renseignements sont nominatifs au sens de la loi? L'appelant prétend que l'art. 57 de la *Loi sur l'accès* confère aux renseignements visés un caractère public. En effet, il avance que les députés sont nécessairement assimilés à des organismes publics aux fins d'application de la *Loi sur l'accès* et que les personnes engagées par eux devraient être assimilées aux membres du personnel d'un organisme

information public, as provided in s. 57, paras. 2 and 3. The relevant sections read as follows:

53. Nominative information is confidential, except in the following cases:

(1) where its disclosure is authorized by the person concerned by the information; in the case of a minor, the authorization may also be given by the person having parental authority;

(2) where it relates to information obtained in the performance of an adjudicative function by a public body performing quasi-judicial functions; the information remains confidential, however, if the body obtained it when holding a sitting *in camera* or if the information is contemplated by an order not to disclose, publish or distribute.

54. In any document, information concerning a natural person which allows the person to be identified is nominative information.

55. Personal information which, by law, is public is not nominative information.

57. The following is public information:

. . .

(2) the name, title, duties, address and telephone number at work and classification, including the salary scale attached to the classification, of a member of the personnel of a public body;

(3) information concerning a person as a party to a service contract entered into with a public body, and the terms and conditions of the contract;

. . .

Moreover, in no case may the information contemplated in subparagraph 2 of the first paragraph result in the disclosure of the salary of a member of the personnel of a public body. [Emphasis added.]

The Commissioner concluded that Members are not public bodies within the meaning of the *Access Act*, basing his decision primarily on *Québec (Assemblée nationale) v. Sauvé*, [1995] C.A.I. 427 (C.Q.), from which he quoted the following passage, at p. 431:

public, ce qui conférerait un caractère public aux renseignements nominatifs comme le prévoit l'art. 57, par. 2° et 3°. Les articles pertinents sont les suivants :

53. Les renseignements nominatifs sont confidentiels sauf dans les cas suivants :

1° leur divulgation est autorisée par la personne qu'ils concernent; si cette personne est mineure, l'autorisation peut également être donnée par le titulaire de l'autorité parentale;

2° ils portent sur un renseignement obtenu dans l'exercice d'une fonction d'adjudication par un organisme public exerçant des fonctions quasi judiciaires; ils demeurent cependant confidentiels si l'organisme les a obtenus alors qu'il siégeait à huis-clos ou s'ils sont visés par une ordonnance de non-divulgation, de non-publication ou de non-diffusion.

54. Dans un document, sont nominatifs les renseignements qui concernent une personne physique et permettent de l'identifier.

55. Un renseignement personnel qui a un caractère public en vertu de la loi n'est pas nominatif.

57. Les renseignements suivants ont un caractère public :

. . .

2° le nom, le titre, la fonction, l'adresse et le numéro de téléphone du lieu de travail et la classification, y compris l'échelle de traitement rattachée à cette classification, d'un membre du personnel d'un organisme public;

3° un renseignement concernant une personne en sa qualité de partie à un contrat de services conclu avec un organisme public, ainsi que les conditions de ce contrat;

. . .

En outre, les renseignements prévus au paragraphe 2° ne peuvent avoir pour effet de révéler le traitement d'un membre du personnel d'un organisme public. [Je souligne.]

Le Commissaire conclut que les députés ne sont pas des organismes publics au sens de la *Loi sur l'accès* en basant principalement sa décision sur *Québec (Assemblée nationale) c. Sauvé*, [1995] C.A.I. 427 (C.Q.), dont il invoque le passage suivant, à la p. 431 :

[TRANSLATION] In other words, a Member may be distinguished in every way from the National Assembly. The Member may not, like the National Assembly, be classed as a public body, there being no analogous wording in s. 3, para. 2. [Emphasis added.]

26 My colleagues are of the opinion that each Member is a public body. By classing the National Assembly as a public body, they say, the legislature also classed the Members of which it is made up as public bodies. In their view, if there were an absolute distinction between the National Assembly and its Members, the first paragraph of s. 34 would not be necessary. In other words, if Members are not classed as public bodies, then they fall outside the ambit of s. 34 because the *Access Act* applies only to public bodies. With respect, I do not share their opinion.

27 First, it must be noted that Members are not included in the definition of "public body" that the legislature has provided in s. 3 of the *Access Act*:

3. The Government, the Conseil exécutif, the Conseil du Trésor, the government departments and agencies, municipal and school bodies and the health services and social services institutions are public bodies.

For the purposes of this Act, the Lieutenant-Governor, the National Assembly, agencies whose members are appointed by the Assembly and every person designated by the Assembly to an office under its jurisdiction, together with the personnel under its supervision, are classed as public bodies.

The courts within the meaning of the Courts of Justice Act (chapter T-16) are not public bodies.

The courts have declined to extend that definition to entities that are not expressly referred to in that section of the Act (*Plastiques M & R inc. v. Bureau du commissaire général du travail*, [1992] C.A.I. 372 (C.Q.), and *Marchildon v. Commission d'accès à l'information*, [1987] C.A.I. 96 (Sup. Ct.)). The appellant in fact acknowledges that the decisions on this question are consistent.

28 As I said, s. 34 provides for a special procedure for Members' documents. It is reasonable to understand that Members are subject to the Act not because they are classed as a public body, but

Bref, tout distingue le député de l'Assemblée nationale. On ne peut pas l'assimiler comme elle à un organisme public, faute de texte analogue à l'article 3, alinéa 2. [Je souligne.]

Mes collègues sont d'avis que chaque député est un organisme public. Le législateur en assimilant l'Assemblée nationale à un organisme public y assimilerait également les membres qui la composent. Selon eux, s'il existait une distinction absolue entre l'Assemblée nationale et ses députés, le premier alinéa de l'art. 34 ne serait pas nécessaire. En d'autres mots, si les députés ne sont pas assimilés à des organismes publics, ils échappent à l'application de l'art. 34 car la *Loi sur l'accès* ne s'applique qu'aux organismes publics. Avec égards, je ne partage pas leur avis.

Il faut noter d'abord que les députés ne figurent pas dans la définition d'organisme public prévue par le législateur à l'art. 3 de la *Loi sur l'accès* :

3. Sont des organismes publics : le gouvernement, le Conseil exécutif, le Conseil du trésor, les ministères, les organismes gouvernementaux, les organismes municipaux, les organismes scolaires et les établissements de santé ou de services sociaux.

Sont assimilés à des organismes publics, aux fins de la présente loi : le lieutenant-gouverneur, l'Assemblée nationale, un organisme dont celle-ci nomme les membres et une personne qu'elle désigne pour exercer une fonction en relevant, avec le personnel qu'elle dirige.

Les organismes publics ne comprennent pas les tribunaux au sens de la Loi sur les tribunaux judiciaires (chapitre T-16).

Les tribunaux ont refusé d'étendre cette définition aux entités non expressément visées par cet article de la loi (*Plastiques M & R inc. c. Bureau du commissaire général du travail*, [1992] C.A.I. 372 (C.Q.), et *Marchildon c. Commission d'accès à l'information*, [1987] C.A.I. 96 (C.S.)). L'appelant reconnaît d'ailleurs la constance de la jurisprudence sur cette question.

Comme je l'ai mentionné, l'art. 34 prévoit une procédure particulière pour les documents des députés. Il est raisonnable de comprendre que ceux-ci sont assujettis à la loi non pas parce qu'ils sont

because the legislature has provided that the *Access Act* will apply to them within the limits prescribed by that Act. My colleagues' argument that if there were an absolute distinction between the National Assembly and its Members the first paragraph of s. 34 would not be necessary can therefore not be accepted. The purpose of s. 34 is twofold: to provide for access to certain documents and to make that access subject to the Member's consent.

To argue that the Members are the National Assembly, and that they cannot be distinguished from it, is to ignore completely the numerous distinctions in the *Access Act*. As Commissioner Comeau very accurately observed, referring to *Sauvé*, *supra*, the *Access Act* distinguishes the National Assembly, as a public body, from Members, as components of that body. For example, s. 34 makes a distinction between the National Assembly and its Members, when it says that no person may have access to a document from the office of a Member of the National Assembly or prepared for the Member without the Member's consent. As well, in the case of the National Assembly, the information referred to as public in s. 57, para. 1 where it relates to "a member . . . of a public body" can only mean a Member of the National Assembly. Lastly, the information referred to as public in para. 2 of that section where it relates to "a member of the personnel of a public body" can only mean the members of the staff of the National Assembly, who are different from the members of the staff of a Member of the National Assembly. It would therefore seem to be difficult to argue that no distinction can be made between the National Assembly and its Members.

My colleagues also argue that s. 9 of the *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels* serves no purpose if a Member is not classed as a public body. That section provides:

> [TRANSLATION] Subject to the provisions relating to access to information and to the protection of personal information, a member of the staff of a Member is bound by discretion regarding matters of which he or she has knowledge in the course of his or her duties. [Emphasis added.]

assimilés à un organisme public, mais parce que le législateur a prévu que la *Loi sur l'accès* s'applique à eux dans les limites prévues par cette loi. L'argument de mes collègues selon lequel s'il existait une distinction absolue entre l'Assemblée nationale et ses députés, le premier alinéa de l'art. 34 ne saurait être nécessaire, ne peut donc être retenu. L'article 34 a deux objets : prévoir l'accès à certains documents et l'assujettir au consentement du député.

29 Prétendre que les députés sont l'Assemblée nationale et qu'ils ne peuvent en être différenciés c'est ignorer complètement les multiples distinctions contenues dans la *Loi sur l'accès*. Comme le remarque très justement le Commissaire Comeau en faisant référence à la décision *Sauvé*, précitée, la *Loi sur l'accès* distingue l'Assemblée nationale, comme organisme public, des députés, comme composantes de celle-ci. Par exemple, l'art. 34 fait une distinction entre l'Assemblée nationale et ses membres, puisqu'il mentionne qu'un document du bureau d'un membre de l'Assemblée nationale ou préparé pour son compte n'est pas accessible sans son consentement. De même, à l'art. 57, par. 1°, les renseignements ayant un caractère public à l'égard « d'un membre d'un organisme public » ne visent, dans le cas de l'Assemblée nationale, que le député, membre de l'Assemblée nationale. Enfin, au par. 2° de ce même article, les renseignements ayant un caractère public à l'égard « d'un membre du personnel d'un organisme public » ne visent que les membres du personnel de l'Assemblée nationale, qui diffèrent du personnel du député. Il semble donc difficile de prétendre qu'on ne peut faire de distinction entre l'Assemblée nationale et les députés.

30 Mes confrères prétendent également que l'art. 9 du *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels* est inutile si le député n'est pas assimilé à un organisme public. Cet article prévoit que :

> Sous réserve des dispositions relatives à l'accès à l'information et à la protection des renseignements personnels, le membre du personnel d'un député est tenu à la discrétion sur ce dont il a connaissance dans l'exercice de ses fonctions. [Je souligne.]

That section of the Regulations is included with two other ethical rules that the staff of a Member are required to follow. Section 8 of the Regulations imposes a duty to be loyal and bear allegiance to the government, and s. 10 governs conflicts of interest. The reference to the *Access Act* in s. 9 of the Regulations is necessary because employees of Members have access to a host of information in the performance of their duties, some of which is subject to that Act. The purpose of s. 9 is to remind employees of their duty of discretion, within the limits defined by the *Access Act*. If an employee is in possession of a document that is subject to that Act, he or she may not refuse access on the pretext that he or she has a duty of discretion.

31 A Member, acting alone, cannot be confused with the National Assembly. No deed can be binding on the National Assembly unless it is signed by the President, by the Secretary General or by another officer, as provided by s. 123 of the *Act Respecting the National Assembly*. As well, ss. 120 and 124.2, para. 2 of the *Act Respecting the National Assembly* treat members of the staff of a Member of the National Assembly and members of the staff of the National Assembly differently. The staff of the National Assembly belong to the public service, unlike the staff of a Member. A Member is not the National Assembly, just as a member of the board of directors of a company is not the company.

32 When the Commissioner based his decision on *Sauvé*, which refers to the numerous distinctions that the legislature has made between the National Assembly and the Members who make it up, and relied on the definition in s. 3 of the *Access Act*, he construed the meaning of s. 57 reasonably. Convincing argument is needed if it is to be suggested that the identity of a member who makes up a body is the same as that of the body. In this case, there is nothing to support changing the definition provided in s. 3.

33 As well, I would note that even if we agreed that each Member is a public body, the very large majority of the information in the document requested should be exempted from disclosure. Section 57, para. 2 provides that the "salary scale" attached to

Cet article du règlement est inséré parmi les deux autres normes d'éthique imposées au personnel d'un député. Ainsi, l'article 8 de ce même règlement prévoit l'obligation d'être loyal et de porter allégeance à l'autorité constituée et l'art. 10 réglemente les conflits d'intérêts. La référence à la *Loi sur l'accès* prévue à l'art. 9 du règlement est nécessaire puisqu'un employé d'un député a accès à une multitude de renseignements dans l'exercice de ses fonctions, dont plusieurs sont soumis à cette loi. L'article 9 a pour mission de lui rappeler son devoir de discrétion dans les limites de la *Loi sur l'accès*. S'il détient un document soumis à cette loi, il ne peut le refuser sous prétexte de son obligation de discrétion.

