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By Electronic Filing

British Columbia Utilities Commission
Suite 410, 900 Howe Street
Vancouver, BC V6Z 2N3

Attention: Patrick Wruck, Commission Secretary

Dear Sirs/Mesdames:

**Re: British Columbia Hydro and Power Authority (“BC Hydro”)
Fiscal 2022 Revenue Requirements Application**

We enclose for filing BC Hydro’s Final Submissions in the above-noted proceeding. The authorities cited in the Final Submissions are also enclosed.

A brief confidential addendum addressing cybersecurity has been filed under separate cover, and is being made available to the BCUC only.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

[Original signed by]

Matthew Ghikas
Personal Law Corporation

MTG/vde
Enclosures

BRITISH COLUMBIA UTILITIES COMMISSION

**IN THE MATTER OF
THE *UTILITIES COMMISSION ACT*, R.S.B.C. 1996, CHAPTER 473**

AND

**BRITISH COLUMBIA HYDRO AND POWER AUTHORITY
FISCAL 2022 REVENUE REQUIREMENTS APPLICATION**

**FINAL SUBMISSIONS OF
BRITISH COLUMBIA HYDRO AND POWER AUTHORITY**

MARCH 18, 2020

FASKEN MARTINEAU DuMOULIN LLP

MATTHEW GHIKAS, CHRISTOPHER BYSTROM and TARIQ AHMED

TABLE OF CONTENTS

PART ONE: INTRODUCTION	1
PART TWO: APPLICATION CONTEXT	4
A. INTRODUCTION.....	4
B. BC HYDRO HAS RESPONDED TO FEEDBACK AND BCUC DIRECTIVES.....	4
C. PROPOSED RATES REFLECT BC HYDRO’S FISCAL DISCIPLINE AND STEWARDSHIP OF THE SYSTEM	6
D. PLANNED INVESTMENTS TARGET RELIABILITY AND RESILIENCE.....	9
PART THREE: LOAD AND REVENUE FORECAST	11
A. INTRODUCTION.....	11
B. BC HYDRO HAS IMPROVED THE LOAD FORECAST METHODOLOGY.....	11
C. COVID-19 SCENARIO A IS AN APPROPRIATE BASIS FOR FORECASTING REVENUES ...	12
PART FOUR: COST OF ENERGY	13
PART FIVE: OPERATING COSTS.....	15
A. INTRODUCTION.....	15
B. BC HYDRO IS GENERALLY MAINTAINING CURRENT OPERATING BUDGETS	16
C. PROPOSED MRS FUNDING IS NON-DISCRETIONARY	17
(a) The Cost of MRS Is Increasing Over Time, But Ratepayers Are Benefiting From a More Reliable and Resilient System	18
(b) Proposed MRS Funding Addresses Ongoing Compliance and Implementation of New Requirements	19
(c) Achieving and Maintaining Compliance with MRS Is a Priority in Fiscal 2022	21
(d) Funding Is Required in Fiscal 2022 to Implement CIP Version 7	22
(e) Further Investment Will Be Necessary in the Next Test Period	22
D. INCREASED VEGETATION MANAGEMENT SPENDING IS WARRANTED	22
(a) Vegetation Management Budget Contemplates Planning Work, Significant Clearing and LiDAR.....	23
(b) There Is a Compelling Rationale for Additional Vegetation Management Funding	26
(c) Planned Spending Reflects the Maximum Amount of Activity, and It Will Make a Significant Impact.....	29
(d) BC Hydro Is Transitioning to New Vegetation Management Strategy	30
(e) BC Hydro Is Developing New Vegetation-Focussed Performance Metrics	32

E.	CYBERSECURITY FUNDING INCREASE: LARGER FOOTPRINT AND MORE THREATS....	34
(a)	Information on Cybersecurity Is Generally Confidential	34
(b)	BC Hydro Has Strong Cybersecurity Governance and Follows Best Practices	34
(c)	Fiscal 2022 Budget Allows for Increased Staffing and Outsourcing of Specialized Services	37
(d)	The Additional Funding and FTEs Will Address Audit and Assessment Recommendations	37
F.	ADDITIONAL EMPLOYEE TRAINING IS NECESSARY	38
G.	THE REMAINING INCREASE IS ALMOST ALL DUE TO UNCONTROLLABLE FACTORS...	39
H.	SUMMARY REGARDING OPERATING COSTS.....	40
	PART SIX: CAPITAL EXPENDITURES AND ADDITIONS.....	41
A.	INTRODUCTION.....	41
B.	FISCAL 2022 CAPITAL EXPENDITURES AND ADDITIONS	41
C.	BC HYDRO’S CAPITAL PLANNING AND DELIVERY PROCESSES REMAIN REASONABLE	42
D.	BC HYDRO’S CAPITAL INVESTMENTS CONTINUE TO BALANCE AFFORDABILITY WITH SYSTEM PERFORMANCE AND RISK	44
(a)	BC Hydro Continues to Moderate Investments to Reflect Lower Load Growth	44
(b)	BC Hydro Is Monitoring System Performance	45
(c)	“Safety Above All” Is Reflected in Capital Plan	46
(d)	BC Hydro Is Making Important Investments for Growth, Reliability and Resilience	47
(e)	BC Hydro Is Meeting its Capital Delivery Performance Targets	47
E.	A DIRECTION TO FILE ADDITIONAL CPCN APPLICATIONS WOULD BE UNWARRANTED	48
	PART SEVEN: REGULATORY ACCOUNTS.....	49
A.	INTRODUCTION.....	49
B.	BC HYDRO HAS PROPOSED ONLY LIMITED CHANGES TO ITS REGULATORY ACCOUNTS	49
C.	DARR TABLE MECHANISM IS JUST AND REASONABLE	51
	PART EIGHT: OTHER REVENUE REQUIREMENTS	53
	PART NINE: TRANSMISSION REVENUE REQUIREMENT	55
	PART TEN: DEMAND SIDE MANAGEMENT	56
A.	INTRODUCTION.....	56
B.	TRADITIONAL DSM REFLECTS CONTINUITY WITH PREVIOUSLY APPROVED PLANS...	56

(a)	DSM Expenditures Reflect Continuation of Similar Activities as the Previous Application	57
(b)	Moderation Strategy Continues Pending 2021 IRP Examination of Future DSM Levels.....	58
(c)	BC Hydro’s Traditional DSM Complies with Section 44.2 of the UCA	60
C.	BC HYDRO IS MAINTAINING LCE ACTIVITIES THAT ARE PRESCRIBED UNDERTAKINGS	62
(a)	BC Hydro Is Continuing Similar LCE Activities as Described in Previous Application	63
(a)	LCE Project/Programs Are Prescribed Undertakings	63
	PART ELEVEN: ELECTRIFICATION	65
A.	INTRODUCTION	65
B.	WORK CONTINUES AS ELECTRIFICATION PLAN DEVELOPMENT IS UNDERWAY	65
C.	EV CHARGING STATION COSTS AND REVENUES ARE ACCOUNTED FOR APPROPRIATELY	67
(a)	BC Hydro’s EV Charging Stations Are Prescribed Undertakings	67
(b)	Section 18 of the <i>Clean Energy Act</i> Requires Recovery of All Costs Incurred with Respect to Prescribed Undertakings	71
(c)	Section 18 of the <i>Clean Energy Act</i> Requires Recovery of the Cost of Eligible Charging Stations that Came into Operation Prior to June 22, 2020	72
(d)	BCUC Must Set Rates to Recover BC Hydro’s Fiscal 2020 and Fiscal 2021 Costs on its Eligible Charging Stations.....	78
(e)	BCUC Should Set Rates to Recover BC Hydro’s Forecast Costs on its Eligible Charging Stations	79
(f)	BC Hydro Is Seeking Approval of EV Charging Station Depreciation Rates	80
(g)	BC Hydro Will Continue to Forecast Costs in RRAs.....	81
D.	BC HYDRO ACQUIRES AND TRANSFERS LOW CARBON FUEL CREDITS IN ACCORDANCE WITH LEGISLATION AND RATEPAYERS BENEFIT	82
	PART TWELVE: CONCLUSION AND ORDER SOUGHT	84

PART ONE: INTRODUCTION

1. BC Hydro’s forecast revenue requirements for fiscal 2022 are characterized by continuity from the Fiscal 2020–Fiscal 2021 Revenue Requirements Application (“Previous Application”) in most areas. The proposed rate increase of 1.16 percent – less than the forecast rate of inflation – reflects ongoing fiscal discipline and targeted investment in system reliability and resilience.

2. BC Hydro foreshadowed the pending need for additional funding for Mandatory Reliability Standards (“MRS”), vegetation management, cybersecurity and employee training during the oral hearing for the Previous Application. In its decision on the Previous Application (“Decision”), the BCUC directed BC Hydro to address the adequacy of funding in these areas, which BC Hydro has done. The evidence in this proceeding, which includes oral testimony from senior BC Hydro management with responsibility for these areas, bears out that the requested additional funding is appropriate and (with one possible exception¹) sufficient for the Test Period. BC Hydro respectfully submits that the requested rate increase and related orders² are just and reasonable and should be approved as sought.

3. BC Hydro’s Final Submissions generally follow the organization of the Application, but focus on requests for increased funding and issues raised. BC Hydro makes the following points:

- ***Part Two: Application Context*** – Three broad themes pervade BC Hydro’s Application and evidence in this proceeding: (1) BC Hydro continues to embrace BCUC regulation and is responsive to feedback; (2) BC Hydro recognizes the importance of both affordability and system investment, and seeks to balance these considerations; and (3) system investment should not only aim to “keep the

¹ A scenario where some additional funding might be required was discussed in the confidential materials. No orders have been sought in that regard as part of this Application. Exhibit B-6, BCUC (Confidential) IR 1.6.6.

² Exhibit B-2-7, Updated Draft Order Sought. The initial orders sought are summarized in Section 1.4 of the Application. As discussed in Part Seven of these Final Submissions, BC Hydro amended its request in Exhibit B-5 (cover letter) to also seek a regulatory account to capture variances between the placeholder net income used in the determination of rates and what flows from BC Hydro’s upcoming cost of capital proceeding. As discussed in Part Eleven of these Final Submissions, BC Hydro also amended its requests in Exhibit B-9, Response to Undertaking No. 19 to include depreciation rates for its EV charging stations.

lights on”, but also to equip the system to withstand and recover from an increasing array of external threats.

- **Part Three: Load Forecast** – BC Hydro has improved the methodology it used to create the March 2020 20-year load forecast, and used scenarios to account for the impacts of the COVID-19 pandemic. COVID-19 Scenario A is an appropriate basis for forecasting revenues in fiscal 2022, particularly given how closely actual load is tracking to date.
- **Part Four: Cost of Energy** – BC Hydro’s forecast Cost of Energy for fiscal 2022 is effectively unchanged compared to fiscal 2021 plan.
- **Part Five: Operating Costs** – BC Hydro is seeking a significant increase in operating costs to fund reliability and resilience investments, as well as uncontrollable costs. Other operating cost pressures have been largely offset by savings.
- **Part Six: Capital** – BC Hydro’s capital planning process is unchanged from the process that the BCUC, in its Decision, found to be reasonable. Planned capital expenditures and additions are lower than fiscal 2021 plan. BC Hydro is still moderating capital spending to reflect lower load growth, but is making important reliability and resilience investments.
- **Part Seven: Regulatory Accounts** – BC Hydro is proposing limited changes to its regulatory accounts. BC Hydro is proposing to resume using the Deferral Account Rate Rider (“DARR”) table mechanism, which remains an efficient and fair mechanism to return (recover) Cost of Energy variance account balances to (from) ratepayers.
- **Part Eight: Other Revenue Requirements** – BC Hydro has proposed a mechanism to address variances between the placeholder net income used in the Application and the outcome of the upcoming cost of capital proceeding. The proposal is efficient and fair to ratepayers.

- **Part Nine: Transmission Revenue Requirements** – The Open Access Transmission Tariff (“OATT”) rates, which BC Hydro has determined on the same basis as in prior applications, are just and reasonable.
- **Part Ten: Demand Side Management (“DSM”)** – BC Hydro’s DSM portfolio reflects continuity from previously approved plans, pending the upcoming Integrated Resource Plan (“IRP”) in which future levels of DSM will be considered. BC Hydro’s Low Carbon Electrification (“LCE”) expenditures will continue to fund the activities that BC Hydro described in the Previous Application, which the BCUC accepted as prescribed undertakings.³
- **Part Eleven: Electrification** – BC Hydro is developing an electrification plan, but is already moving forward with various initiatives. BC Hydro has accounted for Electric Vehicle (“EV”) charging station costs and revenues appropriately. BC Hydro acquires and transfers low carbon fuel credits in accordance with legislation and all ratepayers benefit from sale proceeds.

4. Certain components of BC Hydro’s operating expenses, particularly with respect to cybersecurity and MRS, are subject to confidentiality requirements described in Chapter 5, section 5.6.1 of the Application. These Final Submissions make only generic references to confidential evidence. BC Hydro has filed a brief **Confidential Addendum** to these Final Submissions to address certain confidential matters raised by the BCUC.

³ Exhibit B-2, Application, p. 10-2.

PART TWO: APPLICATION CONTEXT

A. INTRODUCTION

5. Three broad themes pervade BC Hydro's Application and evidence in this proceeding: (1) BC Hydro continues to embrace BCUC regulation and is responsive to feedback; (2) BC Hydro recognizes the importance of both affordability and system investment, and seeks to balance these considerations; and (3) system investment should not only aim to "keep the lights on", but also to equip the system to withstand and recover from an increasing array of external threats.