Le député agissant seul ne peut pas être confondu avec l'Assemblée nationale. Aucun acte ne peut engager l'Assemblée nationale s'il n'est signé par le président, par le secrétaire général ou par un autre fonctionnaire, tel que le prévoit l'art. 123 de la *Loi sur l'Assemblé nationale*. De même, les art. 120 et 124.2, al. 2 de la *Loi sur l'Assemblée nationale* traitent différemment les membres du personnel d'un député et le personnel de l'Assemblée nationale. Le personnel de l'Assemblée nationale fait partie de la fonction publique, contrairement au personnel du député. Un député n'est pas l'Assemblée nationale de même qu'un membre d'un conseil d'administration d'une compagnie n'est pas la compagnie.

Le Commissaire, en basant sa décision sur l'affaire *Sauvé* qui fait référence aux multiples distinctions prévues par le législateur entre l'Assemblée nationale et les membres qui la composent et en s'appuyant sur la définition de l'art. 3 de la *Loi sur l'accès*, a interprété raisonnablement la portée de l'art. 57. Pour soutenir que le membre qui compose un organisme a la même identité que l'organisme, il faut des arguments convaincants. En l'espèce, rien ne milite en faveur de modifier la définition donnée à l'art. 3.

D'ailleurs, je note que même si on acceptait que chaque député est un organisme public, la très grande majorité des informations contenues dans le document demandé devraient être retranchées de la divulgation. En effet, l'art. 57, par. 2° prévoit qu'est

the classification of a member of the personnel of a public body is public. The document in question contains the salary paid, not the salary scale. Section 57, para. 3 applies only to a service contract, that is, a contract for services, and the very large majority of contracts referred to in the document are contracts of employment.

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

English version of the reasons of Major, Bastarache, Binnie and LeBel JJ. delivered by

BASTARACHE AND LEBEL JJ. (dissenting) — The issue in this case is the right of access to documents concerning the expenses of Members of the National Assembly of Quebec pursuant to the *Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, R.S.Q., c. A-2.1 ("*Access Act*"). The outcome of the case depends largely on whether the documents requested are characterized as falling within s. 34, which creates an exception to the rule of disclosure in the case of documents that are produced for a Member of the National Assembly. Obviously, it also depends on the standard of review that applies to the decision of the Commission d'accès à l'information, which refused to authorize the disclosure of the documents.

The appeal raises a second issue, this time relating to ss. 53 and 57 of the *Access Act*, which provide that no nominative information contained in a document that is subject to disclosure may be made public. What is required here is not to define the nature of the information requested, but rather to determine whether a Member of the National Assembly must be considered to constitute a public body within the meaning of s. 57. On that point, it is worth noting that while the appellant began by arguing that the Commission's decision was governed by the same standard of review as the one applicable under s. 34, reasonableness *simpliciter*, he altered his position at the hearing and asked that the correctness standard be applied.

publique « l'échelle de traitement » rattachée à la classification, d'un membre du personnel d'un organisme public. Or, le document en question contient le salaire payé et non pas l'échelle de traitement. Quant à l'art. 57, par. 3°, il s'applique seulement au contrat de services et la très grande majorité des contrats prévus dans le document sont des contrats d'emploi.

Pour ces motifs, je suis d'avis de rejeter le pourvoi avec dépens.

Les motifs des juges Major, Bastarache, Binnie et LeBel ont été rendus par

LES JUGES BASTARACHE ET LEBEL (dissidents) — Ce pourvoi porte sur le droit d'accès aux documents relatifs aux dépenses des membres de l'Assemblée nationale du Québec en vertu de la *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, L.R.Q., ch. A-2.1 (« *Loi sur l'accès* »). L'issue du litige dépend largement de la caractérisation des documents dont on demande la divulgation, à savoir si ce sont des documents protégés par l'art. 34, qui crée une exception à la règle de divulgation dans le cas des documents préparés pour le compte d'un membre de l'Assemblée nationale. Elle dépend aussi, bien entendu, de l'identification de la norme de contrôle applicable à la décision de la Commission d'accès à l'information, qui a refusé d'autoriser la divulgation des documents réclamés par l'appelant.

L'appel soulève une deuxième question. Celle-ci porte sur les art. 53 et 57 de la *Loi sur l'accès*, qui prévoient qu'aucun renseignement nominatif inscrit dans un document sujet à divulgation ne peut être rendu public. Il ne s'agit pas ici de définir la nature des renseignements demandés. Il faut plutôt déterminer si un membre de l'Assemblée nationale doit être assimilé à un organisme public aux termes de l'art. 57. Sur ce point, il convient de mentionner que, bien que l'appelant ait d'abord fait valoir que la décision de la Commission était régie par la même norme de contrôle que celle employée dans le cas de l'art. 34, soit la norme de la décision raisonnable simple, il a changé sa position à l'audience pour demander que la norme de la décision correcte soit appliquée.

I. Facts

37 On December 8, 1992, Roderick Macdonell, a journalist with *The Gazette* in Montreal, made a request under the *Access Act* for access to documents concerning the expenses of Members of the National Assembly. Only one document is in issue in these proceedings; it is entitled "Assemblée nationale, service de la programmation et contrôle budgétaire, état des dépenses engagées pour 1990 et 1991 pour chaque membre de l'Assemblée nationale". The appellant had in fact obtained a document concerning a Member of the National Assembly from another source. That document shows the expenses incurred for all of the Member's staff, as well as the identity and remuneration of workers who worked for the Member on contract. The document includes all of the expenses incurred, taking into account the allocated budget and the balance in the Member's account. The appellant wishes to obtain the same information for all Members.

38 On July 4, 1994, the person in charge of access to information at the National Assembly sent Mr. Macdonell a letter denying his request. The explanation given for the refusal was that the documents were produced for Members of the National Assembly and therefore belonged to an exempt class under s. 34 of the *Access Act*, and that only one Member had agreed to disclosure. The official in question nonetheless refused to disclose the documents relating to that Member since they included personal information the disclosure of which is prohibited by ss. 53 and 57 of the *Access Act*.

39 The appellant appealed the decision to the Quebec Commission d'accès à l'information. The Commissioner, Paul-André Comeau, dismissed the appeal on August 24, 1995 ([1995] C.A.I. 222). At the hearing of the appeal, Mr. Comeau heard, *inter alia*, the testimony of Gilles Dumont, a computer and administrative systems analyst in the Direction de la gestion des ressources financières of the National Assembly, who stated that the amounts paid to Members are governed by the *Règlement sur la rémunération et les conditions de travail du*

I. Les faits

Le 8 décembre 1992, Roderick Macdonell, journaliste à *The Gazette* de Montréal, présente une demande en vertu de la *Loi sur l'accès* en vue d'obtenir des documents relatifs aux dépenses des membres de l'Assemblée nationale. Un seul document fait l'objet des présentes procédures; il est intitulé « Assemblée nationale, service de la programmation et contrôle budgétaire, état des dépenses engagées pour 1990 et 1991 pour chaque membre de l'Assemblée nationale ». L'appelant a de fait obtenu d'une autre source un document relatif à un membre de l'Assemblée nationale. Ce document révèle les dépenses engagées pour tous les membres du personnel du député ainsi que l'identité et la rémunération des contractuels qui ont travaillé pour lui. Cet état comprend le total des dépenses eu égard au budget alloué et le solde du compte du député. L'appelant désire obtenir les mêmes renseignements pour l'ensemble des députés.

Le 4 juillet 1994, le responsable de l'accès à l'information à l'Assemblée nationale envoie une lettre à M. Macdonell rejetant sa demande. Pour expliquer son refus, le responsable affirme que ces documents sont préparés pour le compte des membres de l'Assemblée nationale et appartiennent ainsi à une catégorie exclue en vertu de l'art. 34 de la *Loi sur l'accès*, ajoutant qu'un seul député a accepté la divulgation. Le fonctionnaire en question refuse néanmoins de divulguer les documents de ce député parce qu'ils contiennent des renseignements personnels dont la divulgation est interdite en vertu des art. 53 et 57 de la *Loi sur l'accès*.

L'appelant fait appel de cette décision à la Commission d'accès à l'information du Québec. Le Commissaire, M. Paul-André Comeau, rejette l'appel le 24 août 1995 ([1995] C.A.I. 222). À l'audition de l'appel, M. Comeau entend notamment le témoignage de M. Gilles Dumont, un analyste en procédés informatiques et administratifs à la Direction de la gestion des ressources financières de l'Assemblée nationale, qui déclare que les montants payés aux députés sont régis par le *Règlement sur la rémunération et les conditions de travail du*

personnel d'un député et sur le paiement des services professionnels, National Assembly, Règles administratives du Bureau, Decision No. 092, May 16, 1984 (updated November 1, 1990). He explained that payments are made at the request of a Member, who submits a disbursement request on a form addressed to the accounting service of the National Assembly. Before authorizing payment, the service ensures that there is a sufficient credit balance in the Member's account. The document of which disclosure is requested in this case is produced in order to keep track of the Members' disbursements. It is confidential; only a small number of people have access to it.

II. Applicable Statutory Provisions

Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information, R.S.Q., c. A-2.1

1. This Act applies to documents kept by a public body in the exercise of its duties, whether it keeps them itself or through the agency of a third party.

This Act applies whether the documents are recorded in writing or print, on sound tape or film, in computerized form, or otherwise.

3. The Government, the Conseil exécutif, the Conseil du Trésor, the government departments and agencies, municipal and school bodies and the health services and social services institutions are public bodies.

For the purposes of this Act, the Lieutenant-Governor, the National Assembly, agencies whose members are appointed by the Assembly and every person designated by the Assembly to an office under its jurisdiction, together with the personnel under its supervision, are classed as public bodies.

The courts within the meaning of the Courts of Justice Act (chapter T-16) are not public bodies.

9. Every person has a right of access, on request, to the documents held by a public body.

The right does not extend to personal notes written on a document or to sketches, outlines, drafts, preliminary notes or other documents of the same nature.

personnel d'un député et sur le paiement des services professionnels, Assemblée nationale, Règles administratives du Bureau, décision nº 092, 16 mai 1984 (mise à jour 1er novembre 1990). Il explique que les paiements sont effectués à la demande du député, qui présente une demande de débours sur un formulaire adressé au service de la comptabilité de l'Assemblée nationale. Avant d'autoriser le paiement, le service s'assure que le compte du député conserve un solde créditeur suffisant. Le document dont on demande la divulgation en l'instance est établi pour comptabiliser les dépenses des députés. Il est confidentiel; seul un petit nombre de personnes y a accès.

II. Dispositions législatives applicables

Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, L.R.Q., ch. A-2.1

1. La présente loi s'applique aux documents détenus par un organisme public dans l'exercice de ses fonctions, que leur conservation soit assurée par l'organisme public ou par un tiers.

Elle s'applique quelle que soit la forme de ces documents : écrite, graphique, sonore, visuelle, informatisée ou autre.

3. Sont des organismes publics : le gouvernement, le Conseil exécutif, le Conseil du trésor, les ministères, les organismes gouvernementaux, les organismes municipaux, les organismes scolaires et les établissements de santé ou de services sociaux.

Sont assimilés à des organismes publics, aux fins de la présente loi : le lieutenant-gouverneur, l'Assemblée nationale, un organisme dont celle-ci nomme les membres et une personne qu'elle désigne pour exercer une fonction en relevant, avec le personnel qu'elle dirige.

Les organismes publics ne comprennent pas les tribunaux au sens de la Loi sur les tribunaux judiciaires (chapitre T-16).

9. Toute personne qui en fait la demande a droit d'accès aux documents d'un organisme public.

Ce droit ne s'étend pas aux notes personnelles inscrites sur un document, ni aux esquisses, ébauches, brouillons, notes préparatoires ou autres documents de même nature.

34. No person may have access to a document from the office of a member of the National Assembly or a document produced for that member by the services of the Assembly, unless the member deems it expedient.

The same applies to a document from the office of the President of the Assembly or of a member of the Assembly contemplated in the first paragraph of section 124.1 of the Act respecting the National Assembly (chapter A-23.1) or a minister contemplated in section 11.5 of the Executive Power Act (chapter E-18), and to a document from the office staff or office of a member of a municipal or school body.

53. Nominative information is confidential, except in the following cases :

(1) where its disclosure is authorized by the person concerned by the information; in the case of a minor, the authorization may also be given by the person having parental authority;

(2) where it relates to information obtained in the performance of an adjudicative function by a public body performing quasi-judicial functions; the information remains confidential, however, if the body obtained it when holding a sitting *in camera* or if the information is contemplated by an order not to disclose, publish or distribute.

54. In any document, information concerning a natural person which allows the person to be identified is nominative information.

55. Personal information which, by law, is public is not nominative information.

57. The following is public information:

(1) the name, title, duties, classification, salary, address and telephone number at work of a member, the board of directors or the management personnel of a public body and those of the deputy minister, the assistant deputy ministers and the management personnel of a government department;

(2) the name, title, duties, address and telephone number at work and classification, including the salary scale attached to the classification, of a member of the personnel of a public body;

(3) information concerning a person as a party to a service contract entered into with a public body, and the terms and conditions of the contract;

34. Un document du bureau d'un membre de l'Assemblée nationale ou un document produit pour le compte de ce membre par les services de l'Assemblée n'est pas accessible à moins que le membre ne le juge opportun.

Il en est de même d'un document du cabinet du président de l'Assemblée, d'un membre de celle-ci visé dans le premier alinéa de l'article 124.1 de la Loi sur l'Assemblée nationale (chapitre A-23.1) ou d'un ministre visé dans l'article 11.5 de la Loi sur l'exécutif (chapitre E-18), ainsi que d'un document du cabinet ou du bureau d'un membre d'un organisme municipal ou scolaire.

53. Les renseignements nominatifs sont confidentiels sauf dans les cas suivants :

1° leur divulgation est autorisée par la personne qu'ils concernent; si cette personne est mineure, l'autorisation peut également être donnée par le titulaire de l'autorité parentale;

2° ils portent sur un renseignement obtenu dans l'exercice d'une fonction d'adjudication par un organisme public exerçant des fonctions quasi judiciaires; ils demeurent cependant confidentiels si l'organisme les a obtenus alors qu'il siégeait à huis-clos ou s'ils sont visés par une ordonnance de non-divulgation, de non-publication ou de non-diffusion.

54. Dans un document, sont nominatifs les renseignements qui concernent une personne physique et permettent de l'identifier.

55. Un renseignement personnel qui a un caractère public en vertu de la loi n'est pas nominatif.

57. Les renseignements suivants ont un caractère public :

1° le nom, le titre, la fonction, la classification, le traitement, l'adresse et le numéro de téléphone du lieu de travail d'un membre d'un organisme public, de son conseil d'administration ou de son personnel de direction et, dans le cas d'un ministère, d'un sous-ministre, de ses adjoints et de son personnel d'encadrement;

2° le nom, le titre, la fonction, l'adresse et le numéro de téléphone du lieu de travail et la classification, y compris l'échelle de traitement rattachée à cette classification, d'un membre du personnel d'un organisme public;

3° un renseignement concernant une personne en sa qualité de partie à un contrat de services conclu avec un organisme public, ainsi que les conditions de ce contrat;

(4) the name and address of a person deriving an economic benefit granted by a public body by virtue of a discretionary power, and any information on the nature of that benefit;

(5) the name and address of the establishment of the holder of a permit issued by a public body and which is required by law to be held for the carrying on of an activity, the practice of a profession or the operation of a business.

However, the information contemplated in the first paragraph is not public information where its disclosure would be likely to hinder or impede the work of a person responsible under the law for the prevention, detection or repression of crime.

Moreover, in no case may the information contemplated in subparagraph 2 of the first paragraph result in the disclosure of the salary of a member of the personnel of a public body.

III. Judicial History

1. *Quebec Commission d'accès à l'information*, [1995] C.A.I. 222

The Commissioner ruled that the document requested could not be released except with the authorization of the Member in question, and subject to certain provisos. He began his analysis by commenting on s. 34 of the *Access Act*. He said that it was clear that the document had been produced by the services of the National Assembly and that the only question in issue was whether it had been produced for a Member. In his view, the issue was not whether the document is used by the National Assembly; the document is restricted the moment it is produced for a Member. All that need be found in order to conclude that a document has been produced for a Member is that the information it contains relates specifically to the Member. In such a case, the document cannot be disclosed without the Member's consent.

Mr. Comeau then considered whether s. 57, which differentiates between public and personal information, applies directly to staff employed by the Member. The issue is significant given that the Member for D'Arcy McGee gave his consent to the disclosure of the document under s. 34. On that point, Mr. Comeau relied on the reasons of Judge F.-Michel Gagnon of the Court of Québec in *Québec*

4° le nom et l'adresse d'une personne qui bénéficie d'un avantage économique conféré par un organisme public en vertu d'un pouvoir discrétionnaire et tout renseignement sur la nature de cet avantage;

5° le nom et l'adresse de l'établissement du titulaire d'un permis délivré par un organisme public et dont la détention est requise en vertu de la loi pour exercer une activité ou une profession ou pour exploiter un commerce.

Toutefois, les renseignements prévus au premier alinéa n'ont pas un caractère public si leur divulgation est de nature à nuire ou à entraver le travail d'une personne qui, en vertu de la loi, est chargée de prévenir, détecter ou réprimer le crime.

En outre, les renseignements prévus au paragraphe 2° ne peuvent avoir pour effet de révéler le traitement d'un membre du personnel d'un organisme public.

III. Historique judiciaire

1. *Commission d'accès à l'information du Québec*, [1995] C.A.I. 222

41 Le Commissaire décide que le document demandé ne peut pas être divulgué, sauf autorisation du député concerné, et cela sous certaines réserves. Son analyse commence avec un commentaire au sujet de l'art. 34 de la *Loi sur l'accès*. Il déclare qu'il est clair que le document a été préparé par les services de l'Assemblée nationale et que la seule question à trancher est de savoir s'il a été préparé pour le compte d'un député. À son avis, il n'importe pas que le document serve à l'Assemblée nationale; il est visé dès lors qu'il est préparé pour le compte d'un député. Pour conclure qu'il s'agit d'un document préparé pour le compte du député, il suffit de constater que l'information qu'il contient est spécifique au député. En l'instance, le document ne peut être divulgué sans le consentement du député.

42 M. Comeau se demande ensuite si l'art. 57, qui distingue les renseignements à caractère public des renseignements personnels, s'applique directement au personnel du député. La question est importante parce que le député de D'Arcy McGee a donné son consentement à la divulgation sous le régime de l'art. 34. Sur ce point, M. Comeau s'appuie sur les motifs du juge F.-Michel Gagnon de la

(Assemblée nationale) v. Sauvé, [1995] C.A.I. 427. In that case, it was held that a Member cannot constitute a public body since the *Act Respecting the National Assembly*, R.S.Q., ch. A-23.1, guarantees the Member's complete independence. The Commissioner concluded that since a Member himself or herself is not considered to constitute a public body, the information sought in the access request cannot relate directly to the staff or contractors employed by the Member.

43 Finally, the Commissioner considered whether the documents produced for the Member for D'Arcy McGee could be released if they contained nominative information. Despite the authorization given by the Member, the Commissioner decided that ss. 53 and 57 prohibit the disclosure of documents produced for a Member that contain personal information relating to a physical person. Information relating to moral persons may nonetheless be disclosed.

2. *Court of Québec*, [1996] Q.J. No. 1687 (QL)

44 The appellant sought leave to appeal the decision of the Commission to the Court of Québec under s. 147 of the *Access Act*. It is important to note on this point that the decision of the Commission is protected by the privative clause in s. 154 of the Act.

45 Judge Longtin dismissed the appellant's motion on the ground that the issue raised had already been decided in *Université Laval v. Albert*, [1990] C.A.I. 438 (C.Q.), and *Québec (Procureur général) v. Bayle*, [1991] C.A.I. 306 (C.Q.). In the first case, the court had simply decided that [TRANSLATION] "the essential question . . . is whether these documents are *cabinet* documents . . . or mere administrative documents that are available for consultation by a number of people" (p. 440 (emphasis in original)); in the second case, the court had concluded: [TRANSLATION] "As long as the document in question comes from . . . the office of one of the persons identified in s. [34], that person alone has the discretion to decide whether or not to grant access to it" (p. 307). With respect to s. 57, Judge Longtin simply

Cour du Québec dans *Québec (Assemblée nationale) c. Sauvé*, [1995] C.A.I. 427. Ce jugement décide que le député ne peut pas être assimilé à un organisme public en raison du fait que la *Loi sur l'Assemblée nationale*, L.R.Q., ch. A-23.1, assure son entière indépendance. En conclusion, selon le Commissaire, puisque le député n'est pas lui-même assimilé à un organisme public, les renseignements dont on demande la divulgation ne peuvent pas viser directement le personnel ou les contractuels embauchés par le député.

Le Commissaire se demande enfin si les documents produits pour le député de D'Arcy McGee peuvent être divulgués s'ils contiennent des renseignements nominatifs. Malgré l'autorisation donnée par ce député, le Commissaire conclut que les art. 53 et 57 interdisent la divulgation des documents préparés pour le compte d'un député qui contiennent des renseignements personnels relatifs à une personne physique. Les informations relatives à des personnes morales peuvent toutefois être communiquées.

2. *Cour du Québec*, [1996] A.Q. nº 1687 (QL)

L'appelant s'adresse alors à la Cour du Québec en vue d'obtenir la permission de porter en appel la décision de la Commission en vertu de l'art. 147 de la *Loi sur l'accès*. Il est important de noter ici que la décision de la Commission est protégée par une clause privative, à l'art. 154 de la Loi.

Le juge Longtin rejette la requête de l'appelant au motif que la question soulevée a déjà été tranchée dans *Université Laval c. Albert*, [1990] C.A.I. 438 (C.Q.), et *Québec (Procureur général) c. Bayle*, [1991] C.A.I. 306 (C.Q.). Dans la première affaire, la cour a simplement décidé que « [l]'élément essentiel [. . .] est de savoir s'il s'agit de documents du *cabinet* [. . .] ou de simples documents administratifs à la disposition de plusieurs personnes pour fins de consultation » (p. 440 (en italique dans l'original)); dans la deuxième, la cour a conclu : « Tant que le document visé en est un [. . .] du bureau de l'une des personnes nommées à l'article [34], seule cette personne a discrétion pour le rendre accessible ou non » (p. 307). Au sujet de l'art. 57, le juge Longtin s'en remet simplement à la décision *Québec*

relied on *Québec (Assemblée nationale) v. Sauvé*, which the Commissioner had cited. He agreed with Judge Gagnon's reasoning in that case to the effect that the public nature of the funds used was of no relevance in applying s. 57 of the *Access Act*.

3. *Superior Court*, [1997] R.J.Q. 132

After this setback in the Court of Québec, the appellant filed an application for judicial review of the Commissioner's decision in the Superior Court. Barbeau J., ruling on the motion, recalled the court's duty of deference in matters of judicial review. According to the court, several fundamental principles, namely the division of powers, democracy, and freedom of expression, were in issue. Barbeau J. then considered the purpose of the *Access Act* and went on to examine the nature of the documents that were the subject of the access request.

In his view, s. 34 must be interpreted in accordance with the purpose of the Act and the need to preserve a Member's independence in his or her role as legislator. The document requested was public and disclosing it would have no impact on the Member's political and administrative role. He believed that the Judge of the Court of Québec had erred in law but had also, like the Commissioner, made a decision that was patently unreasonable by interpreting s. 34 in a way that was inconsistent with the Act and the Regulations as a whole. Section 34 is an exception to the general principle of access to information in public documents. That provision must therefore be narrowly construed.

4. *Court of Appeal*, [2000] R.J.Q. 1674

The Court of Appeal was divided in this case. Forget J.A., speaking for the majority, allowed the appeal. Chamberland J.A., for his part, would have affirmed the decision of the Superior Court.

Forget J.A. first dealt with the issue of the applicable standard of review. Referring to *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, he decided that given the

(Assemblée nationale) c. Sauvé, déjà citée par le Commissaire. Il est d'accord avec le raisonnement du juge Gagnon dans cette affaire, suivant lequel le caractère public des fonds utilisés n'a aucune pertinence dans l'application de l'art. 57 de la *Loi sur l'accès*.

3. *Cour supérieure*, [1997] R.J.Q. 132

46 Après son échec devant la Cour du Québec, l'appelant dépose en Cour supérieure une demande de contrôle judiciaire de la décision du Commissaire. Statuant sur cette requête, le juge Barbeau rappelle le devoir de réserve de la cour en la matière. Selon la cour, le litige soulève l'examen de plusieurs principes fondamentaux, à savoir, le partage des pouvoirs, la démocratie et la liberté d'expression. Il s'interroge ensuite sur l'objectif de la *Loi sur l'accès* avant d'examiner la nature des documents faisant l'objet de la demande de divulgation.

47 Selon lui, l'art. 34 doit s'interpréter en fonction de l'objet de la loi et de la nécessité de préserver l'indépendance du député dans sa fonction de législateur. Le document demandé est par sa nature public et sa divulgation n'aura aucun impact sur le rôle politique et administratif du député. Le juge de la Cour du Québec aurait commis une erreur de droit, mais aussi rendu une décision manifestement déraisonnable, tout comme le Commissaire, en interprétant l'art. 34 d'une manière incompatible avec l'ensemble de la Loi et des règlements. L'article 34 déroge au principe général d'accès à l'information sur les documents publics. En conséquence, cette disposition doit recevoir une interprétation restrictive.