B. BC HYDRO HAS RESPONDED TO FEEDBACK AND BCUC DIRECTIVES

6. At the outset of the March 4–5, 2021 Review Session ("Review Session"), Mr. O'Riley (BC Hydro's President and Chief Executive Officer) reaffirmed the company's commitment to the regulatory process. He stated, for instance:⁴

The fiscal 2021 RRA, including that oral hearing, created a vast evidentiary record capturing the robust dialogue and extensive discourse to unpack and build understanding of complex processes and it included some pointed feedback to BC Hydro about how we could improve. By all accounts, it was a successful proceeding and hopefully you see the results reflected in this application and our approach.

7. Chapter 1 of the Application summarizes how BC Hydro has considered and acted upon the Decision directives and recommendations. BC Hydro has already accomplished a lot, and the results are reflected in this Application. BC Hydro will be addressing other matters in upcoming proceedings – including in the next RRA, which is now only months away.⁵

8. This proceeding has provided another forum for feedback. For example:

- Through information requests, the Zone II Ratepayers Group highlighted the opportunity to reduce diesel consumption in the Non-Integrated Areas by

⁴ Tr. 1, p. 14, l. 22 – p. 15, l. 4 (O'Riley).

⁵ Exhibit B-5, BCOAPO IR 1.3.1; Tr. 1, p. 15, l. 16 – p. 16, l. 7 (O'Riley discusses electrification plan, diesel reduction strategy and other initiatives); Tr. 1, p. 63, l. 24 – p. 64, l. 25 (Wong discusses cost of capital); Tr. 1, p. 47, ll. 2–14 (O'Riley discusses rate design).

accelerating the rollout of LED streetlights in those communities. Ms. Daschuk stated:⁶

...I thought that was actually a really good idea that came out from the information requests. And you are absolutely right, we do have an opportunity to reduce diesel reduction. The original roll-out plan for the street light program was going to be regionally based because we are using largely contractors and as you can imagine, it is very cost effective for us to roll contractors out in a particular area and move through. But we are reflecting very seriously on your suggestion. We think it is a valid one. And while I can't confirm what the schedule for NIA street light replacements is, we will be looking at finding ways to accelerate it.

- BC Sustainable Energy Association, British Columbia Old Age Pensioners' Organization *et al.* and Mr. Bryenton spoke about the importance of affordability. While the BCUC must set rates to cover reasonable and prudently incurred costs irrespective of affordability considerations,⁷ Mr. O'Riley confirmed BC Hydro's focus on affordability, stating:⁸

...I am sensitive to the ability of customers to pay and particularly for low income customers and that's why you see investments in things like the conservation programs that help lower income customers bring their bills down, why we have had the customer [crisis] fund and hope to have some form of that in the future and why we pay attention to groups like the members of our Low Income Advisory Council.

As Mr. O'Riley explained, BC Hydro uses inflation and comparisons to other utilities as benchmarks to assess affordability. BC Hydro is open to suggestions on additional measures that would be helpful going forward.⁹

⁶ Tr. 1, p. 256, l. 17 – p. 257, l. 4 (Daschuk).

⁷ Decision, p. 194: "BCUC has no legislative mandate to make rates affordable, either for all customers or for specific groups of customers."

⁸ Tr. 1, p. 115, l. 22 – p. 116, l. 4 (O'Riley).

⁹ Tr. 1, p. 118, ll. 4–9 (O'Riley).

9. BC Hydro respectfully submits that, particularly given the streamlined nature of this “gap year” proceeding and the short time before the next RRA, the BCUC should limit its determinations in this proceeding to matters actively canvassed by the parties. This approach ensures that participants have a meaningful opportunity to be heard. It is both fair and efficient for the BCUC to flag issues for consideration in (e.g.) the next RRA proceeding, without making findings now based on an inherently more limited evidentiary record.

C. PROPOSED RATES REFLECT BC HYDRO’S FISCAL DISCIPLINE AND STEWARDSHIP OF THE SYSTEM

10. A second theme in this Application is the tension between keeping rates low and investment in the system. BC Hydro considers affordability across all customer classes to be an important part of its mandate, and its consideration of affordability manifests through attention to efficient operations and managing within budgets. At the same time, BC Hydro recognizes the importance of ongoing investment in the system.¹⁰

11. Mr. O’Riley expressed conviction that BC Hydro has generally struck the right balance between keeping rates low today and investment in the system. However, he acknowledged that, with the benefit of hindsight, some of the investments planned for fiscal 2022 would have been better made sooner.¹¹

The central tension in our budgeting process and in any utility revenue requirements application is that between affordability for customers and investment in our system. I think of this as a stewardship role which is taking care of something over time. We pay tremendous attention to getting this balance right and I think in most cases we have done so effectively.

During my testimony at the Fiscal 2020/2021 revenue requirements hearing, I signaled to you the need to enhance our spending in areas of vegetation management, cyber security, and employee training necessary to meet evolving safety and regulatory requirements. We recognize that our environment was changing and we were beginning to experience challenges in this area. In other words, the balance between affordability and investment needed to be adjusted.

...

¹⁰ Tr. 1, p. 42, l. 23 – p. 43, l. 22 (O’Riley).

¹¹ Tr. 1, p. 12, l. 16 – p. 14, l. 15 (O’Riley).

We understand the long-standing concern among ratepayers about operating costs and affordability. We don't take these steps lightly. I want to acknowledge that with hindsight some of these investments would have been better made one or two years earlier and, in fact, we did reallocate some spending to these areas within our fiscal 2020 and 2021 budgets to address these pressures. Going forward it's important that our metrics better indicate when we're seeing changes in risk profile.

12. The BCUC's focus and commentary over the past two applications has mirrored the central tension that Mr. O'Riley articulated. The BCUC's decisions support Mr. O'Riley's conviction that BC Hydro has, with the acknowledged exceptions, generally found the right balance between fiscal discipline and reinvestment in the system.

- In the Fiscal 2017–Fiscal 2019 Revenue Requirements Application (“Fiscal 2017–Fiscal 2019 RRA”) proceeding, the general focus of the regulatory review was on cost management. For example, in its Fiscal 2017–Fiscal 2019 RRA decision, the BCUC stated:¹²

...the Panel is concerned about the ability of BC Hydro to achieve the ten year rates forecast, in the light of rising O&M costs, lower than forecast load, increasing energy costs, and increasing deferral account balances. We acknowledge BC Hydro's cost cutting measures and also the upcoming comprehensive government review of BC Hydro's expenditures and we are hopeful that further efficiencies can be found.

- BC Hydro's next RRA (i.e., the Previous Application) outlined in significant detail the company's cost management initiatives. BC Hydro highlighted the processes in place to ensure budgetary discipline and efficient oversight of spending and project execution. BC Hydro conducted cost benchmarking, and included a number of metrics to demonstrate that it was managing costs appropriately. The BCUC made findings in its Decision that recognized BC Hydro's work in this regard.¹³ However, the BCUC's overriding concern and the focus of its most

¹² Order No. G-47-18, Decision, p. 110.

¹³ E.g., Decision, p. 75: “The Panel acknowledges BC Hydro's efforts to minimize the increase in base operating costs. These efforts include identifying vacancy factor savings and eliminating the unallocated funds budget.”

pointed feedback, related to whether BC Hydro needed to spend more in certain areas. For instance:

We are concerned that a singular focus on keeping rates low, while salutary, may encourage any utility to cut corners and focus on cutting costs in areas that may have detrimental effects. These effects could be in the Test Period but could also manifest in a future test period(s).

The BCUC identified vegetation management, cybersecurity, employee training, safety and Energy Studies as areas that may require additional funding.¹⁴

13. This Application represents a recalibration of the balance in favour of greater investment in the areas foreshadowed by BC Hydro and highlighted in the Decision. BC Hydro nonetheless remains focussed on fiscal discipline. Among other things, BC Hydro still seeks ways to reduce the Cost of Energy for IPPs. BC Hydro continues to use the same “top-down/bottom-up” budgeting approach for operating costs, which has worked effectively in prior years. BC Hydro has identified further operating cost savings to offset some of the rising costs, despite the more limited opportunities for savings after years of fiscal restraint. It has frozen executive, management and professional compensation for fiscal 2022. It continues to use the capital planning methodology that the BCUC found to be reasonable, moderating growth-driven expenditures to account for slower load growth. BC Hydro has maintained the moderation strategy for DSM. These and other examples of fiscal discipline are addressed in the Application and noted below.

¹⁴ Decision, p. 195. While the focus of these Final Submissions is on training, vegetation management, MRS and cybersecurity, BC Hydro is addressing the other areas. BC Hydro has added an additional FTE to the Energy Studies team, and the Compliance Filing for the Previous Application described work being advanced on enhancements to Energy Studies modelling. In accordance with Decision Directive 23, BC Hydro will address safety in its next RRA. See Exhibit B-2, Application, p. 5-6.

D. PLANNED INVESTMENTS TARGET RELIABILITY AND RESILIENCE

14. The third theme is system resilience. At the outset of the recent Review Session, Mr. O’Riley framed the planned investments in fiscal 2022 as supporting both traditional “lights-on” reliability and building “resilience” to withstand external threats:¹⁵

We absolutely need to maintain our focus on keeping the lights on, but it is no longer enough.

As our environment becomes more challenging and frankly hostile, we need to broaden our view of reliability beyond this lights on thinking. We are seeing the effect of more extreme weather here in British Columbia in more severe storms and wider swings in our hydro conditions. And we're seeing it elsewhere in North America, including the horrific situations that have occurred recently with the cold weather in Texas and the forest fires in California.

Our industry is coming under a threat by hostile actors, both in the physical and cyber realm and we've had direct experience with that here in British Columbia.

We're using the term "resilience" to describe our ability to guard against a more diverse set of threats without letting down our customers or our neighboring systems. And resilience is grounded in risk and hazards. You could describe resilience as being able to take a punch and still [move] forward with our mission. Compliance with mandatory reliability standards is one important way for utilities to achieve resilience and I acknowledge we are not meeting expectations in this area.

Part of our commitment to compliance is recognizing that lights on thinking is necessary but not sufficient and that we must move beyond our traditional concept of reliability towards resilience.

15. BC Hydro’s planned investments in MRS, vegetation management and cybersecurity are not driven by historic degradation of reliability performance; BC Hydro’s system reliability has been good. They are nonetheless important to reduce the risk of future degradation of reliability performance, including avoiding incidents that while rare have significant impacts if they do occur.¹⁶ Specifically, as described in further detail in subsequent sections of these Final Submissions:

¹⁵ Tr. 1, p. 11, l. 8 – p. 12, l. 11 (O’Riley).

¹⁶ Exhibit B-5, RCIG IR 1.5.1.

- **MRS:** BC Hydro will be working to achieve MRS compliance in areas where necessary mitigation measures have been identified, and to implement new MRS requirements. Although BC Hydro has not observed a degradation of reliability performance to-date, compliance with MRS is critical to minimize the risk of significant reliability impacts to the Bulk Electric System.
- **Vegetation management:** While BC Hydro has not experienced customer reliability impacts as a result of recent transmission grow-in events to-date, it is nonetheless important to avoid grow-in outages. Customer reliability impacts from transmission grow-ins, although rare, can be significant if they do occur. Distribution vegetation management will also help to maintain reliability.
- **Cybersecurity:** BC Hydro's cybersecurity controls and personnel have been effective to date. However, BC Hydro must continuously improve the maturity and breadth of its cybersecurity practices to address evolving threats and an expanding digital footprint.

PART THREE: LOAD AND REVENUE FORECAST

A. INTRODUCTION

16. This Part addresses BC Hydro's load forecast. The evidence, summarized below, demonstrates that:

- BC Hydro improved the load forecast methodology.
- BC Hydro has accounted for the impacts of the COVID-19 pandemic through the development of scenarios. COVID-19 Scenario A is an appropriate basis for forecasting revenues, particularly given how close it is tracking against actuals to date.

B. BC HYDRO HAS IMPROVED THE LOAD FORECAST METHODOLOGY

17. BC Hydro has made improvements to the load forecast methodology since BC Hydro's October 2018 Load Forecast, which are outlined in section 3.2 of the Application. Notably:

- BC Hydro has refined the methodology it uses to avoid overlap in efficiency requirements for end uses of electricity that are enabled from codes and standards as modeled by the U.S. Energy Information Administration ("EIS") and BC Hydro's DSM plan. BC Hydro has refined the adjustment based on a study commissioned from Navigant Inc.¹⁷
- The March 2020 load forecast uses a new methodology for EVs to reflect the targets in the *Zero-Emission Vehicles Act*, which was enacted on May 30, 2019.¹⁸
- The third improvement relates to how BC Hydro develops the uncertainty bands around industrial loads. BC Hydro now applies different approaches to distribution load and transmission load.¹⁹

¹⁷ Exhibit B-2, Application, pp. 3-2 and 3-3; Exhibit B-5, CEABC IR 1.3.6.

¹⁸ Exhibit B-2, Application, p. 3-3.

¹⁹ Exhibit B-2, Application, pp. 3-3 and 3-4.

C. COVID-19 SCENARIO A IS AN APPROPRIATE BASIS FOR FORECASTING REVENUES

18. The Covid-19 Scenario A is tracking to within 0.7 percent of actual load up to January 31, 2021.²⁰ The high degree of uncertainty in fiscal 2022, and the existence of a regulatory account to capture variances, also means there is limited, if any, benefit from updating the forecast. Ms. Daschuk stated:²¹

We believe that the current scenario A is a reasonable forecast on which to base a one-year revenue requirement application. There are a number of factors that go into creating a load forecast and this particular scenario A has been tracking very well. And in fact over the ten months we are within one percent and slightly better.

Also, any differences between the load forecast that we have and the actual revenue would be caught in deferral accounts.

We're also in a period of very high uncertainty and so for us to try and predict the various levels of uncertainty, it's going to have very limited to no value for -- we believe. Also, just as a reminder, we're filing our next revenue requirements application in the summer, likely in August. That revenue requirements application is going to be based off a new load forecast that we've just recently taken to our board of directors. And we found that there's very little difference between our forecasts.