4. *Cour d'appel*, [2000] R.J.Q. 1674

48 La Cour d'appel se divise dans cette affaire. Le juge Forget, pour la majorité, accueille l'appel. Pour sa part, le juge Chamberland aurait confirmé le jugement de la Cour supérieure.

49 Le juge Forget traite d'abord de la question de la norme de contrôle applicable. Se référant à *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, et *Pushpanathan c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [1998] 1 R.C.S. 982, il conclut que l'existence

existence of a privative clause, the Commissioner's expertise and the nature of the problem, the intermediate standard of reasonableness *simpliciter* must be applied.

50 On the substantive issue, Forget J.A. first pointed out that access to information is connected with the concept of democracy and that the *Access Act* is quasi-constitutional in nature. Nevertheless, he believed that he should be guided primarily by the wording of the Act. In his opinion, the *Access Act* makes no distinction between the legislative and administrative duties of a Member, and so Barbeau J. was wrong to consider this. He added that the Regulations also do not distinguish among the various services performed for a Member. On that basis, he concluded that the Commissioner's interpretation of s. 34 was not unreasonable.

51 Forget J.A. then reviewed s. 57. In his opinion, that provision did not apply to Members of the National Assembly. In s. 34, the legislature distinguishes between the National Assembly and its Members. If the legislature had wished to treat Members in the same way as the legislative body itself, it would have done so directly by including them expressly in the list of public bodies in s. 3. Without commenting on whether s. 3 is exhaustive, Forget J.A. simply noted that it does not specifically refer to the Members among the bodies that are subject to the *Access Act*. Accordingly, since s. 57 did not apply, the Commissioner's decision to refuse disclosure of the document despite the fact that consent had been given by the Member for D'Arcy McGee could not be considered unreasonable.

52 In his dissenting opinion, Chamberland J.A. agreed that the intermediate standard of reasonableness should apply. He held however that the Commissioner's interpretation of ss. 34 and 57 was unreasonable.

53 Citing the definition of the standard of reasonableness given by Iacobucci J. in *Southam*, which refers to the fact that the decision is not based on the evidence or that there was an error in the actual logical process that led to the conclusion, Chamberland J.A. first pointed out that on the evidence in the

d'une clause privative, l'expertise du Commissaire et la nature du problème conduisent à l'adoption de la norme de la décision raisonnable simple, soit la norme intermédiaire.

Sur la question de fond, le juge Forget souligne d'abord que l'accès à l'information est lié au concept de démocratie et que la *Loi sur l'accès* revêt un caractère quasi-constitutionnel. Néanmoins, il croit que c'est avant tout le texte de la loi qui doit le guider. À son avis, la *Loi sur l'accès* n'établit aucune distinction entre les fonctions législatives et administratives du député, si bien que le juge Barbeau a eu tort d'en tenir compte. Il ajoute que le règlement ne distingue pas non plus entre les différents services rendus à un député. Sur cette base, il conclut que l'interprétation de l'art. 34 faite par le Commissaire n'est pas déraisonnable.

Le juge Forget passe ensuite à l'étude de l'art. 57. À son avis, cette disposition ne s'applique pas aux membres de l'Assemblée nationale. En effet, le législateur fait une distinction à l'art. 34 entre l'Assemblée nationale et ses membres. Si la législature avait voulu assimiler les députés au corps législatif lui-même, elle l'aurait fait directement en les incluant expressément dans l'énumération des organismes publics à l'art. 3. Sans vouloir émettre d'opinion sur le caractère exhaustif de l'art. 3, le juge Forget note simplement qu'il n'identifie pas expressément les députés parmi les organismes assujettis à la *Loi sur l'accès*. En conséquence, l'art. 57 ne trouvant pas application, la décision du Commissaire de refuser la divulgation des renseignements en dépit du consentement donné par le député de D'Arcy McGee ne saurait être considérée comme déraisonnable.

Dans son opinion dissidente, le juge Chamberland exprime son accord avec l'application de la norme de contrôle intermédiaire de la décision raisonnable. Il croit cependant que l'interprétation qu'a fait le Commissaire des art. 34 et 57 est déraisonnable.

Se référant à la définition que donne le juge Iacobucci de la norme de la décision raisonnable dans l'arrêt *Southam*, qui fait appel au défaut de la décision de s'appuyer sur la preuve ou à une erreur dans le raisonnement qui a mené à la conclusion, le juge Chamberland souligne d'abord que le

record, the document requested was not produced for a Member within the meaning of s. 34. Rather, it was a document prepared by the accounting service for its own purposes. He was of the opinion that it was unreasonable to conclude that the document was produced for the Member simply because it was delivered to him. Chamberland J.A. also believed that the Commissioner's reasoning was flawed since it failed to take into account the need for the exception to the rule of disclosure in s. 34 to be narrowly construed. In his opinion, both the purpose of the *Access Act* and the relevance of the documents to the role of the Member must be taken into account.

With respect to s. 57, Chamberland J.A. found that no real distinction can be made between the National Assembly and its Members. In his view, the distinction is not justified because that section can apply to a Member only in the Member's capacity as a person who is considered to constitute a public body. That is confirmed by the wording of s. 9 of the Regulations of the National Assembly.

IV. Analysis

1. *The Problem of the Standard of Review*

This appeal raises once again the problem of determining the standard for reviewing a decision made by an administrative body which has been given quasi-judicial powers. In this case, the question is closely connected with the difficulties involved in the statutory interpretation of ss. 34 and 57. If the intermediate standard of the reasonableness of the decision must be applied, we must then examine how the methods of statutory interpretation impact on the concept of reasonableness, which is one of the fundamental components of the current system of judicial review.

Before analysing ss. 34 and 57, it is important to recall that this appeal deals with an application for judicial review and that the decision in question is in fact the decision of the information Commissioner, not the decisions of the judges who ruled on that decision. Barbeau J., applying the most stringent standard of review, the patently unreasonable decision standard, nonetheless allowed the application

document demandé n'est pas produit pour le compte d'un député au sens de l'art. 34, selon la preuve au dossier. Il s'agit au contraire d'un document préparé par le service de comptabilité pour ses propres fins. Il est d'avis qu'il est déraisonnable de conclure que le document est préparé pour le compte du député simplement parce qu'il lui est communiqué. Le juge Chamberland pense aussi que, faute de tenir compte de la nécessité d'interpréter restrictivement l'exception à la règle de divulgation que constitue l'art. 34, le raisonnement du Commissaire est vicié. Selon lui, il faut tenir compte de l'objet de la *Loi sur l'accès* et de la pertinence des dossiers eu égard au rôle du député.

54 Au sujet de l'art. 57, le juge Chamberland constate qu'on ne peut pas effectuer une distinction véritable entre l'Assemblée nationale et ses membres. Selon lui, cette distinction ne se défend pas parce que cet article ne peut s'appliquer au député qu'en sa qualité de personne assimilée à un organisme public. Ceci se confirme dans le libellé de l'art. 9 du règlement de l'Assemblée nationale.

IV. Analyse

1. *Le problème de la norme de contrôle*

55 Le pourvoi pose à nouveau le problème de l'identification de la norme de contrôle d'une décision d'un organisme administratif doté de fonctions quasi judiciaires. En l'espèce, la question se rattache étroitement aux difficultés relatives à l'interprétation législative des art. 34 et 57. Dans la mesure où la norme intermédiaire de la décision raisonnable doit être retenue, il faut analyser dans la présente affaire l'impact des méthodes d'interprétation législative sur l'articulation du concept de rationalité, qui est un des éléments fondamentaux du système actuel de contrôle judiciaire.

56 Avant de procéder à l'analyse des art. 34 et 57, il est important de rappeler que le présent pourvoi porte sur une procédure en révision judiciaire et que la décision dont il est question ici est celle du Commissaire à l'information et non celle des juges qui se sont prononcés sur celle-ci. Appliquant la norme de contrôle la plus exigeante, celle de la décision manifestement déraisonnable, le juge Barbeau

for judicial review. On appeal, the two majority judges and the minority judge all applied the intermediate standard of reasonableness *simpliciter*; the parties accepted that standard in relation to s. 34. There is no need to examine the analysis of the Court of Appeal in detail. We would however note that, in this case, the privative clause is only partial since it provides for an appeal on any question of law or jurisdiction (s. 147). Furthermore, the Commissioner's special expertise is needed, for the actual interpretation of s. 34, only when findings of fact are involved. The protection of privacy and of the fundamental values of democracy is essentially a judicial function, as is the contextual interpretation of legislation involving the public interest. In *Southam*, *supra*, at paras. 35-37, Iacobucci J. points out that even though a question of fact is simply about what actually took place between the parties, determining whether those facts satisfy a legal test is a question of mixed law and fact. The more widely the rule will apply, the more the courts will tend to characterize a question as one of mixed law and fact. In our view, the decision concerning the application of s. 34 is a question of mixed law and fact because the Commissioner had to decide whether the document which was supposedly produced for a Member was produced exclusively for the Member or at the Member's request, and these are questions of law. This is also not a case in which different interests must be weighed, as is often the case in administrative law. It is therefore clear that the most stringent standard was not appropriate.

57 As noted earlier, the appellant has changed his mind with respect to the standard that is appropriate in respect of the interpretation of s. 57 and is now asking that the standard of correctness be applied. It could indeed be argued that the question of whether a Member of the National Assembly must be considered to constitute a public body is a pure question of law that goes to the actual jurisdiction of the Commission. The privative clause indicates that the legislature did not intend to leave this type of

a néanmoins accueilli la requête en révision judiciaire. En appel, les juges de la majorité et celui de la minorité ont tous trois appliqué la norme intermédiaire, celle de la décision raisonnable simple; les parties ont accepté cette norme eu égard à l'art. 34. Il n'est pas nécessaire de revenir en détail sur l'analyse de la Cour d'appel. Il convient cependant de signaler qu'en l'instance, la clause privative n'est que partielle, puisqu'elle prévoit un appel sur une question de droit ou de compétence (art. 147). De plus, l'interprétation de l'art. 34 comme telle ne fait appel à l'expertise particulière du Commissaire que dans la mesure où elle porte sur des conclusions de fait. La protection de la vie privée et des valeurs fondamentales de la démocratie demeure essentiellement de nature judiciaire, tout comme l'interprétation contextuelle des lois d'intérêt public. Dans *Southam*, précité, le juge Iacobucci rappelle, aux par. 35-37, que même si une question de fait porte simplement sur ce qui s'est produit entre les parties, la question de savoir si ces faits satisfont à un critère juridique constitue une question mixte de fait et de droit. L'accentuation du caractère général de l'application de la règle renforcera la tendance des tribunaux à conclure à la présence d'une question mixte de fait et de droit. À notre avis, la décision relative à l'application de l'art. 34 est une question mixte de fait et de droit puisque le Commissaire devait décider si le document censément préparé pour le compte d'un député était un document préparé exclusivement pour le député, ou encore à la demande du député, ces éléments étant de nature juridique. Il ne s'agit pas non plus, en l'instance, d'une affaire qui fait appel à la pondération d'intérêts différents, comme c'est souvent le cas en matière administrative. Il est donc clair que la norme la plus stricte n'était pas appropriée.

Tel que mentionné plus haut, l'appelant a changé d'avis au sujet de la norme appropriée dans le cas de l'interprétation de l'art. 57 et demande maintenant que la norme de la décision correcte soit appliquée. On pourrait certes soutenir que la question de savoir si le membre de l'Assemblée nationale doit être assimilé à un organisme public est une question de droit pur qui touche à la compétence même de la Commission. La clause privative indique en fait l'intention du législateur de ne pas laisser ce genre

question to the sole discretion of the Commissioner. In fact, this is a question that falls outside the Commissioner's expertise. As Iacobucci J. said in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 591:

> Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise. [Emphasis added.]

We know that the different decisions that an administrative tribunal makes in a single case may necessitate the application of different standards of review, depending on the nature of the decisions (*Pushpanathan*, *supra*, at para. 49). Some decisions relate to the facts, and others to questions of law or to questions of mixed fact and law. La Forest J. had addressed this issue earlier, in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, and applied the decision of this Court in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554. In *Pezim*, Iacobucci J. analyzed the decision of a highly specialized tribunal that had interpreted an Act which fell squarely within its mandate. In the present case, the issue is the interpretation of a provision that limits the Commission's jurisdiction, a matter in which the Commission has no special expertise. The nature of the problem submitted to the Commissioner is also relevant in determining the intent of the legislature (*Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18; *Commission de la santé et de la sécurité du travail v. Autobus Jacquart inc.*, [2000] C.L.P. 825 (C.A.)). With regard to the above discussion, it is not really necessary to examine the standard of review that was adopted by the judges of the Court of Appeal since, as will be seen later, we find that the Commissioner's interpretation of s. 57 was unreasonable.

As noted earlier, this case requires a close examination of the impact of the methods of statutory interpretation on the delineation of the concept of reasonableness. In *Southam*, *supra*, at para. 56,

de question à la seule discrétion du Commissaire. Il s'agit d'ailleurs d'une question qui échappe à l'expertise du Commissaire. Comme le fait valoir le juge Iacobucci dans l'arrêt *Pezim c. Colombie-Britannique (Superintendent of Brokers)*, [1994] 2 R.C.S. 557, p. 591 :

> Par conséquent, même lorsqu'il n'existe pas de clause privative et que la loi prévoit un droit d'appel, le concept de la spécialisation des fonctions exige des cours de justice qu'elles fassent preuve de retenue envers l'opinion du tribunal spécialisé sur des questions qui relèvent directement de son champ d'expertise. [Nous soulignons.]

58 On sait que les différentes décisions rendues par un tribunal administratif dans le cadre d'une même affaire peuvent faire appel à des normes de contrôle variables selon leur nature (*Pushpanathan*, précité, par. 49). Certaines décisions portent sur les faits, d'autres sur des questions de droit ou des questions mixtes de fait et de droit. Le juge La Forest s'est déjà penché sur la question dans *Ross c. Conseil scolaire du district nº 15 du Nouveau-Brunswick*, [1996] 1 R.C.S. 825, appliquant la jurisprudence de la Cour dans *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554. Dans *Pezim*, le juge Iacobucci analyse la décision d'un tribunal hautement spécialisé qui a interprété une loi directement liée à son mandat. Ici, le litige porte sur l'interprétation d'une disposition limitant la compétence de la Commission, un domaine dans lequel le Commissaire ne possède pas d'expertise particulière. La nature du problème soumis au Commissaire est pertinente aussi pour déterminer l'intention du législateur (*Pasiechnyk c. Saskatchewan (Workers' Compensation Board)*, [1997] 2 R.C.S. 890, par. 18; *Commission de la santé et de la sécurité du travail c. Autobus Jacquart inc.*, [2000] C.L.P. 825 (C.A.)). Ceci dit, il n'est pas réellement essentiel de revenir sur la norme de contrôle adoptée par les juges de la Cour d'appel puisque, comme nous le verrons plus loin, nous concluons que le Commissaire a donné une interprétation déraisonnable à l'art. 57.

59 Tel que mentionné plus haut, la présente affaire nous oblige à considérer de façon particulière l'impact des méthodes d'interprétation législative sur l'articulation du concept de rationalité. Dans

Iacobucci J. describes the intermediate standard of reasonableness as follows:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. [Emphasis added.]

We are of the opinion that there was no justification for the Commissioner's conclusions, but most importantly that they resulted from erroneous reasoning. Here, as in *Pezim*, *supra*, we will apply the standard of reasonableness to the actual interpretation of the statutory provision in examining the reasoning of the Commissioner.

2. *Analysis of Section 34*

60 We will now return to the analysis of s. 34. As noted earlier, the issue seems to have been joined on the question of whether the document the disclosure of which was requested was produced for the Member. The respondents argued that the document falls under s. 34 essentially because of its usefulness to the Member. They stated:

> [TRANSLATION] It is essential that a Member of the National Assembly keep accounting records of the expenses that he or she incurs and ensure that he or she does not exceed the amount of money allocated to the Member under the Regulations, both in terms of the total payroll available to the Member and in terms of the maximum salaries that the Member may pay.

The appellant argued that the document

> [TRANSLATION] is a document that was prepared by the financial resources management branch, an administrative service of the National Assembly, so that it can ensure compliance with the Regulations respecting remuneration and ensure that the Members do not exceed the total payroll that is allocated to them.

61 Those comments confirm that the document prepared by the accounting service is used both by the

Southam, précité, par. 56, le juge Iacobucci précise la norme intermédiaire de la décision raisonnable en ces termes :

> Est déraisonnable la décision qui, dans l'ensemble, n'est étayée par aucun motif capable de résister à un examen assez poussé. En conséquence, la cour qui contrôle une conclusion en regard de la norme de la décision raisonnable doit se demander s'il existe quelque motif étayant cette conclusion. Le défaut, s'il en est, pourrait découler de la preuve elle-même ou du raisonnement qui a été appliqué pour tirer les conclusions de cette preuve. [Nous soulignons.]

Nous sommes d'avis, en ce qui concerne les conclusions du Commissaire, qu'elles sont dénuées de justification et surtout qu'elles résultent d'un raisonnement erroné. Comme dans *Pezim*, précité, nous appliquerons la norme de la décision raisonnable à l'interprétation d'une disposition législative dans notre analyse du raisonnement du Commissaire en l'espèce.

2. *Analyse de l'art. 34*

Revenons donc à l'analyse de l'art. 34. Tel que constaté plus haut, le débat semble s'être engagé autour de la question de savoir si le document dont la divulgation est demandée a été préparé pour le compte du député. Les intimés sont d'avis que le document est visé par l'art. 34 essentiellement en raison de son utilité pour le député. Ils s'expriment comme suit :

> [I]l est essentiel pour le membre de l'Assemblée nationale de tenir une comptabilité des dépenses qu'il engage et de s'assurer qu'il ne dépasse pas le montant des sommes qui lui sont allouées en vertu du règlement, tant à l'égard de la masse salariale dont il dispose que des échelles de traitement maximum qu'il peut consentir.

L'appelant, pour sa part, fait valoir que le document

> est un document préparé par un service administratif de l'Assemblée nationale, à savoir la Direction de la gestion des ressources financières, et ce, pour que le service s'assure que le *Règlement sur la rémunération* est respecté et que les députés ne dépassent pas la masse salariale qui leur est allouée.

Ces commentaires confirment que le document du service de comptabilité sert à la fois à

central administrative services and by the Member. The Commissioner recognized this fact and concluded that the document could fall under s. 34 even though it was not produced exclusively for the benefit of the Member. In his view, it was sufficient that the document was useful to the Member in order for it to be exempted from disclosure. In saying this, however, was he addressing the issue properly? Was this justification sufficient to establish the reasonableness of the interpretation?

In our opinion, the Commissioner did not use the right method of analysis in interpreting s. 34. He should have kept the purpose of the *Access Act*, as set out in s. 9, foremost in his mind. That section states, in the first paragraph, the fundamental principle that access may be had to government information:

> Every person has a right of access, on request, to the documents held by a public body.

That error affected the Commissioner's analysis so seriously that it made it unreasonable, considering that that concept has been defined by this Court, *inter alia*, in *Southam*, *supra*, and *Pushpanathan*, *supra*. As will be seen, that interpretation leads to an unresolvable conflict between the legislative purpose stated in the Act and the actual application of its provisions.

The Commissioner then had to consider the meaning and scope of the exceptions to the general rule that are set out in s. 34 by examining the category of exceptions in question, that is, the category in subdivision 5: "Information affecting administrative or political decisions". The heading of a statutory provision is one of the indicators from which the legislature's intended purpose may be determined when exceptions are provided to the general scheme of an Act: *R. v. Lohnes*, [1992] 1 S.C.R. 167, at p. 179; *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 763; *R. v. Kelly*, [1992] 2 S.C.R. 170, at p. 189. As the appellant rightly argued, the purpose of those exceptions is to guarantee the independence of the Member in performing his or her duties as a Member of the National Assembly. All of those exceptions, some of which are discretionary, while others are limited in time, refer to, *inter alia*, the

l'administration centrale et au député. Le Commissaire a reconnu ce fait et conclu que le document pouvait être visé par l'art. 34 même s'il n'était pas préparé exclusivement pour le bénéfice du député. Pour lui, il suffisait que le document soit utile au député pour le soustraire à l'obligation de divulgation. Était-ce une façon adéquate d'aborder la question? Était-ce une justification suffisante pour établir la rationalité de l'interprétation?

62 À notre avis, le Commissaire n'a pas utilisé la bonne méthode d'analyse dans son étude de l'art. 34. Il devait en premier lieu considérer l'objet de la *Loi sur l'accès*, inscrit à l'art. 9. Celui-ci exprime, au premier alinéa, le principe fondamental du droit d'accès à l'information gouvernementale :

> Toute personne qui en fait la demande a droit d'accès aux documents d'un organisme public.

Cette erreur affecte si gravement la méthode d'analyse du Commissaire qu'elle lui donne un caractère déraisonnable au sens de la jurisprudence de notre Cour, notamment dans les arrêts *Southam* et *Pushpanathan*, précités. Comme nous le verrons, elle conduit en effet à un conflit insoluble entre l'objectif législatif déclaré dans la loi et l'application effective de ses dispositions.

63 Il devait ensuite s'interroger sur le sens et la portée des exceptions à la règle générale inscrites à l'art. 34 en portant attention à la catégorie d'exceptions visée, soit celle relative à la sous-section 5 : « Renseignements ayant des incidences sur les décisions administratives ou politiques ». L'intitulé d'un texte législatif constitue l'un des indices permettant d'établir l'objet visé par le législateur lorsqu'il prévoit des exceptions au régime général d'une loi : *R. c. Lohnes*, [1992] 1 R.C.S. 167, p. 179; *R. c. Zundel*, [1992] 2 R.C.S. 731, p. 763; *R. c. Kelly*, [1992] 2 R.C.S. 170, p. 189. Comme le fait valoir à bon droit l'appelant, ces exceptions visent à protéger l'indépendance du député dans l'exercice de ses fonctions comme membre de l'Assemblée nationale. Toutes ces exceptions, tantôt discrétionnaires, tantôt limitées dans le temps, visent entre autres les catégories de documents suivantes : les décisions ou décrets du

following categories of documents: decisions or orders of the Conseil exécutif; legal opinions; studies; records of deliberations; statutory instruments; opinions and recommendations of a Member or consultant, and of a body; and knowledge appraisal tests. All of those exceptions, which are relevant in applying s. 34, relate to the Conseil exécutif or the public bodies as collective entities.

64 There is no provision in the *Access Act* giving the reasons behind those exceptions. Secondary sources, however, are available which provide useful information about the legislative approach to access to information that has been widespread for approximately 20 years. For instance, a commission set up by the Ontario government, which reported in 1980, analyzed the entire problem of access to government information in depth (Commission on Freedom of Information and Individual Privacy, *Public Government for Private People* (1980)). The report discussed the exclusion of certain information from the duty to disclose. The exceptions that were recommended corresponded, in part, to the exceptions in subdivision 5 of the Act under consideration (vol. 2, at pp. 280-81). The report concluded that the judicial and executive branches had to be exempted from the duty to disclose. However, it did not contain any exceptions pertaining to access to the government's administrative or financial management documents (vol. 2, at p. 239). That approach reflected a principle of general access with narrowly defined exceptions. In the present case, we must keep in mind that in adopting the *Access Act*, the National Assembly thought it appropriate that it should be subject, itself, to the legislation. In so doing, it expressed a desire for transparency that went beyond the solutions that have been adopted by other legislatures or were recommended to them.

65 As previously noted, s. 34 is the only provision in subdivision 5 that relates solely to the documents of individual Members. That provision exempts two types of documents from disclosure: documents from the office of a Member and documents produced for that Member by the services of the National Assembly, unless the Member deems that disclosure would be expedient. The request for

Conseil exécutif; les opinions juridiques; les analyses; les mémoires de délibérations; les textes législatifs ou réglementaires; les avis ou recommandations d'un membre ou d'un consultant et ceux d'un organisme, ainsi que les épreuves d'évaluation des connaissances. Toutes ces exceptions, pertinentes dans l'application de l'art. 34, visent le Conseil exécutif ou les organismes publics en tant qu'organes collectifs.

Aucune disposition de la *Loi sur l'accès* n'explique la raison d'être de ces exceptions. Certaines sources secondaires donnent cependant des indications utiles sur une approche législative de l'accès à l'information qui s'est généralisée au cours des 20 dernières années. Ainsi, une commission établie par le gouvernement de l'Ontario, qui a présenté son rapport en 1980, a analysé en profondeur tout le problème de l'accès à l'information gouvernementale (Commission on Freedom of Information and Individual Privacy, *Public Government for Private People* (1980)). Le rapport envisageait la soustraction de certaines informations à l'obligation de divulgation. Les exceptions recommandées correspondaient en partie à celles de la sous-section 5 de la loi à l'étude (vol. 2, p. 280-281). Le rapport concluait à la nécessité de soustraire les pouvoirs judiciaire et législatif à l'obligation de divulgation. Il n'exprimait cependant aucune réserve à l'égard de l'accès aux documents de gestion administrative ou financière de l'État (vol. 2, p. 239). Cette approche exprimait un principe d'accès général, assorti d'exceptions restreintes. Dans la présente affaire, il faut se rappeler que l'Assemblée nationale, en adoptant la *Loi sur l'accès*, a cru bon de s'assujettir elle-même à la législation. Elle affirmait alors une volonté de transparence qui transcendait les solutions retenues par d'autres législatures ou qui leur étaient recommandées.

Tel que noté précédemment, l'art. 34 est la seule disposition de la sous-section 5 qui ne concerne que les documents des députés eux-mêmes. Cette disposition soustrait deux types de documents à la divulgation : les documents du bureau du député et ceux que les services de l'Assemblée nationale produisent pour son compte, à moins que celui-ci ne juge opportun de les communiquer. La demande

access in this case involves the second category of document. We must therefore define the content of that category in order to construe and apply s. 34. The Commissioner defined that category very broadly and found that it included all documents prepared by the services of the National Assembly that are delivered to a Member. In our opinion, the Commissioner's interpretive approach was flawed. If he had applied the proper methodology, he would have excluded only certain types of documents.