So, you know, I think that it's not something that we would consider would have any type of an impact on this revenue requirements application.

19. The BCUC should find that COVID-19 Scenario A is an appropriate basis for setting rates in fiscal 2022.

²⁰ Tr. 1, p. 187, ll. 14–16 (Rich); Exhibit B-5, ZONE II RPG IR 1.3.1; Exhibit B-9, BC Hydro's Response to Undertaking No. 11.

²¹ Tr. 1, p. 185, l. 18 – p. 186, l. 14 (Daschuk).

PART FOUR: COST OF ENERGY

20. This Part addresses BC Hydro's planned Cost of Energy for fiscal 2022, which is categorized into Heritage Energy, Non-Heritage Energy and Market Energy. BC Hydro submits that its planned Cost of Energy is reasonable and appropriate for the purpose of setting rates for the Test Period.

21. Cost of Energy is effectively unchanged compared to fiscal 2021 plan.²² Increases in cost of Heritage and Non-Heritage Energy are largely offset by decreases in the cost of Market Energy:

- (a) **Cost of Heritage Energy** relates to the operation of heritage assets. It is increasing in fiscal 2022 compared to fiscal 2021 plan, primarily due to a forecast increase in water rental fees of \$52.2 million. The increase is mainly due to higher hydro generation volumes in calendar year 2020 as a result of high inflows in the Peace and Columbia regions.²³
- (b) **Non-Heritage Cost of Energy** is increasing from the fiscal 2021 plan, primarily due to increasing Independent Power Producer ("IPP") energy costs under existing agreements. BC Hydro is managing its IPP energy costs to the extent it is able by reducing the volume of IPP energy within the terms of agreements where there are cost savings to BC Hydro.²⁴ However, as noted by Mr. O'Riley, the IPP agreements are typically require BC Hydro to take the full output of the project.²⁵ BC Hydro does not have any active programs for the procurement of new energy resources from IPPs. While there are some contemplated Electricity Purchase Agreement ("EPA") renewals (e.g., under the Biomass Energy Program), the only expected new EPAs are a small number of potential new First Nations energy projects, including two potential EPAs remaining from the Standing Offer

²² Exhibit B-2, Application, p. 4-1.

²³ Exhibit B-2, Application, pp. 4-6 and 4-7.

²⁴ Exhibit B-2, Application, p. 4-2.

²⁵ Tr. 1, p. 161, ll. 2-7 (O'Riley).

Program.²⁶ Mr. O'Riley confirmed that the question of how to approach IPP renewals in a period of surplus will be a topic for the upcoming IRP.²⁷

- (c) **Cost of Market Energy** in the fiscal 2022 plan is \$93.5 million lower compared to the fiscal 2021 plan, largely due to lower System Imports and higher System Exports driven by higher water inflows.²⁸ This decrease largely offsets the increases discussed above.

22. Variances between planned and actual Costs of Energy are deferred to one of the Heritage Deferral Account, the Non-Heritage Deferral Account, the Load Variance Regulatory Account or the Biomass Energy Program Variance Account. Customers will only pay BC Hydro's actual Cost of Energy.²⁹

²⁶ Exhibit B-2, Application, p. 4-2. See also Exhibit B-4, BCUC IR 1.15.2; Exhibit B-5, BCOAPO IR 1.20.1 and 1.22.2.

²⁷ Tr. 1, p. 162, ll. 2-5 (O'Riley).

²⁸ Exhibit B-2, Application, p. 4-19.

²⁹ Exhibit B-2, Application, p. 4-5.

PART FIVE: OPERATING COSTS

A. INTRODUCTION

23. This Part addresses BC Hydro's forecast operating costs, which BC Hydro has determined using the same well-developed budgeting process that the BCUC accepted in the Decision.³⁰ BC Hydro makes the following points:

- BC Hydro is generally maintaining operating budgets and headcount at current levels for most parts of the company, with the exception of the significant, targeted investments in reliability and resilience and uncontrollable costs.
- The planned MRS work is non-discretionary, and it is essential to the protection of the Bulk Electric System.
- The planned increase in vegetation management spending will allow BC Hydro to significantly increase its activities in fiscal 2022, address part of the current vegetation accumulation, and lay the foundation for BC Hydro's new Vegetation Management Strategy.
- The cybersecurity funding increase will augment BC Hydro's existing capabilities to address the growing sophistication of cybersecurity threats.
- The forecast funding increase for training, which BC Hydro had foreshadowed, is aligned with the BCUC's commentary in its Decision.
- The remaining base operating cost increase is almost entirely due to uncontrollable factors.

³⁰ Decision, p. 58: "The Panel accepts BC Hydro's approach to leveraging a top down to bottom up budgeting to forecast its base operating costs for the Test Period, which provides insight into the cost pressures and savings opportunities for BC Hydro. The monitoring processes provide opportunities to adjust as necessary to ensure targets are achieved, as well as to gain insights to develop sound budgets for the future. In addition, the monitoring processes reveal trends that may otherwise go unnoticed."

B. BC HYDRO IS GENERALLY MAINTAINING CURRENT OPERATING BUDGETS

24. BC Hydro has held operating budgets across all Key Business Units at current levels, with the exception of the targeted investments in reliability and resilience and uncontrollable costs. BC Hydro has largely offset other cost pressures with cost savings, despite there being fewer opportunities to do so after years of fiscal restraint.³¹ BC Hydro has avoided an increase in costs through a wage freeze for executive, management and professional employees. It has achieved savings related to lease accounting changes, reduced apprentice intakes, in-housing of the reliability coordinator function from Peak Reliability, and capital overhead savings as a result of increased costs eligible for capitalization.³²

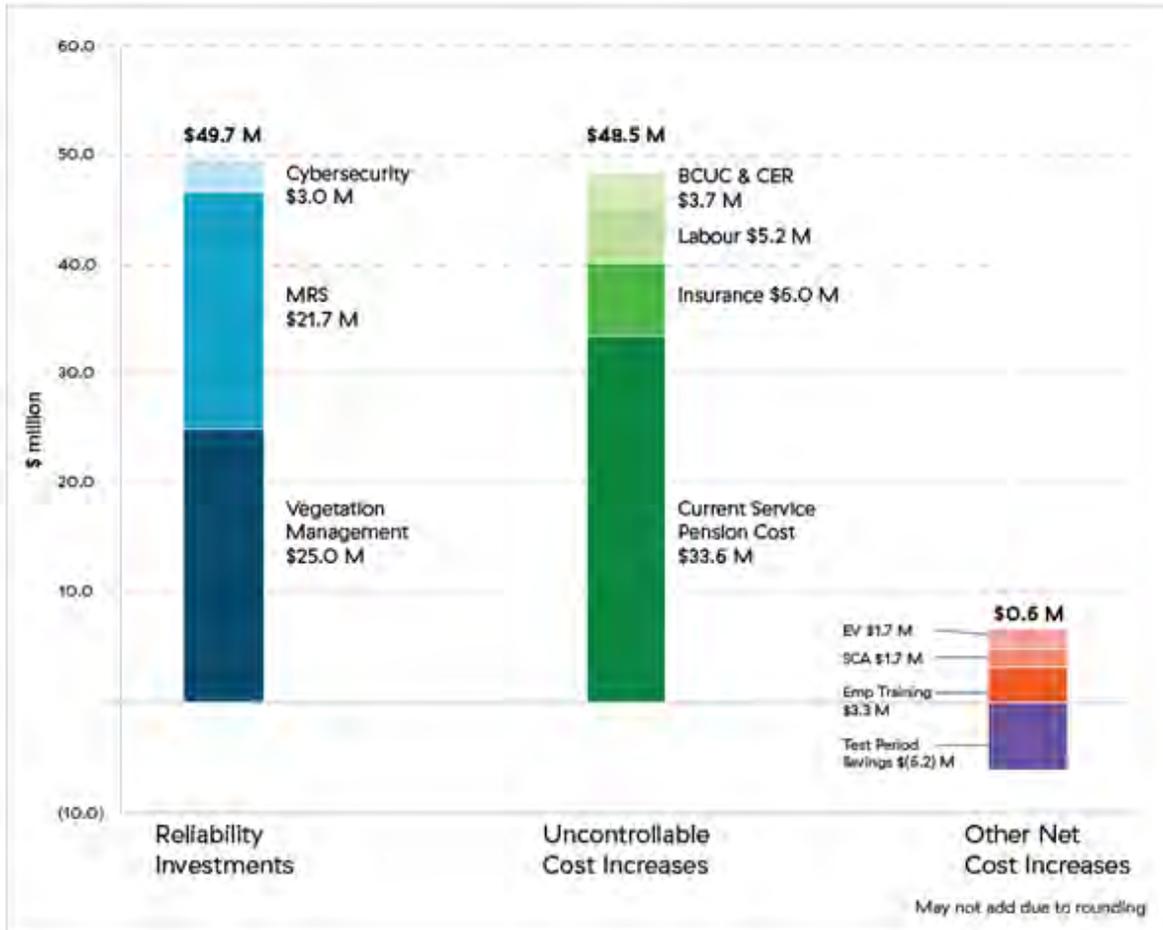
25. The figure below summarizes the breakdown of the planned operating cost increase. BC Hydro provided further information in Table 5-5 of the Application.³³

³¹ Tr. 1, p. 11, l. 24 – p. 14, l. 15 (O’Riley); Exhibit B-2, Application, p. 5-20.

³² Exhibit B-2, Application, pp. 5-2 and 5-19.

³³ Exhibit B-2, Application, pp. 5-15 and 5-17.

Figure 5-3 Fiscal 2022 Base Operating Cost Changes



C. PROPOSED MRS FUNDING IS NON-DISCRETIONARY

26. MRS is a key driver of base operating cost increases in fiscal 2022. Mr. O’Riley acknowledged that BC Hydro is not meeting expectations in terms of its compliance with MRS.³⁴ The evidence demonstrates that the requested funding will advance compliance. The planned work is non-discretionary, and it is essential to the protection of the Bulk Electric System.

³⁴ Tr. 1, p. 12, ll. 4–7 (O’Riley).

(a) The Cost of MRS Is Increasing Over Time, But Ratepayers Are Benefiting From a More Reliable and Resilient System

27. MRS affects many parts of BC Hydro's operations, and MRS activities are performed by a large group of people across the organization. These roles may be entirely devoted to MRS support, or they may form some portion of a person's work. The costs for maintaining and achieving compliance with MRS "are part of everything we do, similar to costs associated with reconciliation or electrification for example."³⁵

28. The cost and work effort associated with MRS implementation and maintaining compliance has increased over time, commensurate with the increased complexity and scope of MRS.³⁶ MRS was introduced in B.C. in 2010. There are now 99 standards in effect in B.C., comprised of a total of 457 requirements that apply across 3,250 BC Hydro assets.³⁷ Ms. Peck stated:³⁸

So, for context, annually there are approximately 20 new or revised standards that are issued. Those standards have become increasingly more complex in nature since 2010 when they first became mandatory for us. They are now very expansive, requiring much better coordination between business units within BC Hydro and a systemic approach needs to be taken to make sure we're compliant with the standards, while at the same time evolving to adapt to the next standards, or new versions of those standards as they're introduced.

As the scope of complexity has increased, BC Hydro has reallocated resources from existing headcount to perform the additional higher priority work. For instance, BC Hydro noted in the Previous Application that it had reallocated five existing roles to support compliance with CIP Version 5.³⁹ BC Hydro also incurs capital costs in support of MRS, over and above the operating costs discussed in Chapter 5.

³⁵ Exhibit B-5, BCOAPO IR 1.30.1. In that response, BC Hydro estimated the base budget using a number of assumptions.

³⁶ Exhibit B-4, BCUC 1.22.1.3 (CIP costs over time); Exhibit B-4, BCUC 1.22.1.1 (increase in number and scope of CIP requirements).

³⁷ Exhibit B-2, Application, p. 5-34.

³⁸ Tr. 1, p. 30, l. 22 – p. 31, l. 6 (Peck).

³⁹ Exhibit B-4-2, Errata #2, which corrects Exhibit B-4, BCUC 1.22.1.3.

29. These are important investments, given the changing environment in which BC Hydro operates. Ms. Peck elaborated:⁴⁰

The concept of moving from reliability to resilience that Mr. O'Riley spoke of in his opening presentation, is very applicable to my comment about MRS being a living framework. There are many changes that are occurring all around us that challenge our ability to make our grid resilient, and we can't modify those challenges, such as climate change, or bad actors in the physical or the cyber world, and the increasing presence of non-dispatchable and distributed generation.

This means that all entities in North America need to work together to harden their systems against these threats, so that our electrical systems are available when most needed. The MRS standards do just that, but they evolve as impacts of all of this change around us becomes more sophisticated and complex to manage.

(b) Proposed MRS Funding Addresses Ongoing Compliance and Implementation of New Requirements

30. BC Hydro's plan includes an additional \$21.7 million in operating expenses for non-vegetation related MRS, including Critical Infrastructure Protection ("CIP") standards. This represents a significant increase in funding and activity for MRS.⁴¹ The following table breaks down these funds by driver.⁴²

Mandatory Reliability Standards	<p>The operating cost increase of \$21.7 million and an FTE increase of 21.5 is required to maintain and achieve compliance with Mandatory Reliability Standards. The costs are presented by driver:</p> <ul style="list-style-type: none"> • \$21.3 million relates to compliance activities. BC Hydro will be working to achieve compliance in certain areas where necessary mitigation measures have been identified. These investments lay a strong foundation (through improved processes, documentation, systems and training) that will make addressing new standards more efficient and effective; and • \$0.4 million relates to the implementation of the next version of the Critical Infrastructure Protection standards (CIP version 7). MRS Standards, and the associated requirements, are updated and expanded through the adoption of new "versions". New versions of CIP standards have significantly expanded the scope and complexity of the obligations on BC Hydro. <p>Mandatory Reliability Standards are further discussed in section 5.6.</p>	21.7
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⁴⁰ Tr. 1, p. 30, ll. 5–21 (Peck).

⁴¹ Exhibit B-5, BCOAPO IR 1.30.1. In that response, BC Hydro estimated the base budget using a number of assumptions.

⁴² Exhibit B-2, Application, p. 5-17.

31. Most of the \$21.7 million increase (\$17.0 million) represents one-time costs. The one-time costs include improvements to processes, documentation, systems and training. The remaining \$4.7 million budgeted for ongoing sustainment includes:

- \$3.6 million for 21.5 FTEs, which will perform the following functions, among others: developing and maintaining process and control documentation, managing compliance maintenance tasks, providing guidance and training to employees and contractors to meet compliance requirements, leading incident investigations, developing remediation and mitigation plans, and reporting.⁴³
- \$1.1 million for ongoing MRS consulting and contractor services to obtain subject matter expertise on industry best practices and specialized compliance assurance support.⁴⁴

32. The figures above represent the additional operating costs only. MRS-related Power System investments with capital expenditures in fiscal 2022 include those set out in the table below.⁴⁵ BC Hydro also addresses MRS as part of its annual capital programs (e.g., the Transmission Line Rating Restoration and the Substation Security Upgrades programs). In addition, the Capital Plan included a provision in the Technology portfolio for unidentified MRS compliance related system enhancements to be defined through detailed fiscal 2022 work and budget planning. Planned capital investments that support MRS compliance are also discussed in the confidential materials.⁴⁶

IPID	Project Name	Fiscal 2022 Capital Expenditures (\$M)
900625	NERC CIP V5 Compliance at Medium Impact T&D Stations	2.0
901592	Various Sites – NERC CIP-003v7 Implementation	12.8

⁴³ Exhibit B-4, BCUC IR 1.23.1 and 1.23.2; Exhibit B-5, CEC IR 1.23.4, MoveUP IR 1.3.1.

⁴⁴ Exhibit B-2, Application, p. 5-34; Exhibit B-4, BCUC IR 1.23.1.

⁴⁵ Exhibit B-5, RCIG IR 1.8.6.

⁴⁶ Exhibit B-6, BCUC (Confidential) IR 1.3.1.

(c) Achieving and Maintaining Compliance with MRS Is a Priority in Fiscal 2022

33. The majority of the planned MRS operating cost increase (\$21.3 million) will fund activities that are necessary to deliver on mitigation plans developed in conjunction with the Western Electricity Coordinating Council (“WECC”) which WECC has recommended for approval by the BCUC.⁴⁷ BC Hydro described the mitigation plans as follows in the public portion of the evidentiary record:⁴⁸

Mitigation measures are comprised of two key sets of actions to achieve compliance following a potential or confirmed violation of a Mandatory Reliability Standard. First, the non-compliance is remediated immediately to reduce reliability risk to the extent possible over the short-term. Second, over a longer duration one or more mitigation measures are generally completed to prevent the potential or confirmed violation from re-occurring.

BC Hydro performs a root cause analysis and an assessment to determine what mitigation measures are most appropriate given the characteristics of the violation and proposes mitigation measures to WECC. If the mitigation measures are accepted by WECC, they recommend them for acceptance to the BCUC and the BCUC ultimately determines if they are acceptable.

The mitigation measures associated with the \$21.7 million were reviewed and accepted by WECC between August and October 2020 and are awaiting approval by BCUC.

34. BC Hydro has no flexibility in terms of whether or not to implement steps in an approved mitigation plan, nor is there any discretion as to timing.⁴⁹

35. BC Hydro’s evidence regarding mitigation plans and the basis for the budgeted MRS funding is subject to confidentiality requirements described in Chapter 5, section 5.6.1 of the Application. In the confidential materials, BC Hydro provided a further breakdown and explanation for the funding requirements. It described the value that these investments will bring in terms of compliance going forwards.⁵⁰

⁴⁷ Exhibit B-2, Application, Chapter 5, section 5.6.3.1; Exhibit B-4, BCUC IR 1.23.2; Exhibit B-2-4, Confidential Appendix Z, pp. 6-7; Exhibit B-6, BCUC (Confidential) IR 1.5.4 and 1.5.4.1; Exhibit B-4, BCUC IR 1.23.1.

⁴⁸ Exhibit B-5, RCIG IR 1.8.2.

⁴⁹ Exhibit B-5, RCIG IR 1.8.4.

⁵⁰ Exhibit B-2-4, Confidential Appendix Z, pp. 5-6; Exhibit B-6, BCUC (Confidential) IR 1.2.1, 1.2.3 and 1.3.1.

36. The work that BC Hydro is performing will accomplish more than just technical compliance today. It is laying the groundwork for the future. Ms. Peck explained that the current work is making BC Hydro's MRS program more adaptable and accommodating of new standards and new versions.⁵¹ BC Hydro has updated its MRS governance framework, has introduced new processes and internal auditing requirements, and is increasing automation.⁵²

(d) Funding Is Required in Fiscal 2022 to Implement CIP Version 7

37. BC Hydro has budgeted \$0.4 million of operating costs for implementing CIP Version 7, which increases the scope of cyber and physical security protection to include an additional 18 generating stations and 115 transmission substations. These protections will cover cyber security awareness and incident response, physical security controls, electronic access controls and use of transient cyber assets and removable media.⁵³ There is also a significant capital investment required to implement CIP Version 7, and the fiscal 2022 capital amount is referenced in paragraph 32 above.

(e) Further Investment Will Be Necessary in the Next Test Period

38. BC Hydro will complete a full resource analysis for CIP sustainment as part of its next RRA.⁵⁴ The implementation of CIP Version 7 and other new or revised standards will require ongoing investment in future years. For example, the next iteration of the CIP-003 Standard (CIP-003-8, which comes into effect in October 2023) will greatly expand the scope of compliance requirements.⁵⁵

D. INCREASED VEGETATION MANAGEMENT SPENDING IS WARRANTED

39. BC Hydro's plan includes a \$25 million increase in vegetation management, consistent with BC Hydro's foreshadowing in the last oral hearing and with Directive 22 of the Decision. As discussed below, the increase will allow BC Hydro to significantly increase its activities in fiscal

⁵¹ Tr. 1, p. 32, ll. 15–21 (Peck).

⁵² Tr. 1, p. 199, ll. 8–15; p. 194, l. 16 – p. 195, l. 1 (Peck).

⁵³ Exhibit B-2, Application, p. 5-34.

⁵⁴ Exhibit B-4, BCUC IR 1.22.1.3; see also: Exhibit B-6, BCUC (Confidential) IR 1.2.2.

⁵⁵ Exhibit B-2, Application, p. 5-28; Exhibit B-4, BCUC IR 1.22.2. BC Hydro provided additional information regarding future compliance-related costs in Exhibit B-6, BCUC (Confidential) IR 1.3.1.

2022, address part of the current vegetation accumulation, and lay the foundation for BC Hydro’s new Vegetation Management Strategy.

(a) Vegetation Management Budget Contemplates Planning Work, Significant Clearing and LiDAR

40. BC Hydro has provided a breakdown of the vegetation management budget starting at page 5-38 of the Application. BC Hydro expects that the budget increases will bring its funding levels up to the second quartile of vegetation management funding in benchmarking conducted by First Quartile.⁵⁶

Table 5-11 Fiscal 2021 and Fiscal 2022 Vegetation Program Funding Summary⁹³

(\$ million)	F2021 RRA	Standard Labour Rate Increase	Incremental Funding	F2022 Plan
Transmission Vegetation Maintenance	17.8	0.1	15.5	33.3
Distribution Vegetation Maintenance	30.6	0.2	5.4	36.1
LiDAR	-	-	4.0	4.0
Planning Resources	-	-	0.9	0.9
Total Gross	48.4	0.2	25.8	74.4
Distribution Vegetation Recoveries (TELUS)	(6.1)	-	(0.8)	(6.9)
Total Net of Recoveries	42.2	0.2	25.0	67.4

41. The allocation of additional funds between transmission and distribution is based on a risk assessment,⁵⁷ as Mr. Kumar explained:⁵⁸

The reason why we’ve had more allocation towards transmission is that we have done some analysis over the last year in terms of the accumulation of vegetation on our transmission system, and that is something that we need to address fairly quickly. And that drove some of the allocation decisions that we’ve made towards the transmission system.

Also if you look at the historical events that have happened in North America with respect to utilities and their experience with transmission tree outages, some of the significant outages in the utilities across North America have happened

⁵⁶ Tr. 2, p. 300, ll. 5–18 (Kumar). For clarity, the second quartile is the second lowest cost quartile.

⁵⁷ Tr. 2, p. 298, l. 23 – p. 299, l. 24 (Kumar).

⁵⁸ Tr. 2, p. 299, l. 3 – l. 19 (Kumar).

because of transmission related vegetation grow-ins and effects. So, although it happens very rarely, but if it happens, it has huge consequences for the utility business.

42. With respect to distribution, Mr. Kumar explained:⁵⁹

So the amount of funding that we are allocating to distribution, which as shown on page 5-39, is about \$5.4 million, in our mind is significant in terms of the impact that we are looking for in terms of the hazard trees and the additional pruning that we are going to do.

So for example, on the hazard tree side with this additional funding we are expecting to clear somewhere around 23,000 hazard trees, which is significantly more than what the forecast for this year is which is about 15,000. So that increased hazard tree budget, it does allow us to reduce and de-risk the system from a reliability standpoint.

The additional funding for distribution will be allocated to the pruning, which is again going towards the safety and the reliability of the system.

43. The additional funds will, in part, support an additional 18 FTEs for vegetation management.⁶⁰ Mr. Kumar described the rationale for the new FTEs as follows:⁶¹

The first two resources are for the planning requirements and if you look at our overall spending, we are going for a 50 percent increase on the vegetation [spend] in F22, which requires us to plan for that spend. So those two planning resources will be actually part of the requirement for the planning required for the additional funding.

The next three resources are for three professional foresters. And the reason for that is we want to increase our oversight of what's happening in the field from a planning standpoint. So these foresters would actually be in the field providing us with the information that we require to develop our plan and also to make sure that we're executing those plans as per the requirements of the work management system.

The next category is for distribution coordinators and this is with respect to the increase spending that we are asking for in the distribution side of our business. And one of the trends we've seen in the distribution side is there's a lot of consultation required with municipalities and stakeholders in terms of

⁵⁹ Tr. 2, p. 295, ll. 8–24 (Kumar).

⁶⁰ Tr. 1, p. 97, l. 24 – p. 99, l. 11 (Kumar).

⁶¹ Tr. 1, p. 98, l. 2 – p. 99, l. 19 (Kumar).

implementing and executing our programs. And a lot of our vegetation contractors are getting engaged in those conversations with the stakeholders and that is not a very prudent way of managing our contractors. So we do require those additional distribution coordinators to ensure that we are taking on that consultation with the stakeholders and the vegetation contractors are actually focusing on addressing the vegetation on our system.

Then we are also looking for one vegetation specialist to manage the riparian and environmental requirements that we see as a key driver for our requirements of our vegetation program.

And, lastly, we've also asked for eight LiDAR resources for our program, as Mr. O'Riley mentioned in his initial comments. That's one of the key foundations of our vegetation program going forward and we need to ensure that we can actually use the dynamic information that we get from LiDARs effectively to make those vegetation decisions within the organization.

44. BC Hydro's adoption of Light Detection and Ranging ("LiDAR") surveying to model vegetation on the system is notable. LiDAR is an industry best practice. It has, for example, been adopted in the past few years by Bonneville Power Authority to augment inspections and identify vegetation growth risks.⁶² Ms. Daschuk explained that LiDAR provides a more dynamic view of the system. It also provides "leading indicators and better measures so that we can respond to changes in vegetation on our system."⁶³

45. BC Hydro is also planning enhancements to the transmission vegetation Geographic Information System (GIS) data collection platform (VegNET) to add controls and streamline operational functionality. BC Hydro is also developing training modules to support consistent competencies for vegetation field staff.⁶⁴

46. The point of reference for the "incremental funding" shown in the table above is the planned spending for fiscal 2021 (i.e., the amount stated in the Previous Application), rather than actual spending for fiscal 2021. In fact, BC Hydro spent an additional \$3.6 million in fiscal 2020 on transmission vegetation management over and above what had been reflected in the Previous Application. Similarly, BC Hydro spent an additional \$8.8 million above plan in fiscal 2021,

⁶² Exhibit B-4, BCUC IR 1.33.3, 1.35.3, 1.39.1 and 1.39.2; Tr. 1, p. 99, ll. 12–19 (Kumar).

⁶³ Tr. 1, p. 26, ll. 13–19 (Daschuk).

⁶⁴ Exhibit B-4, BCUC IR 1.35.3.

funding which came available “as some of our stations’ maintenance work couldn’t be done under the COVID work protocols.”⁶⁵ BC Hydro’s decision to reallocate an additional \$12.4 million over the last test period to vegetation management – an additional 33 percent – underscores the need for additional resources in fiscal 2022.

47. BC Hydro also provided confidential information on the subject of vegetation management activities and the budget.⁶⁶

(b) There Is a Compelling Rationale for Additional Vegetation Management Funding

48. BC Hydro’s significant planned increase in vegetation management spending is justified by the combined impact of three factors.