The respondents oppose the approach of the Commissioner on the ground that the wording of s. 34 makes no distinction based on the nature of the document prepared for the Member, an argument which seems to be founded on the reasons of the court in *Université Laval v. Albert*, *supra*. However, the reasons of the court in that case are not conclusive, since it also wrote at p. 440:

> [TRANSLATION] Given the evidence that was heard by the undersigned, they cannot conclude, like the commissioner, that the excerpts from minutes were documents that were *produced* and *used* by the *administrative services* of the university. In order for s. 34 not to be applicable in this case, it would have had to be clearly established that those documents were essential to the administrative aspect of the university — in other words, essential to the decision-making by the institutional authorities or to the action taken on those decisions; no evidence to that effect was presented in this case. [Emphasis in original.]

The analysis of the provision must necessarily take into account the legislative context, the purpose of the Act as a whole, and the purpose of the provision in question. This is necessary to avoid an error in the reasoning that supports the Commissioner's conclusion on the meaning of s. 34. This Court has often stressed the need to have regard to the overall purpose of the Act in construing it: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *2747-3174 Quebec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. In *Rizzo Shoes*, Iacobucci J. interpreted the expression "terminate the employment of an employee" to include employees whose termination resulted from the bankruptcy of their employer, having regard to the purposes of the Act. He rejected

de divulgation vise ici la deuxième catégorie de documents. Il faut donc définir le contenu de cette catégorie pour interpréter et appliquer l'art. 34. Le Commissaire a donné une portée très générale à cette catégorie en y incluant tous les documents préparés par les services de l'Assemblée nationale qui sont communiqués au député. À notre avis, la démarche interprétative du Commissaire était fautive. Une interprétation correcte l'aurait amené à n'exclure que certains types de documents.

66 Les intimés contestent cette approche au motif que le libellé de l'art. 34 ne fait pas de distinction fondée sur la nature du document préparé pour le député, argument qui semble s'appuyer sur les motifs du tribunal dans *Université Laval c. Albert*, précité. Pourtant, les motifs du tribunal dans cette affaire ne sont pas concluants puisqu'il y est écrit aussi à la p. 440 :

> Avec la preuve entendue par les soussignés, ceux-ci ne peuvent conclure, comme la commissaire, que les documents, en l'occurrence les extraits de procès-verbaux, étaient des documents *produits* et *utilisés* par *l'appareil administratif* de l'université. Pour que l'article 34 ne puisse recevoir application en l'instance, il eût fallu établir clairement que ces documents constituaient un élément essentiel de la fonction administrative de l'université, c'est-à-dire pour la prise de décisions par les instances officielles de l'institution ou pour assurer le suivi desdites décisions; aucune preuve ne fut apportée, en la présente cause, dans ce sens. [En italique dans l'original.]

67 L'analyse de la disposition doit nécessairement tenir compte du contexte législatif, de l'objet de la loi dans son ensemble et de l'objet de la disposition précisément visée. Ceci fait partie de l'obligation du Commissaire de ne pas commettre d'erreur dans le raisonnement suivi pour déterminer le sens à donner à l'art. 34. Notre Cour a souvent souligné la nécessité d'interpréter la loi en tenant compte de son objectif général : *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *2747-3174 Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 R.C.S. 919; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2. Dans *Rizzo Shoes*, le juge Iacobucci interprète les mots « licencier un employé », vu les objectifs de la loi, comme englobant les employés mis à pied à la suite d'une faillite. Il rejette ainsi

the interpretation of the Court of Appeal, which had concluded that the ordinary meaning of the words used restricted the application of the statutory provision to those employees who had in fact been dismissed. Although he acknowledged that "[a]t first blush, bankruptcy does not fit comfortably into this interpretation" (para. 20), he concluded that this analysis was incomplete. Iacobucci J. referred, rather, to the principles of interpretation and to the *Interpretation Act*, R.S.O. 1980, c. 219, now R.S.O. 1990, c. I.11, and concluded that the Court of Appeal had not paid sufficient attention to the overall scheme of the Act, its object, and the true intention of the legislature (para. 23). As Iacobucci J. said in *Southam*, *supra*, at para. 59, the standard of reasonableness *simpliciter* is closely akin to the standard that should be applied in reviewing findings of fact by trial judges. E. A. Driedger notes in his work entitled *Construction of Statutes* (2nd ed. 1983), at p. 87, that the interpretation of an Act cannot be based simply on its wording:

> 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.

The plain meaning of the words will not be of much value if the court considers it without regard to the context of the statutory provision and the purposes of the Act.

68 The justification for and importance of this approach were discussed at length by L'Heureux-Dubé J. in a concurring opinion in *2747-3174 Québec Inc.*, *supra*. She focussed on the problems associated with the old rule about the plain meaning of the words, explaining that this rule obscured the fact (at para. 154)

> that the so-called "plain meaning" is based on a set of underlying assumptions that are concealed in legal reasoning. In reality, the "plain meaning" can be nothing but the result of an implicit process of legal interpretation. [Emphasis deleted.]

In her analysis, L'Heureux-Dubé J. quoted at para. 155 a scathing excerpt from M. Zander, *The Law-Making Process* (4th ed. 1994), at p. 126:

l'interprétation de la Cour d'appel qui avait conclu que le sens ordinaire des mots utilisés limitait l'application de la disposition législative aux seuls employés qui avaient effectivement été licenciés. Bien qu'il reconnaisse que, « [à] première vue, la faillite ne semble pas cadrer très bien avec cette interprétation » (par. 20), il conclut que cette analyse reste incomplète. Le juge Iacobucci se réfère plutôt aux principes d'interprétation et à la *Loi d'interprétation*, L.R.O. 1980, ch. 219, maintenant L.R.O. 1990, ch. I.11, pour conclure que la Cour d'appel n'avait pas porté une attention suffisante à l'économie générale de la loi, à son objet et à l'intention véritable du législateur (par. 23). Or, comme le mentionne le juge Iacobucci dans *Southam*, précité, par. 59, la norme de la décision raisonnable se rapproche de la norme applicable au contrôle des conclusions de fait des juges de première instance. E. A. Driedger souligne dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983), p. 87, que l'interprétation de la loi ne peut pas reposer simplement sur son libellé :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Le sens ordinaire des mots n'a donc pas une très grande valeur si la cour l'examine sans tenir compte du contexte de la disposition législative et des objets de la loi.

La justification de cette approche et son importance sont discutées à fond par le juge L'Heureux-Dubé dans une opinion concurrente dans *2747-3174 Québec Inc.*, précité. Le juge fait surtout ressortir les problèmes associés à l'ancienne règle relative au sens ordinaire des mots lorsqu'elle explique que cette règle obscurcit le fait (au par. 154)

> que le soi-disant « sens ordinaire » est fondé sur un ensemble de prémisses sous-jacentes qui se trouvent dissimulées dans le raisonnement juridique. En réalité, le « sens ordinaire » ne peut être autre chose que le résultat d'un processus implicite d'interprétation juridique. [Soulignement omis.]

Dans son analyse, le juge L'Heureux-Dubé cite au par. 155 un passage cinglant de M. Zander, *The Law-Making Process* (4e éd. 1994), p. 126 :

The literal *interpretation* in a particular case may in fact be the best and wisest of the various alternatives, but the literal *approach* is always wrong because it amounts to an abdication of responsibility by the judge. Instead of decisions being based on reason and principle, the literalist bases his decision on one meaning arbitrarily preferred. [Emphasis in original.]

The conclusion must therefore be that it is essential in all cases to consider the purpose of the Act and the overall legislative objective. In *Sharpe*, *supra*, McLachlin C.J. refused to adopt an interpretation of s. 163.1(1)(*a*) that would have required that she include things in the definition of the intended material caught by the law that would not have served the legislative objective (para. 43).

In this case, the same reasoning must be applied in analysing the expression "document produced for that member". Interpreting s. 34 without examining the legislative context and the specific purpose of the exception set out in that section is an error. As in *Sharpe*, failing to refer to the legislative objective creates a risk of catching things within the scope of the provision that should not be included, because including them does nothing to achieve the legislature's intended objective. It is also very clear that disregarding the legislature's overall intention contradicts s. 41 of the *Interpretation Act*, R.S.Q., c. I-16, as in *Rizzo Shoes*, *supra*. As noted earlier, the error made by the Commissioner creates an inconsistency between the objective of the *Access Act*, which he ignored, and its actual content. This confirms that his interpretation is unreasonable. The effect of the Commissioner's interpretation is that the legislature enacted an incoherent statute, giving generous access to government information on one hand, and denying access, even in respect of matters relating to the day-to-day management of public funds by the legislative body, composed of the Members, on the other.

In our opinion, a narrow interpretation of the exceptions that is consistent with its underlying objective could not reasonably have led to the conclusion that s. 34 applied to the document requested since that document is essentially an accounting

[TRADUCTION] Il est possible que, dans un cas donné, l'*interprétation* littérale soit la meilleure et la plus sage des solutions, mais l'*approche* littérale est toujours mauvaise parce qu'elle équivaut à l'abdication par le juge de ses responsabilités. Au lieu de fonder leurs décisions sur la raison et sur des principes, les partisans de l'approche littérale basent leurs décisions sur un sens choisi arbitrairement. [En italique dans l'original.]

69 Il faut alors retenir qu'il est essentiel, dans tous les cas, de tenir compte de l'objet de la loi et de l'objectif législatif général. Dans *Sharpe*, précité, le juge en chef McLachlin a refusé d'adopter une interprétation de l'al. 163.1(1)*a*) qui l'aurait amenée à inclure dans la définition du matériel visé des choses dont l'inclusion ne servirait aucunement la réalisation de l'objectif législatif (par. 43).

70 Dans la présente instance, il faut appliquer le même raisonnement à l'analyse de l'expression « pour le compte de ce membre ». C'est une erreur d'interpréter l'art. 34 sans se référer au contexte législatif et à l'objet spécifique de l'exception visée par cet article. Comme dans *Sharpe*, le défaut de se référer à l'objectif législatif fait courir le risque d'inclure dans la portée de l'article des choses qui ne devraient pas s'y trouver parce que leur inclusion n'avance en rien la réalisation de l'intention du législateur. Il est aussi bien clair que le fait de ne pas tenir compte de l'intention générale du législateur contredit l'art. 41 de la *Loi d'interprétation*, L.R.Q., ch. I-16, comme dans *Rizzo Shoes*, précité. Cette erreur du Commissaire crée, comme nous l'avons noté, une incompatibilité entre l'objectif, qu'il néglige, et le contenu réel de la *Loi sur l'accès*, ce qui confirme son caractère déraisonnable. Selon l'interprétation du Commissaire, le législateur aurait adopté une législation incohérente, accordant d'une main un accès généreux à l'information gouvernementale, pour, de l'autre, la refuser même à l'égard de matières concernant la gestion courante des fonds publics par le corps législatif que forment les députés.

71 À notre avis, une interprétation restrictive des exceptions, conforme à l'objectif qui les anime, ne pouvait raisonnablement mener à la conclusion que l'art. 34 visait le document demandé puisqu'il s'agit essentiellement d'un état comptable préparé pour le

statement prepared for the accounting service. The other sections in subdivision 5 list the categories of documents that are exempt from disclosure at the discretion of the Conseil exécutif or of a public body acting as an entity; it seems to us that s. 34 must confer the same power on Members of the National Assembly acting individually. Although the other provisions of subdivision 5 do not provide an exhaustive list of cases where s. 34 applies, they nonetheless provide important guidance as to the types of information and documents caught by that provision. Even though it can be argued that s. 34 might possibly apply to cases other than those specifically mentioned in subdivision 5, the scope of that provision is not so broad that it would extend to the accounting statements in question. This is entirely consistent with the conclusion reached by the Commissioner himself, given that he accepted the testimony of Gilles Dumont, a computer and administrative systems analyst in the National Assembly's financial resources management branch. In the Commissioner's opinion (at p. 225), Mr. Dumont's testimony confirmed that

[TRANSLATION] payment of amounts owing to the people thus employed is made at the Member's request. The Member must first fill out the proper form and send it to the National Assembly's accounting department. Before authorizing payment, the employee assigned to that job verifies that the total payroll that was made available to the Member has not been exhausted.

We would also add on this point that it was not shown that the information requested could have any impact on the independence of the Member in performing his duties. While the Commissioner did not discuss this point, we agree with the comments made by Chamberland J.A. on the issue.