Reason #1: The Long-Term Benefits from Prior Extensive Clearing Are Now Diminishing

49. BC Hydro conducted significant vegetation clearing during the period leading up to 2010, a time notable for significant pine beetle kill and damage from a severe wind storm. BC Hydro reaped ongoing benefits from that extensive clearing, reflected in the lower and stable budget in the following decade (see figure below, showing actual spend).⁶⁷ In effect, the clearing allowed BC Hydro to absorb significant cost pressures and maintain reliability performance during a period of fiscal constraint (i.e., multiple government reviews and the 2013 10 Year Rates Plan).⁶⁸ However, the vegetation that was cleared during the period of heightened activity has regrown and is now reaching maturity size that poses a risk to the system. As BC Hydro explained: “Initially, selective removal of the tallest vegetation is effective after a cycle of area clearing. Eventually, however, the remaining tall vegetation grows to a height where all remaining targets must be addressed.”⁶⁹

⁶⁵ Tr. 1, p. 25, l. 10 – p. 26, l. 6 (Daschuk).

⁶⁶ Exhibit B-6, BCUC (Confidential) IR 1.6.1, 1.6.5, 1.6.6, 1.7.1 and 1.7.3.

⁶⁷ Exhibit B-8 PowerPoint Presentation, slide 8; Tr. 1, p. 23, ll. 14 – p. 24, l. 14 (Daschuk).

⁶⁸ Exhibit B-2, Application, pp. 5-36 and 5-44.

⁶⁹ Exhibit B-4, BCUC IR 1.33.1.1. See also Exhibit B-2, Application, p. 5-47.



50. Although it is now clear that ramping up expenditures and activities is necessary, this only became apparent recently. Prior to fiscal 2020, all system performance and reliability metrics were within targeted ranges.⁷⁰ The accumulation of vegetation growth had been gradual. In 2019 and 2020, however, vegetation growth rates on the transmission system were high in much of the province due to ideal growing conditions. On the distribution system, although BC Hydro removed fewer hazard trees in the past two years to balance costs, it prioritized and removed all highest risk assessed trees.⁷¹

Reason #2: Vegetation Cost Pressures Can No Longer Be Absorbed

51. Cost pressures (described in section 5.7.4.2 of the Application and summarized in the table below) have increased over time. BC Hydro provided examples of how it “found efficiencies, prioritized work and innovated to extend our ability to preserve system performance without additional resources.”⁷² The measures that BC Hydro has been using to mitigate the impacts of these pressures within the fixed vegetation budget are no longer sufficient. The costs can no longer be absorbed in existing budgets.⁷³

⁷⁰ Exhibit B-4, BCUC IR 1.32.2.

⁷¹ Exhibit B-4, BCUC IR 1.32.6.

⁷² Exhibit B-2, Application, pp. 5-46 and 5-47.

⁷³ Exhibit B-2, Application, p. 5-44.

Table 5-12 Cost Pressures by Category

Category of Cost Pressures	Examples
Increased compliance requirements	<ul style="list-style-type: none"> • Introduction of MRS in 2009 • Fire prevention equipment, training and regulations
Increased safety requirements	<ul style="list-style-type: none"> • WorkSafeBC requirements • Growing safety practices
Increased climate impacts and environmental factors	<ul style="list-style-type: none"> • Increased extreme weather events • Multi-year drought, increasing tree mortality • Warm and wet summers, increasing tree growth rates
Non-vegetation events impacting regular vegetation work cycles	<ul style="list-style-type: none"> • Wildfires • Environmental and Wildlife Requirements
Increased market rates for program delivery	<ul style="list-style-type: none"> • Inflation • Increased market demand for vegetation services
System expansion	<ul style="list-style-type: none"> • +6 per cent increase in system size

52. Mr. Kumar explained that, although it is not possible to quantify the impact of each of these factors, “collectively what we can say is that all of them have had a significant impact on our ability to execute, and our units have gone down over the last ten years as far as our programs are concerned.”⁷⁴

Reason #3: Climate Change Is Impacting Vegetation Growth Rate and Health

53. Climate change is impacting vegetation on BC Hydro’s system. BC Hydro has seen greater frequency and severity of storms. There have also been localized weather pattern changes. For example, in the Lower Mainland and Vancouver Island regions, “we have generally seen much warmer and wetter summers in recent years causing vegetation to grow more quickly than expected. In other regions of the province, we have seen increased tree mortality due to summer droughts and insect infestations related to warmer winters.”⁷⁵ Rapid vegetation growth was particularly apparent in 2019 and 2020, with ideal growing conditions:⁷⁶

In 2019 and 2020, British Columbia experienced conditions that have encouraged rapid growth of vegetation in much of the province (mild to warm spring and summers and enough precipitation interspersed with plenty of sun). While this weather lowers wildfire ignition risks, it has encouraged growth of vegetation on rights of way at the higher end of the normal range. BC Hydro has observed growth of more than three metres per year for bigleaf maple and cottonwood trees at

⁷⁴ Tr. 1, p. 94, l. 13 – p. 95, l. 11 (Kumar); Exhibit B-5, RCIG IR 1.18.3.

⁷⁵ Exhibit B-2, Application, p. 5-47.

⁷⁶ Exhibit B-4, BCUC IR 1.34.1.

many sites. In response, BC Hydro is shifting to increased area brushing on a shorter maintenance return cycle as opposed to conducting selective removals. This is reflected in the fiscal 2022 vegetation management budget and will be continued through the new Vegetation Management Strategy.

54. In recent years, storms and prolonged drought in some parts of the province have increased the inventory of hazard trees on the distribution system. Additional hazard tree removals are required to address this inventory to improve customer reliability.⁷⁷

(c) Planned Spending Reflects the Maximum Amount of Activity, and It Will Make a Significant Impact

55. As discussed below, the fiscal 2022 budget for vegetation management is the “maximum amount that we feel that we can effectively manage in a single year.”⁷⁸ The spending will make a significant impact.

56. There are practical limits on the amount of vegetation management activity that BC Hydro can undertake in a year. There are a limited number of qualified tree contractors in the market. Work execution must also account for the time to complete environmental studies, archeology and heritage assessments and monitoring, as well as customer/landowner consultation.⁷⁹ The extensive vegetation maintenance performed a decade ago required several years to complete.⁸⁰

57. While the amount of work that BC Hydro can carry out is constrained, Ms. Daschuk expressed confidence that “the budget that we've asked for will allow us to de-risk the system and address the immediate needs for vegetation infringement.”⁸¹ With respect to the transmission system, Mr. Kumar explained how the LiDAR initiative and increased patrols funded in fiscal 2022 will identify the highest risk areas.⁸² BC Hydro provided additional evidence to the BCUC in confidence with respect to the budget for the transmission system.⁸³

⁷⁷ Exhibit B-4, BCUC IR 1.33.1.2 and 1.36.2.

⁷⁸ Tr. 1, p. 26, l. 23 – p. 27, l. 4 (Daschuk). See also Tr. 2, p. 308, l. 23 – p. 309, l. 8 (Daschuk); Exhibit B-4, BCUC IR 1.32.8.

⁷⁹ Tr. 2, p. 295, l. 8 – p. 296, l. 2 (Kumar). See also Tr. 2, p. 305, l. 18 – p. 306, l. 18; p. 309, l. 19 – p. 310, l. 5 (Kumar). See also Exhibit B-4, BCUC IR 1.32.8 and 1.40.8.

⁸⁰ Exhibit B-4, BCUC IR 1.32.8. Tr. 2, p. 304, l. 24 – p. 305, l. 13 (Kumar).

⁸¹ Tr. 1, p. 27, ll. 5–8 (Daschuk).

⁸² Tr. 2, p. 309, l. 19 – p. 312, l. 10 (Kumar).

⁸³ Tr. 2A (Confidential), p. 41, l. 12 – p. 44, l. 1 (Kumar).

58. Mr. Kumar also indicated that the amount of spending allocated to the distribution system (\$5.4 million) is significant in terms of addressing hazard trees and pruning.⁸⁴ There is every reason to expect that BC Hydro's agreement with TELUS regarding shared ownership of distribution poles – a topic of information requests and discussion at the Review Session – will continue to facilitate BC Hydro's vegetation management activities.⁸⁵

(d) BC Hydro Is Transitioning to New Vegetation Management Strategy

59. BC Hydro identified fiscal 2022 as a transition year before moving to a new Vegetation Management Strategy. The strategy is still in development, but it will be completed in time to present it in BC Hydro's next RRA.

60. The immediate priority of the strategy will be to address the accumulation of vegetation clearing, which BC Hydro expects to take a few years.⁸⁶

61. Once the accumulation has been addressed, there are two general approaches that can be taken. The first approach, which was BC Hydro's historical approach, is to perform intensive clearing throughout the system, followed by more targeted clearing while the vegetation re-grows. The second approach is to maintain a relatively consistent level of activity over a longer period of time. Ms. Daschuk indicated that "both approaches are valid, sustainable and can be effective."⁸⁷ However, BC Hydro anticipates moving toward the latter approach. Mr. Kumar stated:⁸⁸

Going forward, I think our approach is going to be more looking at finding that equilibrium point that allows us to actually clear at the same rate as what the vegetation is being added on from an accumulation standpoint. So that the backlog doesn't happen, both on the transmission and the distribution system.

⁸⁴ Tr. 2, p. 295, l. 8 – p. 296, l. 2 (Kumar). See also Tr. 2, p. 305, l. 18 – p. 309, l. 18; p. 209, l. 19 – p. 310, l. 5 (Kumar). See also Exhibit B-4, BCUC IR 1.40.8.

⁸⁵ Exhibit B-4, BCUC IR 42.4.1 and 42.12; Tr. 2, p. 288, l. 6 – p. 289 l. 12 (Daschuk); Tr. 2A (Confidential), p. 1, l. 20 – p. 8, l. 12 (Daschuk).

⁸⁶ Exhibit B-2, Application, p. 5-48; Exhibit B-4, BCUC IR 1.36.2 and 1.39.5.

⁸⁷ Tr. 1, p. 24, l. 22 – p. 25, l. 9 (Daschuk). See also Exhibit B-5, RCIG IR 1.16.5; Exhibit B-4, BCUC IR 1.33.1 and BCUC IR 1.33.1.1.

⁸⁸ Tr. 2, p. 334, l. 6 – p. 335, l. 13 (Kumar).

So that is a utopian approach that we want to take, and hopefully get to that state in the next three to five years as we expand our program. And as Ms. Daschuk has mentioned before, we do expect the spending to increase in the coming years, and then slow down to a point where that equilibrium point has been reached. That's not going to be the \$50 million level that we have spent before, so that is going to be somewhere higher than that, but we do need to address the backlog that currently exists before we can get to that point.

And I think the other benefit of getting to that equilibrium point is the fact that it sends the right message to the market, in terms of what is out there from a business standpoint, because a lot of these contractors would move between provinces even if they don't see the future for their business there, and they can't even procure their equipment and resources, and even train their people for that level of spending. So I think it's a beneficial model for all of us in BC Hydro as well as our suppliers to know what that long term approach would be. And that is what we are striving for in the veg management status.

62. The work BC Hydro is planning for fiscal 2022 (LiDAR, patrols and surveys) will yield information that will improve BC Hydro's ability to forecast when equilibrium could be established.⁸⁹ Ms. Daschuk stated that the strategy will also need to account for the capabilities of the contracting community:⁹⁰

I think the other part that we are learning is, it's really important for us to signal to our contractors what our long-term demand is. That gives our contractor community time to build up their capabilities, hire the people that they need to hire, so that we're not bidding against ourselves, or bidding against others for those services. And that is a key foundation of the contracting strategies that we're working on.

BC Hydro will also consider input from suppliers and other Canadian and U.S. utilities.⁹¹ BC Hydro will consider the best approach to contracting.⁹²

63. BC Hydro addressed MRS in the context of vegetation management during the confidential session.⁹³

⁸⁹ Exhibit B-4, BCUC IR 1.39.6.

⁹⁰ Tr. 1, p. 96, ll. 12–20 (Daschuk). See also Exhibit B-4, BCUC IR 1.36.2.

⁹¹ Tr. 2, p. 308, ll. 2–17 (Kumar).

⁹² Tr. 1, p. 96, l. 12 – p. 97, l. 8 (Daschuk, Kumar). See also Exhibit B-4, BCUC IR 1.39.12.

⁹³ Tr. 2A (Confidential), p. 45, l. 22 – p. 48, l. 21; p. 49, l. 19 – p. 50, l. 22 (Daschuk, Kumar).

Significant Ongoing Investment in Vegetation Management Will Be Necessary

64. BC Hydro's preliminary estimate is that removing the transmission accumulation could cost as much as \$60 million in addition to the funding required for base work.⁹⁴ Ms. Daschuk outlined BC Hydro's initial expectations regarding future spending on vegetation management:⁹⁵

We've also been asked a number of questions about whether we (sic) not we expect future expenditures to be at the same level going forward and I will say that we are still in the process of developing our vegetation management strategy that will outline those requirements. That said, we do expect that we will need to maintain a similar level of funding in the F22 RRA for at least the next few years as we address the accumulation of vegetation and the increased costs, increased regulation, the growth of our system, changes in wildfires, climate change and also the need for higher consultation will all impact our program costs. While it may be possible for us to reduce below the current fiscal '22 levels at some point in the future, given the various cost pressures that I've mentioned, it's unlikely that we'll ever go back to the \$50 million per year.

A long-term level of funding which is sufficient to prevent that accumulation of vegetation will be informed by activities such as the LiDAR system wide study that we're undertaking. We'll review the program priorities and cost pressures in future years and you will see that in the next revenue requirements application.

(e) BC Hydro Is Developing New Vegetation-Focussed Performance Metrics

65. BC Hydro will be developing a suite of metrics and associated targets for the Vegetation Management Strategy to enhance accountability and operational decision making.

66. BC Hydro's current metrics to measure the effectiveness and progress of annual work plans are described in its response to BCUC IR 1.35.4.⁹⁶ BC Hydro will be reviewing these metrics to determine whether they should form part of the new suite of metrics going forward.

67. BC Hydro will also develop additional metrics around new capabilities (e.g., LiDAR coverage and system modelling). BC Hydro identified the following areas of interest for potential

⁹⁴ Exhibit B-4, BCUC IR 1.36.2.

⁹⁵ Tr. 1, p. 27, l. 9 – p. 28, l. 6 (Daschuk). See also Exhibit B-4, BCUC IR 1.32.9.

⁹⁶ Exhibit B-4.

benchmarking and metrics. Many of these areas of interest are already available through existing benchmarking and industry comparisons (e.g., First Quartile benchmarking studies).⁹⁷

- Cost of work delivered relative to industry peers (e.g., cost per customer for distribution vegetation investment, cost per circuit kilometre for transmission investment, total vegetation work output versus dollar spent, etc.);
- Reliability performance, specifically with respect to impacts originating from vegetation;
- Safety performance (e.g., wildfire ignition, distribution fires, etc.);
- Compliance with all required standards and regulations; and
- Risk profiles, through the development of a risk model that can objectively evaluate the state of the current system with respect to vegetation clearances and growth.

68. BC Hydro will make the results of the metrics available in subsequent years to communicate the progress and performance of the new Vegetation Management Strategy.⁹⁸

69. Augmenting the existing metrics will also bring operational benefits. New metrics will increase management visibility into the progression of work plans and whether desired outcomes are being achieved. For example, introducing a metric on vegetation accumulation would provide ongoing visibility to the overall state of vegetation on the system and provide an indication of system risk from vegetation.⁹⁹ This increased visibility is important. Prior to fiscal 2020, all system performance and reliability metrics were within targeted ranges; it is only recently that the metrics used to evaluate the vegetation management program have indicated a need for incremental vegetation management investment.¹⁰⁰ BC Hydro recognizes that this

⁹⁷ Exhibit B-5, RCIG IR 1.31.1. See also Exhibit B-4, BCUC IR 1.35.4.1 and 1.39.8.

⁹⁸ Exhibit B-2, Application, p. 5-49.

⁹⁹ Exhibit B-4, BCUC IR 1.35.4.1.

¹⁰⁰ Exhibit B-4, BCUC IR 1.32.2. BC Hydro's current metrics are discussed in Exhibit B-4, BCUC IR 1.32.7.

experience with lagging indicators in the context of vegetation management points to the need to augment BC Hydro's performance metrics in this area.

E. CYBERSECURITY FUNDING INCREASE: LARGER FOOTPRINT AND MORE THREATS

70. BC Hydro plans a \$3 million increase in cybersecurity funding, which includes the cost of four FTEs. This additional funding, along with some reallocated internal resources, will result in a total base operating budget for cybersecurity of \$8.0 million.¹⁰¹ BC Hydro's additional investment in cybersecurity, which is consistent with Decision Directive 21, can be characterized as a resilience investment. The increase will augment BC Hydro's existing capabilities to address the growing sophistication of cybersecurity threats.

(a) Information on Cybersecurity Is Generally Confidential

71. Information about cybersecurity is security sensitive, which limits the extent to which BC Hydro can discuss it publicly. The material below is taken from the public record. Mr. Morison, who is responsible for cybersecurity across the company, provided further information in the *in camera* proceedings about BC Hydro's capabilities and budget amounts, as well as areas of focus.¹⁰² BC Hydro has augmented these cybersecurity submissions with a brief Confidential Addendum.

(b) BC Hydro Has Strong Cybersecurity Governance and Follows Best Practices

72. BC Hydro has had considerable success to date when it comes to cybersecurity. Mr. Morison noted: "We've had no major incidents that have impacted our company. Our team is showing good capability to respond and manage threats using our cyber security incident response plan that's been developed over many years."¹⁰³

¹⁰¹ Exhibit B-2, Application, p. 1-9.

¹⁰² Tr. 2A (Confidential), p. 15, ll. 12 – 24; p. 32, ll. 1 – p. 33, l. 1; p. 35, l. 12 – p. 36, l. 25; p. 38, ll. 4 – 21 (Morison, O'Riley).

¹⁰³ Tr. 1, p. 34, l. 22 – p. 35, l. 3 (Morison). Mr. Morison also addressed, during the *in camera* proceeding, BC Hydro's response to the recent incident involving Powertech and its implications for BC Hydro: See Tr. 2A (Confidential), starting at p. 15, l. 25 (Morison, Wong).

73. BC Hydro’s cybersecurity program is based on the industry standard framework of the National Institute of Standards and Technology, which Mr. Morison characterized as aligning with best practices. BC Hydro also uses the C2M2 maturity model.¹⁰⁴ Its supply chain risk assessment procedures align with the standards of the Canadian Centre for Cyber Security, and will be strengthened upon adoption of CIP 013-1 and the application of CIP 013-1 principles beyond MRS assets.¹⁰⁵ BC Hydro also engages with numerous cybersecurity agencies including the Canadian Centre for Cyber Security, Electricity Information Sharing and Analysis Center, and groups within the Canadian Electricity Association. The engagement includes obtaining guidance on BC Hydro’s capabilities and information on threats and incidents.¹⁰⁶

74. BC Hydro has a well-established governance framework and regular internal reporting.¹⁰⁷ The following table summarizes roles and responsibilities within the governance framework:

Role	Accountability/Responsibility
Executive Vice President Finance, Technology, Supply Chain	Accountable for the Technology KBU in which the Cybersecurity team resides
Chief Information Officer	Accountable for enterprise cybersecurity and reports to the Executive Team and Board of Directors
Director, Planning & Performance	Responsible for enterprise cybersecurity including: <ul style="list-style-type: none">• Strategy and Plans• Risk Management• Policies, programs, and projects• Operations• IT CIP Compliance
Senior Manager, Cybersecurity	Responsible for cybersecurity planning and operations

75. BC Hydro’s approach to cybersecurity incorporates both in-house and external expertise. BC Hydro retains a core internal cybersecurity capability for management decisions and critical functions, and has a good track record of attracting and retaining talent. BC Hydro outsources

¹⁰⁴ Tr. 2, p. 315 ll. 7–22 (Morison).

¹⁰⁵ Exhibit B-4, BCUC IR 1.30.1. Tr. 2, p. 312, l. 16 – p. 314, l. 16; p. 315, l. 23 – p. 316, l. 7 (Morison, Wong).

¹⁰⁶ Tr. 1, p. 35, ll. 4–18 (Morison).

¹⁰⁷ Exhibit B-4, BCUC IR 1.24.3, 1.24.4.1, 1.24.4.2, 1.25.1. BC Hydro also addressed governance and oversight in the confidential portion of the Review Session: Tr. 2A (Confidential), p. 28, ll. 12–22 (O’Riley).

highly-skilled technical work, commodity technical work or any technical work required to fill transient capacity gaps.¹⁰⁸ Mr. Morison expanded:¹⁰⁹

Yeah, I think we've tried to address that issue by taking sort of a three layer approach to our cyber security delivery model. So we -- you know, as I referred to in the application, we insourced cyber security from TELUS back in the 2015, '16 timeframe. We didn't feel at the time that we were really getting the attention and kind of learnings from those folks that we needed to, so we wanted to bring that in-house as a retained service, we felt that was critical.

The model we follow is that our internal staff is really intended to be very strong IT people with very good cyber security skills, but very, very knowledgeable in our domain, knowledgeable about BC Hydro's requirements and being able to understand what services we may need.

Commodity based services like looking after firewalls, we outsource that, in fact, we give that to TELUS. And the specialized services that we would have a very difficult time recruiting, either from a cost perspective or from an interest perspective, we outsource those. So special service around things like penetration testing, things around incident response, things around helping us through incidents through coaching, those are all services that we outsource.

76. Despite BC Hydro's success to date, Mr. Morison cautioned against complacency:¹¹⁰

So why is it important that BC Hydro invest more in cyber security? Well, first there's more to protect. The footprint and complexity of our environment that we need to protect is expanding. To respond to business needs we're continually adding new applications, infrastructure and mobile devices. These all need to be protected. Second, cyber threats are growing in volume and sophistication. Every day we're learning about nation state attacks and ransomware incidents. These are impacting Canadian businesses and some very close to home here in B.C.

Phishing is a growing concern as attackers use more sophisticated approaches to deploy malware and today this is probably one of the most common methods of cyber attack. This supply chain risk has also now emerged as a top concern with vulnerabilities or malware being deployed in software product updates.

These growing threats will increase the risk to BC Hydro. So we need to respond to the growing and evolving cyber security risks, from self-assessments, audits and actual incidents we've identified specific areas in which we need to further build

¹⁰⁸ Exhibit B-4, BCUC IR 1.25.2.

¹⁰⁹ Tr. 2, p. 332, l. 2 – p. 333, l. 8 (Morison).

¹¹⁰ Tr. 1, p. 35, l. 19 – p. 36, l. 18 (Morison).

our capabilities. Some of these areas include vulnerability management, enterprise-wide 24 by 7 monitoring, supply chain risk management, and incident recovery.

77. The planned funding for cybersecurity in fiscal 2022, discussed next, will improve BC Hydro's ability to withstand and respond to cyber threats and attacks.

(c) Fiscal 2022 Budget Allows for Increased Staffing and Outsourcing of Specialized Services

78. The planned budget increase for fiscal 2022 includes both labour and non-labour costs, consistent with the operating model of employing in-house and external expertise. Mr. Morison explained that the work undertaken by the four new planned FTEs will include assessing "the workforce and resources required to bolster the areas that we know we need to develop, and those include what I mentioned in my opening remarks during the presentation around vulnerability management, around 24/7 monitoring, and around risk assessment and penetration testing."¹¹¹ Mr. Morison indicated that \$2.3 million is associated with "outsourcing services that are specialized that we could never hope to recruit." Mr. Morison also elaborated on sources of input in BC Hydro's program and budget during the confidential portion of the Review Session.¹¹²

(d) The Additional Funding and FTEs Will Address Audit and Assessment Recommendations

79. BC Hydro has obtained significant external input on its cybersecurity activities. It has been implementing recommendations from an internal audit, self-assessments, an Office of the Auditor General ("OAG") audit of BC Hydro's Operating Technology ("OT") environment, and an external assessment of BC Hydro's Industrial Control Systems ("ICS").¹¹³ Many of these recommendations are already addressed. The fiscal 2022 plan includes funding to address outstanding recommendations.

- BC Hydro Internal Audit conducted an audit of the company's cybersecurity function in 2019. BC Hydro has implemented the majority of the recommended management actions (14 out of 21 actions complete as of December 2020).

¹¹¹ Tr. 1, p. 91, ll. 2–17 (Morison).

¹¹² Tr. 2A (Confidential), p. 33, l. 22 – p. 34, l. 11 (Morison).

¹¹³ Exhibit B-4, BCUC IR 1.28.2.2.

Activities in the fourth quarter of fiscal 2021 and in fiscal 2022 will, with one exception, complete the 2019 audit management plan actions.¹¹⁴

- BC Hydro's OAG audit Action Plan (submitted to the Public Accounts Committee last September) set out how BC Hydro would be addressing the OAG recommendations for the OT environment. BC Hydro has implemented recommendations from the OAG audit report, including the primary recommendation to engage a third party to provide a technical review of the ICS environments.¹¹⁵
- The ICS review identified some immediate areas of vulnerability, which have been addressed.¹¹⁶

80. BC Hydro provided further information on its progress and plans in response to these reviews in confidential materials and during the *in camera* portion of the Review Session. BC Hydro has addressed the topic in the Confidential Addendum to these Final Submissions.

F. ADDITIONAL EMPLOYEE TRAINING IS NECESSARY

81. BC Hydro's fiscal 2022 plan includes a \$3.3 million increase for employee training. During the Previous Application proceeding, BC Hydro had identified employee training as an area that is critical to BC Hydro's ability to continue to operate effectively. It had foreshadowed increased investment. The planned funding for fiscal 2022 is aligned with the BCUC's commentary in its Decision.

82. Historically, the Operations Business Group has budgeted an average of 10 training days per IBEW employee to complete annual safety and regulatory training, as well as technical and

¹¹⁴ Exhibit B-4, BCUC IR 1.28.2 and 1.28.2.3. Exhibit B-4-1, the confidential Attachment 1 to BCUC IR 1.28.2 is the "Quarterly Monitoring of Audit Recommendations, Cybersecurity Audit Recommendations, Cybersecurity Audit (Report Date June 5, 2019) for Q2 F2021".

¹¹⁵ Exhibit B-4, BCUC IR 1.27.2, 1.28.1 and 1.28.2. Confidential Attachment 2 to Exhibit B-4-1, BCUC IR 1.28.2 "Action Plan and Progress Assessment for implementation of recommendations from the OAG, Detection and Response to Threats on BC Hydro's Industrial Control Systems", September 2020.

¹¹⁶ Exhibit B-4, BCUC IR 1.28.1 and 1.28.2.

leadership training. There has been steady growth in safety and regulatory expectations (e.g., MRS, asbestos, confined space and environmental), and the associated training has consumed the budgeted 10 days of training. Technical and leadership training is often delayed due to budget constraints and the need to maintain field resources utilization. Technical and leadership training is vital to support safe, reliable and efficient operations by crews. Equipment at stations is becoming increasingly complex with a variety of new and legacy equipment to maintain and operate.¹¹⁷

G. THE REMAINING INCREASE IS ALMOST ALL DUE TO UNCONTROLLABLE FACTORS

83. Almost all (\$49.7 million) of the remaining planned operating cost increase is associated with uncontrollable factors:

- (a) Approximately two-thirds of that amount (\$33.6 million) is associated with current service costs. Current service costs relate to BC Hydro's pension plan, and are a function of the discount rate. The discount rate is provided by BC Hydro's external actuary, consistent with the practice directed by the BCUC and reviewed in the Previous Application. Changes in the discount rate are market driven and outside of BC Hydro's control;¹¹⁸
- (b) A general wage increase under the collective agreements that were also in place for the Previous Application (\$5.2 million). The increase is consistent with the bargaining mandate set by the Public Sector Employers Council;¹¹⁹
- (c) Insurance costs associated with rising premiums (\$6.2 million);¹²⁰ and
- (d) Cost recovery levies from the BCUC and Canadian Energy Regulator (\$3.7 million), in line with the actual levies assessed to BC Hydro in fiscal 2021.¹²¹

¹¹⁷ Exhibit B-2, Application, pp. 5-85 and 5-86.