72 When s. 34 protects documents, it is for a specific purpose: the independence of a Member in performing his or her duties. Moreover, ss. 3 and 9 clearly state that the purpose of the *Access Act* is to allow public access to a portion of the documents kept by public bodies, including the National Assembly. That objective, the transparency of government

service de la comptabilité. Les autres articles de la sous-section 5 font l'énumération des catégories de documents qui sont soustraits à la divulgation à la discrétion du Conseil exécutif ou d'un organisme public agissant en tant qu'organisme collectif; il nous semble que l'art. 34 doit accorder un pouvoir semblable aux membres de l'Assemblée nationale agissant sur une base individuelle. Bien que les autres articles de la sous-section 5 n'établissent pas de liste exhaustive des cas d'application de l'art. 34, ils n'en donnent pas moins des indications importantes sur le type d'information et de documents que cette disposition vise. Même si l'on peut soutenir que l'art. 34 pourrait éventuellement s'appliquer à d'autres cas que ceux que mentionne spécifiquement la sous-section 5, celui-ci n'a pas une portée assez vaste pour inclure les états comptables en cause. Cette conclusion est tout à fait conforme à celle du Commissaire lui-même, dans la mesure où il accepte le témoignage de M. Gilles Dumont, analyste en procédés informatiques et administratifs à la Direction de la gestion des ressources financières de l'Assemblée nationale. Selon le Commissaire (à la p. 225), le témoignage de M. Dumont confirme que

le paiement des sommes dues aux personnes ainsi engagées est effectué à la demande du député. Ce dernier doit préalablement compléter le formulaire approprié et le transmettre au Service de la comptabilité de l'Assemblée nationale. Avant d'autoriser le paiement, le fonctionnaire affecté à cette tâche s'assure que la masse salariale mise à la disposition du député n'est pas épuisée.

Nous ajoutons ici qu'il n'a pas été démontré que la divulgation des renseignements demandés pouvait avoir un impact sur l'indépendance du député dans l'exécution de ses fonctions. Le Commissaire n'a pas discuté ce point; nous sommes d'accord, pour notre part, avec les commentaires du juge Chamberland sur la question.

La protection des documents que prévoit l'art. 34 sert une fin spécifique, l'indépendance du député dans l'exécution de ses fonctions. Par ailleurs, les art. 3 et 9 énoncent clairement que la *Loi sur l'accès* vise à permettre un accès public à une partie de la documentation des organismes publics, y compris l'Assemblée nationale. Cet objectif de transparence

administrative bodies, was recently reaffirmed by the Quebec Court of Appeal in a case in which it even pointed out the quasi-constitutional nature of this Act. In *Conseil de la magistrature du Québec v. Commission d'accès à l'information*, [2000] R.J.Q. 638, the court stated at para. 47:

[TRANSLATION] This issue involves a conflict between two important principles. The first is the right to information, which is one of the cornerstones of our democratic system. Unless there is a clear exception, justified by the preservation of a higher interest (for instance, privacy), every citizen must have access to documents kept by a public body. Henceforth, the government and its agencies may no longer shelter behind administrative silence, or privilege, either to refuse to disclose even sensitive information, or to avoid accountability for their decisions. There must be great transparency in the administration of public affairs; this is the guarantee of the democratic exercise of the individual's rights. The 1982 access to information legislation represents a remarkable step forward in this respect, in its effort to achieve transparency in the management of public affairs.

See also Y. Duplessis and J. Hétu, *L'accès à l'information et la protection des renseignements personnels* (loose-leaf), vol. 2, ch. I, at p. 10 103.

Because it disregards the legislative context and in particular the purpose of the *Access Act*, the Commissioner's interpretation of s. 34 is unreasonable. In *2747-3174 Québec Inc.*, *supra*, L'Heureux-Dubé J. clearly stated, at para. 150, that the rules of statutory construction are an essential part of the judicial process:

While imprecision in the substantive law may potentially affect a certain segment of our society, vagueness in legal methodology has effects that pervade the entire judicial system in its broadest sense and are accordingly felt by society as a whole.

In our view, legal interpretation is one of those areas of the law in respect of which the judiciary must be extremely vigilant and fully perform its normative function (para. 151). Iacobucci J. confirmed this in *Rizzo Shoes*, *supra*, at para. 27, when

de l'administration publique a d'ailleurs été réaffirmé récemment par la Cour d'appel du Québec dans un arrêt où elle signale même la valeur quasi constitutionnelle de cette loi. Dans *Conseil de la magistrature du Québec c. Commission d'accès à l'information*, [2000] R.J.Q. 638, la cour dit au par. 47 :

Cette question met en opposition deux grands principes. Le premier est celui du droit à l'information, qui est une des bases de notre système démocratique. Tout citoyen, sauf exception caractérisée et motivée par la préservation d'un intérêt supérieur (dont, par exemple, le respect de la vie privée), doit pouvoir avoir accès aux documents détenus par un organisme public. Le gouvernement et ses organismes ne peuvent plus désormais se réfugier derrière le silence administratif ou le droit au secret pour, d'une part, refuser de dévoiler des informations mêmes sensibles et, d'autre part, éviter de subir l'imputabilité de leurs décisions. L'administration de la chose publique doit avoir une grande transparence, garantie, pour le citoyen, de l'exercice démocratique de ses droits. La loi sur l'accès à l'information de 1982 représente à cet égard un remarquable pas en avant dans la recherche de la transparence de la gestion et de l'administration publique.

Voir aussi Y. Duplessis et J. Hétu, *L'accès à l'information et la protection des renseignements personnels* (feuilles mobiles), vol. 2, ch. I, p. 10 103.

73 Parce qu'elle ne tient pas compte du contexte législatif et particulièrement de l'objectif de la *Loi sur l'accès*, l'interprétation que fait le Commissaire de l'art. 34 est déraisonnable. Dans *2747-3174 Québec Inc.*, précité, le juge L'Heureux-Dubé explique bien, au par. 150, que les règles d'interprétation législative sont une partie essentielle du processus judiciaire :

Alors que l'imprécision d'un droit substantif peut, potentiellement, toucher un certain segment de notre société, le caractère flou de la méthodologie en droit emporte des effets qui s'infiltrent dans toute la composante judiciaire au sens large, et ceux-ci touchent donc l'ensemble de la société.

74 Le mode d'interprétation des lois est donc un domaine du droit dans lequel les tribunaux doivent exercer une grande vigilance et remplir pleinement leur fonction normative (par. 151). C'est ce que confirme le juge Iacobucci dans *Rizzo Shoes*, précité,

he found that the interpretation given by the Court of Appeal led to an absurd result:

> According to *Côté*, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment . . . . Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile . . . . [Emphasis added.]

An error in the application of the method of interpretation will not necessarily amount to an unreasonable decision. However, some errors appear to be so fundamental that they vitiate the reasonableness of the decision. They therefore justify the intervention by the superior courts to ensure that the legal rule is properly applied and that the principle of legality that governs the actions of administrative tribunals is preserved.

75 The need to interpret the Act in light of its real purpose is not simply a question of approach or of strategy. It is a duty, an essential part of the judicial process. As Zander, *supra*, observed, if the court or the administrative tribunal does not take into account the legislative purpose in its interpretation, it is acting unconsciously or arbitrarily, and that is certainly not reasonable.

76 In this case, the respondents' position regarding the exceptions to the duty to disclose cannot reasonably be defended. We strongly doubt that it is essential to a Member's ability to perform his or her role that the manner in which the Member spends the public funds made available to him or her, the use of which is subject to specific terms and conditions, be protected from disclosure.

77 In our opinion, the Commissioner's decision relating to s. 34 is unreasonable. As stated earlier, his broad interpretation of a rule providing for an exception is inconsistent with achieving the purpose of the *Access Act*. The analysis also contains an error in the characterization of the document: there was nothing in the evidence submitted to the Commissioner that justifies his interpretation on that

par. 27, lorsqu'il conclut que l'interprétation de la Cour d'appel a mené à un résultat absurde :

> D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif [. . .] Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile . . . [Nous soulignons.]

Ainsi, toute erreur dans la méthode d'interprétation n'aura pas nécessairement un caractère déraisonnable. Cependant, certaines erreurs paraissent si fondamentales qu'elles touchent à la rationalité de la décision. Elles justifient alors l'intervention des tribunaux supérieurs pour assurer l'application régulière de la règle de droit et la préservation du principe de légalité gouvernant l'action des tribunaux administratifs.

La nécessité d'interpréter la loi à la lumière de son objet véritable n'est pas simplement une question d'approche ou de stratégie. C'est un devoir, une partie essentielle du processus judiciaire. Comme le note Zander, *op. cit.*, si la cour ou le tribunal administratif ne tient pas compte de l'objectif législatif dans son interprétation, il se trouve à agir de façon inconsciente ou arbitraire, ce qui n'est certes pas raisonnable.

Dans la présente affaire, on ne peut raisonnablement défendre la position des intimés sur les exceptions à l'obligation de divulgation. Nous doutons fort qu'il soit essentiel à la fonction du député de garder le secret sur la façon dont il dépense les fonds publics qui sont mis à sa disposition et dont l'utilisation est soumise à des modalités précises.

À notre avis, la décision du Commissaire relativement à l'art. 34 est déraisonnable. Tel qu'indiqué plus haut, son interprétation large d'une règle d'exception est incompatible avec la réalisation de l'objectif de la *Loi sur l'accès*. L'analyse comporte aussi une erreur dans la caractérisation du document. En effet, rien dans la preuve soumise au Commissaire ne justifie son interprétation sur ce

point. In fact, at p. 227 of his decision, Mr. Comeau wrote:

[TRANSLATION] This does not in any way alter the fact that the documents are produced for the Member, that they are treated as confidential by some members of the staff of the Assembly who have access to them in the course of their duties, and that the Member has complete discretion in choosing his staff and the contracts for professional services that he enters into.

There is no real explanation of the connection between the document and s. 34; this explanation is required according to *Southam*, *supra*. The Commissioner simply said that the fact that a document is kept by the accounting department does not mean that it will not be caught by s. 34. The Commissioner did not consider whether the document can be considered to have been prepared for the Member when it must, in any event, have been prepared for the accounting service, whether or not it was delivered to the Member. We note that the French version of the *Access Act* says that the document must be produced "*pour le compte [du député]*". This suggests that the document has a specific purpose that relates directly and specifically to the individual Member and the performance of his or her role. The English version confirms that interpretation by using the preposition "for" rather than "about". The Commissioner added that the document is kept confidential. That is self-evident, and is the reason why the *Access Act* was enacted. The Commissioner also said that a Member is free to enter into contracts, but did not say how access to financial information would interfere with that freedom. Where the structure of and reasons for a decision are of this nature, that decision must be characterized as unreasonable within the meaning of that expression as used in judicial review.

3. *Analysis of Sections 53, 55 and 57*

The second issue we must address is the prohibition on disclosing nominative information under s. 53, which is subject to the exceptions in s. 57. That section provides a list of information that is considered to be public:

(2) the name, title, duties, address and telephone number at work and classification, including the salary

plan. M. Comeau écrit d'ailleurs à la p. 227 de sa décision :

Ceci n'enlève rien au fait que les documents sont produits pour le compte du député, qu'ils sont traités confidentiellement par les quelques membres du personnel de l'Assemblée qui y ont accès dans le cadre de l'exercice de leurs fonctions et que le député jouit d'une entière discrétion dans le choix de son personnel et des contrats de services professionnels qu'il conclut.

78 On ne trouve ici aucune explication réelle du lien entre le document et l'art. 34, ce qui est aussi requis suivant l'arrêt *Southam*, précité. Le Commissaire dit simplement que ce n'est pas parce que c'est un document du service de comptabilité qu'il ne peut pas être un document visé par l'art. 34. Il ne se demande pas si le document doit être considéré comme étant préparé pour le compte du député alors qu'il doit être préparé pour le service de comptabilité de toute manière, qu'il soit communiqué ou non au député. La version française de la *Loi sur l'accès* indique pourtant que le document doit être produit « pour le compte » du député. Cela implique que le document a une finalité précise visant directement et particulièrement la personne du député et l'exécution de sa fonction. La version anglaise confirme cette interprétation en utilisant la préposition « *for* » et non « *about* ». Le Commissaire ajoute que le document est gardé confidentiellement. Cela va de soi. C'est pour cela que la *Loi sur l'accès* a été adoptée. Le Commissaire ajoute que le député est libre de contracter, mais ne dit pas en quoi l'accès aux renseignements financiers entraverait cette liberté. Une décision structurée et motivée de telle manière doit être qualifiée de déraisonnable au sens de cette expression en matière de contrôle judiciaire.

3. *Analyse des art. 53, 55 et 57*

79 La deuxième question qui nous intéresse est l'interdiction de la divulgation de renseignements nominatifs aux termes de l'art. 53, qui est sujette aux exceptions de l'art. 57. Cet article donne une liste de renseignements qui sont considérés publics :

2° le nom, le titre, la fonction, l'adresse et le numéro de téléphone du lieu de travail et la classification, y

scale attached to the classification, of a member of the personnel of a public body;

(3) information concerning a person as a party to a service contract entered into with a public body, and the terms and conditions of the contract;

80 It is clear that the information requested in this case will not be nominative if the Member is considered to constitute a public body. It is argued, first, that s. 1 of the *Act Respecting the National Assembly*, which provides that the National Assembly "is composed of the Members elected", means that no distinction may be made between the Assembly and its Members. Second, it is argued, based on the conclusions of Judge Gagnon in *Sauvé*, that the Members are distinct from the institution itself. We would note, on this point, that the Commissioner did not analyse the issue himself; rather, he simply adopted the reasons of Judge Gagnon in *Sauvé*.