¹¹⁸ Exhibit B-2, Application, pp. 5-18 and 5-103; Tr. 1, p. 22, ll. 1-9 (Wong); p. 79, l. 26 – p. 80, l. 6 (Wong); p. 82, ll. 14-21 (Layton).

¹¹⁹ Exhibit B-2, Application, p. 5-18.

¹²⁰ Exhibit B-2, Application, p. 5-18.

¹²¹ Exhibit B-2, Application, p. 5-19.

H. SUMMARY REGARDING OPERATING COSTS

84. Unlike an investment in a system expansion, for instance, reliability and resiliency drive *lower* productivity in economic terms because the inputs (dollars spent on reliability and resiliency) are not producing tangible new outputs (new production, delivery capability, revenues, etc.). However, there can be no doubt as to the importance of such investments to BC Hydro and its customers. The BCUC should find that BC Hydro has made a compelling case for increasing operating costs, and the planned amounts are (subject to a confidential caveat¹²²) sufficient.

¹²² Exhibit B-6, BCUC (Confidential) IR 1.6.6.

PART SIX: CAPITAL EXPENDITURES AND ADDITIONS

A. INTRODUCTION

85. This Part addresses why BC Hydro's capital forecast for the Test Period provides an appropriate basis for setting rates. BC Hydro makes the following points:

- BC Hydro's capital forecast is the outcome of BC Hydro's robust capital planning and delivery processes,¹²³ which are unchanged from the processes that the BCUC found to be reasonable in its Decision.
- BC Hydro's planned capital investments for the Test Period promote safety, reliability and resilience, while having regard to affordability for customers.
- A direction to file additional CPCN applications for projects added to Appendix J would be unwarranted.

B. FISCAL 2022 CAPITAL EXPENDITURES AND ADDITIONS

86. BC Hydro's planned capital expenditures and additions are derived from BC Hydro's fiscal 2021 to fiscal 2030 Capital Plan (the "Capital Plan"), which is the most recent capital plan available.¹²⁴ BC Hydro's planned capital expenditures and additions for fiscal 2022, as presented in sections 6.3 to 6.5 of the Application, are lower than the amounts planned for fiscal 2021.¹²⁵ They are supported by detailed information in Appendices E to T of the Application, including a summary of the Capital Plan, the Technology Strategy Five-Year Plan, asset health indices, and capital investment information on projects over \$5 million (or \$2 million for Technology projects) with expenditures or additions in the Test Period.¹²⁶ BC Hydro supplemented this evidence with thorough responses to information requests and testimony at the Review Session.

¹²³ Exhibit B-2-2, Appendix S is a verbatim copy of the section of the Previous Application describing BC Hydro's capital planning and delivery processes.

¹²⁴ Exhibit B-2, Application, p. 6-11; Exhibit B-4, BCUC IR 1.45.1; Tr. 1, p. 282, ll. 18–26 (Daschuk).

¹²⁵ Exhibit B-2, Application, p. 6-1.

¹²⁶ Exhibit B-2, Application, pp. 6-2 to 6-4.

C. BC HYDRO'S CAPITAL PLANNING AND DELIVERY PROCESSES REMAIN REASONABLE

87. BC Hydro has well-established and effective processes for the planning and delivery of its capital investments, which are unchanged from those presented in the Previous Application.¹²⁷

The BCUC endorsed these processes in the Decision:¹²⁸

The Panel finds that BC Hydro's capital planning process is reasonable.

...

...the Panel considers it appropriate to review the process by which capital expenditures were selected in making that determination. The BCUC may review any capital expenditure for prudence of execution once the associated asset is in service. However, it is impractical to review every capital project for a utility the size of BC Hydro. Instead, if the Panel is satisfied that capital spending is the result of a sound selection process, prudence reviews can focus on exceptional items.

...

The Panel is satisfied that BC Hydro's capital planning process has balanced the issues of desire for cost containment with the risks to system performance and asset deterioration, and finds that BC Hydro's proposed level of sustainment capital spending in the Test Period is reasonable.

...

The Panel finds that BC Hydro's forecast planned capital expenditures for the Test Period are reasonable. The Panel is satisfied that the forecast is based on a reasonable process, and that BC Hydro has maintained an appropriate balance between cost containment and system performance and reliability.

...

BC Hydro submits that its planned level of spending on sustainment capital represents "an appropriate balance of system performance, risk and affordability". The Panel explains in section 5.13 that the BCUC has no mandate to consider the affordability of utility's rates. When considering BC Hydro's submission in its entirety, we interpret BC Hydro's submission to refer to balancing

¹²⁷ Exhibit B-2-2, Appendix S is a verbatim copy of the section of the Previous Application describing BC Hydro's capital planning and delivery processes.

¹²⁸ Decision, pp. 78-79, 86 and 96.

risks to system performance and asset deterioration while containing costs as far as it deems prudent. Looked at in this light, we agree with BC Hydro's submission.

88. BC Hydro's Capital Plan, which forms the basis of BC Hydro's forecast capital additions and expenditures for the Test Period, was the product of the same reasonable capital planning processes.¹²⁹

89. The currency date of the Capital Plan is April 2019 for Power System, Properties, and Fleet capital plan forecasts and July 2019 for Technology. The Capital Plan is the latest version approved by BC Hydro's Board of Directors;¹³⁰ BC Hydro's Board has no more recent information.¹³¹ While BC Hydro would normally have a more recent Capital Plan to support its revenue requirements applications, the timing of the Application for this "gap year" made that impractical. BC Hydro's next RRA, to be filed later this year, will be supported by a new capital plan.¹³²

90. Since the F2017 to F2019 RRA, BC Hydro has used a portfolio risk adjustment. The risk adjustment addresses the fact that, historically, planned capital expenditures and additions had typically been higher than actual expenditures and additions in the near-term years of a capital plan. BC Hydro explained:¹³³

The Portfolio Risk Adjustment is used to account for project-level uncertainties to provide a more realistic portfolio level forecast (for both capital expenditures and additions) for the test period. The Portfolio Risk Adjustment amounts were established by considering the different phases of the projects, the type and cost of the projects, and the level of both cost and schedule variability that has been seen in the past with similar projects in similar phases. The overall impact was then aggregated into a portfolio view via Monte Carlo simulation.

¹²⁹ Exhibit B-2-2, Appendix S is a verbatim copy of the section of the Previous Application describing BC Hydro's capital planning and delivery processes.

¹³⁰ Exhibit B-2, Application, pp. 6-10 and 6-11.

¹³¹ Exhibit B-2, Application, p. 6-11; Exhibit B-4, BCUC IR 1.45.1; Tr. 1, p. 282, ll. 18-26 (Daschuk).

¹³² Exhibit B-4, BCUC IR 1.45.1.

¹³³ Exhibit B-4, BCUC IR 1.49.1.

The portfolio risk adjustment produces a more accurate forecast. For example, without the portfolio risk adjustment, the variance between fiscal 2020 Actuals compared to fiscal 2020 RRA for the Generation and Transmission portfolio would be higher.¹³⁴ Other utilities have used a similar practice.¹³⁵

91. The Capital Plan provides a reasonable estimation for the amortization and finance charges related to BC Hydro's capital investments that are included in the Application. The Amortization of Capital Additions Regulatory Account will continue to capture any differences between forecast and actual amortization of capital additions for future refund to, or recovery from, ratepayers.¹³⁶

D. BC HYDRO'S CAPITAL INVESTMENTS CONTINUE TO BALANCE AFFORDABILITY WITH SYSTEM PERFORMANCE AND RISK

92. The following points illustrate how BC Hydro's planned capital investments for the Test Period continue to promote safety, reliability and resilience, while still having regard to affordability for customers.¹³⁷

(a) BC Hydro Continues to Moderate Investments to Reflect Lower Load Growth

93. Planned expenditures and additions for fiscal 2022 are lower than the amounts planned for fiscal 2021, primarily due to the completion of major projects in fiscal 2021.¹³⁸ Updated load forecasts support the decision in the Previous Plan to moderate investments to expand and reinforce the Power System. However, new growth investments continue to be required for both distribution and transmission infrastructure to meet regional customer demand growth, to connect new supply of electricity, to support CleanBC electrification initiatives, and to mitigate other risks such as reliability performance.¹³⁹

¹³⁴ Exhibit B-4, BCUC IR 1.49.2.

¹³⁵ Exhibit B-4, BCUC IR 1.49.6.

¹³⁶ Exhibit B-4, BCUC IR 1.45.1.

¹³⁷ Exhibit B-2, Application, pp. 6-15 to 6-18.

¹³⁸ Exhibit B-2, Application, p. 6-1.

¹³⁹ Exhibit B-2, Application, p. 6-16.

(b) BC Hydro Is Monitoring System Performance

94. Maintaining reliability remains a priority, and BC Hydro continues to monitor system performance. The system is performing well.

95. BC Hydro's unadjusted system average duration ("all-events" SAIDI) and unadjusted system average frequency ("all-events" SAIFI) trends are as strong as, or better than, the Canadian Electricity Association (CEA) composite. Normalized SAIDI and SAIFI metrics also compare well. The reliability scores in BC Hydro's Customer Satisfaction Index indicate that customers continue to be satisfied with the level of reliability.¹⁴⁰

96. BC Hydro includes targets for SAIDI and SAIFI in its Service Plan because these metrics are indicators of overall system performance. BC Hydro also has targets for CAIDI and CEMI-4 to identify system operations performance. BC Hydro monitors other metrics, but does not set targets because the results can be misleading.¹⁴¹ Average Availability Factor is a good example of a metric that can be impacted by other system factors. BC Hydro's Average Availability Factor has been trending downward, but this is not a concern; the results are due to an increase in planned outages for maintenance that are scheduled when unit unavailability presents an acceptable risk to the system.¹⁴² A more meaningful metric is the average forced outage factor for Key facilities, which provide 90 percent of the average annual electricity generated by BC Hydro's facilities. This metric provides a long-term indicator of the effectiveness of BC Hydro's maintenance and capital investment program.¹⁴³

97. BC Hydro also manages the health of its assets during potential delays in its projects. For example, where there was a delay in the schedule to projects in the Transmission Growth and the Transmission Sustain – Stations portfolios in fiscal 2021, BC Hydro performed interim measures (e.g., maintenance) to mitigate the associated risks.¹⁴⁴ Similarly, BC Hydro explained the reasons for the fiscal 2020 variance below plan in the Hydroelectric Generation – Sustaining

¹⁴⁰ Exhibit B-2, Application, p. 6-16.

¹⁴¹ Exhibit B-4, BCUC IR 1.52.1

¹⁴² Exhibit B-4, BCUC IR 1.52.2.

¹⁴³ Exhibit B-4, BCUC IR 1.52.1.

¹⁴⁴ Exhibit B-4, BCUC IR 1.47.1 and 1.47.2.

Other portfolio; there were no material impacts to asset health as a result of the three projects in the portfolio with delays.¹⁴⁵

(c) “Safety Above All” Is Reflected in Capital Plan

98. BC Hydro’s first goal in its Safety Plan continues to be “Safety Above All”. BC Hydro has a strong governance structure over safety, where safety is championed by the Operations and Planning Committee, the committee Chair, and the whole Board of Directors. BC Hydro has integrated safety into the decision-making and operational aspects of its day-to-day activities. It has taken specific action to reduce injuries. The downward trend in Lost Time Injury Frequency (“LTIF”) targets illustrates BC Hydro’s steady improvement in controlling safety risks and mitigating hazards.¹⁴⁶

99. BC Hydro’s focus on safety is reflected in how the company manages its Dam Safety portfolio, which was a topic of a number of information requests. BC Hydro’s detailed responses demonstrate that BC Hydro has a robust governance structure to manage risks for its dam fleet, and a thorough process for evaluating and prioritizing dam safety risks. Through these structures and processes, BC Hydro manages its dams so that there is no significant deterioration in the risk position and the overall level of risk is kept within tolerable limits. BC Hydro also follows the Canadian Dam Association (CDA) Public Safety Around Dams Guidelines, and stays current on CDA requirements.¹⁴⁷

100. BC Hydro’s Dam Safety Program manages risks so that project schedule delays¹⁴⁸ do not have a significant impact on the risk position of BC Hydro’s dam fleet. BC Hydro pays close attention to risk levels in the interim period before a dam project can be completed. BC Hydro’s established practices have ensured that schedule delays within dam safety projects “do not typically have a significant impact on the risk position of BC Hydro’s dam fleet.”¹⁴⁹

¹⁴⁵ Exhibit B-4, BCUC IR 1.46.2.

¹⁴⁶ Exhibit B-4, BCUC IR 1.54.9, 1.54.12 and 1.54.13; Exhibit B-2-2, Appendix Q, Service Plan, p. 8 of 29.

¹⁴⁷ Exhibit B-4, BCUC IR 1.53.2, 1.53.3 and 1.54.3.

¹⁴⁸ Exhibit B-4, BCUC IR 1.53.4.

¹⁴⁹ Exhibit B-4, BCUC IR 1.53.4.