81 In order to dispose of the issue, we must first refer to s. 3 of the *Access Act*. That section provides that the National Assembly and every person designated by the Assembly to an office under its jurisdiction, together with the personnel under its supervision, are considered to constitute public bodies. That provision is very important because the interpretation of the *Access Act* must take into account the intention of the legislature that the Assembly be subject to the duty of transparency. In other words, the *Access Act* must be interpreted not so as to impede its purpose, but so as to ensure that its purpose is achieved.

82 Here again, two diametrically opposite positions must be analysed. The appellant submits that if the Member was not included in s. 57, it would not have been necessary to enact s. 34. If he was not considered to constitute a public body, no request for access to his documents could be made under s. 9. The respondents argue that the independence of the Members must be taken into account; they argue that if any interference with that independence had been intended, it would have been specifically set out in the Act.

83 In *Sauvé*, Judge Gagnon found that s. 1 of the *Act Respecting the National Assembly* is not

compris l'échelle de traitement rattachée à cette classification, d'un membre du personnel d'un organisme public;

3° un renseignement concernant une personne en sa qualité de partie à un contrat de services conclu avec un organisme public, ainsi que les conditions de ce contrat;

Il est donc clair que les renseignements demandés dans la présente affaire ne seront pas considérés nominatifs si le député est assimilé à un organisme public. D'une part, il est allégué que l'art. 1 de la *Loi sur l'Assemblée nationale* qui prévoit que l'Assemblée « se compose des députés élus » fait qu'on ne peut distinguer l'Assemblée de ses membres. D'autre part, on fait valoir, suivant les conclusions du juge Gagnon dans *Sauvé*, que les membres sont distincts de l'institution elle-même. Nous rappellerons ici que le Commissaire n'a pas procédé à une analyse indépendante de la question, mais qu'il a simplement adopté les motifs du juge Gagnon dans *Sauvé*.

Pour trancher la question, il faut d'abord se référer à l'art. 3 de la *Loi sur l'accès*. Celui-ci dispose que l'Assemblée nationale, les personnes qu'elle désigne pour exercer une fonction en relevant et les personnes qu'elle dirige, sont assimilées à un organisme public. Cette disposition est très importante parce que l'interprétation de la *Loi sur l'accès* doit tenir compte de la volonté du législateur de soumettre l'Assemblée au devoir de transparence. En d'autres mots, la *Loi sur l'accès* ne doit pas être interprétée de manière à faire obstacle à cet objet, mais à en garantir la réalisation.

Ici encore, deux positions diamétralement opposées doivent être analysées. D'une part, l'appelant fait valoir que si le député n'était pas visé par l'art. 57, il n'aurait pas été nécessaire d'adopter l'art. 34. N'étant pas assimilé à un organisme public, aucun de ses documents ne pourrait faire l'objet d'une demande d'accès suivant l'art. 9. Les intimés, pour leur part, plaident qu'il faut tenir compte de l'indépendance des députés, ce qui les amène à conclure que toute atteinte à celle-ci aurait été prévue spécifiquement si elle avait été voulue.

Dans l'affaire *Sauvé*, le juge Gagnon écrit que l'art. 1 de la *Loi sur l'Assemblée nationale* n'est

conclusive, particularly because the *Access Act* makes no connection between the source of the funds made available to a Member and his status as a public body, and because the *Act Respecting the National Assembly* makes a distinction between the staff of a Member and the staff of the National Assembly. In his opinion, reference to the Member's independence suggests that there would have been a specific provision recognizing the status of a Member as a public body if this had been the intention of the National Assembly.

In our opinion, the reasons in *Sauvé*, *supra*, suffer from the same defect as the Commissioner's reasons with regard to s. 34, which were discussed earlier. Judge Gagnon analysed the *Access Act* literally, without considering its purpose, the justification needed for the exceptions to the principles it lays down, or what is actually required with regard to the Member's independence pursuant to s. 57. He did not refer to any rule of interpretation and did not do any contextual analysis. By adopting those reasons, the Commissioner adopted a reasoning that does not meet the requirements of the standard of reasonableness described in *Southam*, *supra*, and *Pezim*, *supra*.

Moreover, the respondents' argument does not take into account the need to ensure coherency between statutes, in this case between the *Act Respecting the National Assembly* and the *Access Act*. In *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, Lamer C.J. said, at para. 61: "There is no doubt that the principle that statutes dealing with similar subjects must be presumed to be coherent means that interpretations favouring harmony among those statutes should prevail over discordant ones". In this case, s. 3 of the *Access Act* expressly provides that the National Assembly and its staff are considered to constitute public bodies. Section 1 of the *Act Respecting the National Assembly* provides that the Assembly is composed of its Members. An interpretation of s. 3 inconsistent with the recognition that the National Assembly is composed of its Members would be incompatible with the rule that there must be harmony among statutes. The respondents argue that the Assembly

pas déterminant, notamment parce que la *Loi sur l'accès* ne fait aucun rapport entre la provenance des fonds mis à la disposition du député et le statut d'organisme public, et parce que la *Loi sur l'Assemblée nationale* fait une distinction entre le personnel du député et celui de l'Assemblée nationale. Selon lui, la notion d'indépendance du député indique que l'assimilation du député à un organisme public aurait fait l'objet d'une disposition spécifique si telle avait été l'intention de l'Assemblée nationale.

84 À notre avis, les motifs dans *Sauvé*, précité, souffrent du même défaut que ceux du Commissaire relativement à l'art. 34, discuté antérieurement. Le juge Gagnon a procédé à une analyse littérale sans tenir compte de l'objet de la *Loi sur l'accès*, de la justification requise pour les exceptions aux principes qu'elle formule, ou des exigences réelles de la notion d'indépendance du député eu égard à l'art. 57. Il ne mentionne aucune règle d'interprétation et ne procède à aucune analyse contextuelle. En adoptant ces motifs, le Commissaire a adopté un raisonnement qui ne satisfait pas aux exigences de la norme de la décision raisonnable décrite dans *Southam* et *Pezim*, précités.

85 L'argument des intimés ne tient pas compte de la nécessité d'assurer la cohérence des lois, ici la *Loi sur l'Assemblée nationale* et la *Loi sur l'accès*. Dans *Pointe-Claire (Ville) c. Québec (Tribunal du travail)*, [1997] 1 R.C.S. 1015, le juge en chef Lamer affirme, au par. 61 : « Certes, selon le principe de la présomption de cohérence des lois qui portent sur des sujets analogues, l'interprète doit chercher l'harmonisation entre ces lois plutôt que leur contradiction ». Dans la présente affaire, l'art. 3 de la *Loi sur l'accès* prévoit de façon expresse que l'Assemblée nationale et son personnel sont assimilés à des organismes publics. L'article premier de la *Loi sur l'Assemblée nationale* stipule que l'Assemblée est constituée de ses membres. Une interprétation de l'art. 3 qui signifierait que l'Assemblée nationale n'est pas constituée de ses membres serait incompatible avec la règle d'harmonisation des lois. Les intimés prétendent qu'il ne faut pas confondre l'Assemblée et ses membres. Pourtant, cette distinction ne respecte pas le texte de l'art. 3 et l'intention claire d'inclure

must not be confused with its Members, even though that distinction is not consistent with the text of s. 3 and the clear intention that the National Assembly be included among the bodies covered by the *Access Act*. However, including the Members in this case does not diminish their independence in any way. The fact that a Member's staff is mentioned separately from the staff of the National Assembly does not appear to us to have any impact on the status of a Member. The fact that a Member has staff working exclusively for him or her facilitates the Member's work but says nothing about the Member's obligations of transparency under the *Access Act*. Nor is there any explanation showing why that distinction is essential to a Member's independence. After all, this independence appears *prima facie* to exist even if the Member does not have staff working exclusively for him or her.

l'Assemblée nationale au nombre des organismes visés par la *Loi sur l'accès*. Inclure les députés ici ne diminue en rien leur indépendance. Le fait que le personnel du député soit mentionné séparément de celui de l'Assemblée nationale ne nous paraît avoir aucune incidence sur le statut du député. Le fait qu'un député ait du personnel à son service exclusif facilite son travail mais n'a rien à voir avec ses obligations de transparence résultant de la *Loi sur l'accès*. Il n'y a pas non plus d'explication reliant cette distinction à l'indépendance même du député qui nous semble à priori exister même si le député n'a pas de personnel à son service exclusif.

86 Section 53 sets out the general rule: nominative information is confidential. The objective of that section is clearly to protect privacy. Section 55 restricts the general rule by specifying that personal information which is public is subject to access. Section 57 provides examples that are very significant regarding the type of information that is requested in this case. The legislature intended that people who are employed by a public body or who do business with a body of that nature must forego confidentiality in their dealings with the public agency. The question that must then be asked is whether the *Access Act* should be interpreted as creating an exception to the rule for people who do business with Members rather than with the National Assembly directly. Would concluding that it did be consistent with the legislative intention? Would that deprive s. 3 of its value, in practice, in light of the objective of transparency assigned to an assembly "composed of the Members elected"? This is a fundamental consideration (*Héroux v. Groupe Forage Major*, [2001] C.L.P. 317 (C.A.)).

L'article 53 établit la règle générale : les renseignements nominatifs demeurent confidentiels. L'objectif poursuivi par cet article est clair : il s'agit de la protection de la vie privée. L'article 55 apporte un tempérament à la règle générale en précisant que les renseignements personnels ayant un caractère public sont soumis à la règle d'accès; l'art. 57 offre des exemples qui sont très significatifs eu égard au genre de renseignements qui sont demandés dans la présente instance. Le législateur a voulu que ceux qui sont à l'emploi d'un organisme public ou qui traitent avec un tel organisme doivent renoncer à la confidentialité de leurs rapports avec le service public. Dès lors se pose la question de savoir si l'on devrait interpréter la *Loi sur l'accès* comme créant une exception à la règle pour ceux qui traitent avec les députés plutôt qu'avec l'Assemblée nationale directement. Une telle conclusion est-elle conforme à l'intention législative? Rendrait-elle en pratique l'art. 3 sans valeur eu égard à l'objectif de transparence d'une Assemblée « constituée de ses membres élus »? C'est là une considération fondamentale (*Héroux c. Groupe Forage Major*, [2001] C.L.P. 317 (C.A.)).

87 The Commissioner did not really provide independent reasoning to explain his position. He simply adopted the reasoning of Judge Gagnon in

Le Commissaire n'a pas réellement fourni de raisonnement autonome pour expliquer sa position. Il a tout bonnement adopté le raisonnement du juge

Sauvé. In our opinion, the analysis and reasoning of Chamberland J.A. must be preferred in this case. Like him, we believe that s. 34 would be largely pointless if the Member was not subject to ss. 55 and 57. Like Chamberland J.A., we are of the opinion that this conclusion is supported by s. 9 of the *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels*, which provides:

> [TRANSLATION] Subject to the provisions relating to access to information and to the protection of personal information, a member of the staff of a Member is bound by discretion regarding matters of which he or she has knowledge in the course of his or her duties.

The decision of the Commissioner on that issue was required to be reasonable, and it was not.

For these reasons, we would allow the appeal, with costs at all stages of the proceedings.

Appeal dismissed with costs, MAJOR, BASTARACHE, BINNIE *and* LEBEL JJ. *dissenting.*

Solicitors for the appellant: Gowling Lafleur Henderson, Montréal.

Solicitors for the respondents: Saint-Laurent, Gagnon, Québec.

Gagnon dans *Sauvé*. À notre avis, on doit préférer ici l'analyse et le raisonnement du juge Chamberland. Nous croyons, comme lui, que l'art. 34 serait largement inutile si le député n'était pas assujetti aux art. 55 et 57. Comme le juge Chamberland, nous sommes d'avis que cette conclusion trouve une confirmation dans l'art. 9 du *Règlement sur la rémunération et les conditions de travail du personnel d'un député et sur le paiement des services professionnels* qui prévoit que :

> Sous réserve des dispositions relatives à l'accès à l'information et à la protection des renseignements personnels, le membre du personnel d'un député est tenu à la discrétion sur ce dont il a connaissance dans l'exercice de ses fonctions.

La décision du Commissaire sur cette question devait être à tout le moins raisonnable. Elle ne l'était pas.

Pour ces motifs, nous accueillerions le pourvoi, avec dépens à toutes les étapes de la procédure. 88

Pourvoi rejeté avec dépens, les juges MAJOR, BASTARACHE, BINNIE *et* LEBEL *sont dissidents.*

Procureurs de l'appelant : Gowling Lafleur Henderson, Montréal.

Procureurs des intimés : Saint-Laurent, Gagnon, Québec.