(d) BC Hydro Is Making Important Investments for Growth, Reliability and Resilience

101. BC Hydro continues to invest in system growth, asset sustainment and risk mitigation.¹⁵⁰ BC Hydro is also increasing its Technology, Properties, Fleet and Tools/Other investments to address changes in business requirements, the increasing prevalence of technology, and ongoing changes in work spaces to support employee needs.¹⁵¹

102. The capital budget for fiscal 2022 contemplates increased investments in MRS and other regulatory compliance initiatives. This includes funding for the implementation of CIP Version 7, security improvements at various substations, upgrades and enhancements to IT systems to support MRS compliance, and addressing regulatory compliance requirements such as the Federal Polychlorinated Biphenyl (PCB) Regulation.¹⁵²

(e) BC Hydro Is Meeting its Capital Delivery Performance Targets

103. BC Hydro is meeting its capital delivery performance targets. In fiscal 2020, BC Hydro completed a total of 40 projects with aggregate Original Approved Expected Costs of \$364.3 million and aggregate Actual Costs of \$340.9 million, which was a favourable variance of -\$23.4 million (-6.4 percent).¹⁵³

104. In fiscal 2021, BC Hydro completed implementation of the Supply Chain Applications (“SCA”) Project with no material change in cost or scope.¹⁵⁴ The capital additions for the SCA Project are planned to be \$68.2 million, \$0.2 million above the amount accepted in Order G-78-19, with the variance primarily due to delays caused by the COVID-19 pandemic.¹⁵⁵ SCA project benefits will be reflected in future RRAs.¹⁵⁶

¹⁵⁰ Exhibit B-2, Application, p. 6-19, and Section 5.4 of the Application, generally.

¹⁵¹ Exhibit B-2, Application, pp. 6-69 and 6-70, and Section 6.5 of the Application, generally.

¹⁵² Exhibit B-2, Application, pp. 6-16 and 6-17. MRS related capital investments are also discussed in paragraph 32 of these Final Submissions.

¹⁵³ Exhibit B-2, Application, p. 6-18.

¹⁵⁴ Exhibit B-2, Application, p. 6-71; Exhibit B-4, BCUC IR 1.50.5.

¹⁵⁵ Exhibit B-4, BCUC IR 1.50.4.

¹⁵⁶ Exhibit B-4, BCUC IR 1.50.6.

E. A DIRECTION TO FILE ADDITIONAL CPCN APPLICATIONS WOULD BE UNWARRANTED

105. The BCUC had reviewed most of the material projects in the Capital Plan in the previous RRA proceeding. In this Application, BC Hydro provided project summaries for the 16 projects with a forecast cost of close to or over \$20 million that had not been included in Appendix J of the Previous Application.¹⁵⁷ BC Hydro has identified projects that will, or could potentially, require a CPCN or section 44.2 application because their authorized cost is expected to exceed, or could potentially exceed, the major project thresholds in BC Hydro's Capital Filing Guidelines.¹⁵⁸

106. BC Hydro recognizes that the BCUC has discretion to direct BC Hydro to file CPCNs for extension projects less than that threshold. However, the BCUC should not direct BC Hydro to file a CPCN for any of the 16 projects added to Appendix J this year because these projects fall into one of two categories:

- (a) They are Power System projects that are already in implementation and have a cost well below the \$100 million CPCN threshold (\$35.3, \$18.9 and \$40 million).¹⁵⁹
- (b) They are future projects or are in the identification phase with no cost estimate or start date for construction. It would be premature to direct BC Hydro to file a CPCN for these projects. There is insufficient information, and the projects will be subject to change as they become further defined.¹⁶⁰ The BCUC will have an opportunity to consider these projects further in future iterations of Appendix J.

¹⁵⁷ Exhibit B-4, BCUC IR 1.43.1, Attachments.

¹⁵⁸ Exhibit B-2-2, Appendix I; Exhibit B-4, BCUC IR 1.45.2.

¹⁵⁹ Exhibit B-4, BCUC IR 1.43.1, Attachments 3, 9 and 10.

¹⁶⁰ Exhibit B-4, BCUC IR 1.43.1.

PART SEVEN: REGULATORY ACCOUNTS

A. INTRODUCTION

107. This Part addresses BC Hydro's proposed changes to its regulatory accounts (other than the Electric Vehicle Costs Regulatory Account, which is addressed in Part Eleven). The evidence, summarized below, demonstrates that the approvals sought are just and reasonable.

B. BC HYDRO HAS PROPOSED ONLY LIMITED CHANGES TO ITS REGULATORY ACCOUNTS

108. BC Hydro has proposed only limited changes to its regulatory accounts:

- (a) ***Cost of Energy Variance Accounts:*** BC Hydro is proposing to recover the balances in the Cost of Energy Variance Accounts through the DARR using the DARR table mechanism as described in Chapter 7, section 7.2.1.2. BC Hydro addresses this request further below.
- (b) ***Amortization of Capital Additions Regulatory Account:*** BC Hydro proposes to defer to the Amortization of Capital Additions Regulatory Account any variances (either positive or negative) arising in fiscal 2022 as a result of any changes determined in the depreciation study, with interest charges and recovery of these amounts being on the same basis as previously approved for this account.¹⁶¹ The variances resulting from the study could be significant, and are not within BC Hydro's control.¹⁶² The BCUC has previously granted deferral treatment for similar variances arising from a depreciation study.¹⁶³ The proposal ensures that customers ultimately only pay BC Hydro's actual depreciation expense during the Test Period. BC Hydro's depreciation study will be reviewed in the next RRA.¹⁶⁴
- (c) ***Dismantling Cost Regulatory Account:*** In its Decision on the Previous Application, the BCUC directed BC Hydro to consider options to its current treatment of

¹⁶¹ Exhibit B-2, Application, p. 7-6 and 7-7.

¹⁶² Exhibit B-4, BCUC IR 1.56.4.

¹⁶³ Exhibit B-4, BCUC IR 1.56.5.

¹⁶⁴ Exhibit B-2, Application, pp. 7-6 and 7-7; Exhibit B-4, BCUC IR 1.156 series.

dismantling costs. While BC Hydro identified a net salvage approach as an option, it would entail rate impacts and the outcome of BC Hydro's depreciation study is needed to analyze this potential alternative treatment. BC Hydro's depreciation study and the potential for an alternative treatment of dismantling costs will be considered in the next RRA. Unless or until a superior alternative treatment is identified, it is just and reasonable to continue to (i) defer any variances between forecast and actual dismantling costs in fiscal 2022 to the Dismantling Cost Regulatory Account, (ii) apply interest to the balance of the account each year based on BC Hydro's current weighted average cost of debt ("WACD"), (iii) recover the forecast interest charged to the account each year from the account each year, and (iv) recover the forecast account balance at the end of a test period over the next test period.¹⁶⁵

- (d) ***Project Write-off Costs Regulatory Account:*** Consistent with the BCUC's direction in its Decision, BC Hydro is proposing to recover amounts deferred to the Project Write-off Costs Regulatory Account in respect of completed fiscal years over the next test period, starting in fiscal 2022 and on an ongoing basis, subject to BCUC review and approval of the recovery of these amounts. BC Hydro is proposing to apply interest to the balance of the account based on BC Hydro's current WACD, and recover actual interest charged to the account for amounts related to any completed fiscal years over the next test period. BC Hydro submits that this is a just and reasonable way to address project write-offs. The amounts recorded in the account and reviewed in this proceeding reflect prudent expenditures and should be amortized over the Test Period.¹⁶⁶
- (e) ***Electric Vehicle Costs Regulatory Account:*** BC Hydro proposes an Electric Vehicle Costs Regulatory Account to defer any actual operating costs, amortization, and cost of energy amounts related to EV charging stations that meet the definition of

¹⁶⁵ Exhibit B-2, Application, pp. 7-8 to 7-10; Exhibit B-4, BCUC IR 1.57.1.

¹⁶⁶ Exhibit B-2, Application, pp. 7-10 to 7-12; Exhibit B-2-2, Appendix L; Exhibit B-4, BCUC IR 1.58.1.

a prescribed undertaking under the *Greenhouse Gas Reduction Regulation* (“GGRR”) for fiscal 2020 and fiscal 2021. BC Hydro is proposing to (i) apply interest to the balance of the account based on BC Hydro’s current WACD, and (ii) recover the forecast interest charged to the account each year from the account each year, and, (iii) starting in fiscal 2022, recover the forecast balance at the end of a test period over the next test period, until such time that the actual amounts deferred to the account for fiscal 2020 and fiscal 2021 are recovered in rates.¹⁶⁷ BC Hydro discusses this account in Part 11 of these Final Submissions.

- (f) **Rock Bay Remediation Regulatory Account:** BC Hydro is proposing to close the Rock Bay Remediation Regulatory Account at the end of fiscal 2022.¹⁶⁸

C. DARR TABLE MECHANISM IS JUST AND REASONABLE

109. The DARR table mechanism, as previously approved by the BCUC as part of BC Hydro’s Fiscal 2009 to Fiscal 2010 Revenue Requirements Application,¹⁶⁹ remains a reasonable mechanism for clearing the net balances in the Cost of Energy variance accounts.

110. The table mechanism, shown in Table 7-1 of the Application, will set the percentage of the DARR based on the forecast net balance in the Cost of Energy variance accounts at the end of the preceding fiscal year. As the forecast balance increases (or decreases) by increments of \$50 million, the DARR would increase (or decrease) by 0.5 percent. The incremental increases clear the balances in the Cost of Energy variance accounts over a reasonable period of time, while maintaining rate stability.¹⁷⁰ The DARR is capped at +/- 5 percent to avoid the potential for rate shock.¹⁷¹

¹⁶⁷ Exhibit B-2, Application, p. 7-12 to 7-14.

¹⁶⁸ Exhibit B-2, Application, p. 7-14.

¹⁶⁹ BCUC Decision and Order No. G-16-09, Fiscal 2009 to Fiscal 2010 Revenue Requirements Application Decision, March 13, 2009, page 172. One clarification is that BC Hydro proposes to determine the level of the DARR based on the forecast net balance of the Cost of Energy Variance Accounts at the end of the preceding fiscal year. (Exhibit B-2, Application, p. 7-3.)

¹⁷⁰ Exhibit B-5, AMPC IR 1.5.1.

¹⁷¹ Exhibit B-4, BCUC IR 1.55.2.

111. BC Hydro's modelling indicates that the DARR table mechanism clears balances of \$250 million, \$500 million and \$750 million within 4 to 6 years.¹⁷² BC Hydro's analysis also shows that the DARR table mechanism is similar to a five-year amortization period.¹⁷³

112. The DARR table mechanism was the subject of review in past BCUC proceedings, and BC Hydro's prior analysis continues to support the table mechanism.¹⁷⁴ The BCUC has previously concluded that the DARR table mechanism provides a principled and structured approach to clearing the net balances in a way that:¹⁷⁵

- Minimizes intergenerational inequity by being responsive to the changing net balance in the Cost of Energy variance accounts;
- Maintains rate stability for customers to the extent practicable; and
- Is administratively simple and transparent.

113. BC Hydro submits that the BCUC's previous conclusion remains accurate.

114. For clarity, even if the BCUC approves the proposed DARR table mechanism, BC Hydro will still need to seek and obtain BCUC approval of its proposed rate increases (including for the DARR) in future RRAs. BC Hydro will always identify the proposed DARR in its RRAs. The DARR table mechanism will provide a structured approach to setting the DARR, but the BCUC retains discretion to alter BC Hydro's DARR proposal and/or the DARR mechanism in future applications if circumstances warrant.¹⁷⁶

¹⁷² Exhibit B-5, BCSEA IR 1.13.1.

¹⁷³ Exhibit B-9, BC Hydro's Response to Undertaking No. 23.

¹⁷⁴ Exhibit B-4, BCUC IR 1.55.1; Exhibit B-5, AMPC IR 1.5.1 and CEC IR 1.49.1.

¹⁷⁵ Exhibit B-2, Application, pp. 7-3 to 7-6.

¹⁷⁶ Exhibit B-4, BCUC IR 1.55.4.

PART EIGHT: OTHER REVENUE REQUIREMENTS

115. The main issue raised during the proceeding with respect to the content of the Other Revenue Requirements chapter of the Application relates to net income. BC Hydro amended its orders sought to request a regulatory account to capture any variance between (a) the amount of net income reflected in the proposed rates for fiscal 2022 (\$712 million) and (b) the net income flowing from the BCUC's determination in the upcoming BC Hydro cost of capital proceeding. The proposal allows for the efficient determination of the present Application and, relative to the typical interim rates approach, is advantageous to ratepayers.

116. The \$712 million net income used in the Application is a placeholder. The amount reflects the *status quo*; Direction No. 8 specified net income of \$712 million for fiscal 2020 and fiscal 2021, and that amount is reflected in BC Hydro's Fiscal 2021 to Fiscal 2023 Service Plan. Using the *status quo* net income as a placeholder makes sense in the absence of any evidentiary basis to choose a different amount.

117. BC Hydro's upcoming cost of capital application will address key determinants of net income – rate base, Return on Equity and capital structure. It will also reflect any government policy guidance, as foreshadowed by Government's Phase 1 Comprehensive Review Report.¹⁷⁷

118. Mr. Wong explained how the proposed account would work.¹⁷⁸

This account would capture any differences between the net income caused by changes to any return percentage, capital structure, or rate base. I want to note that under IFRS regulatory accounting rules, in this situation we would only record the deferral if the ultimate difference is to the benefit of the ratepayer.

So in other words, if the BCUC accepts our proposal of having a regulatory account and using \$712 million for setting rates for Fiscal '22, but later in the cost in capital proceeding decides that the net income should be a different amount and say less amount, this difference between the 712 million and the lower amount would be picked up in the deferral account and returned to ratepayers in the future. We expect that we would propose over the next test period. However, if the BCUC decides that the net income amount for Fiscal '22 is something greater than 712

¹⁷⁷ Exhibit B-8, Review Session Presentation Slide 6; Tr. 1, p. 20, ll. 1–12 (Wong).

¹⁷⁸ Tr. 1, p. 20, l. 17 – p. 21, l. 12 (Wong).

million, the difference cannot be picked up in the deferral account under IFRS accounting rules. But the key principle here is that ratepayers will be kept whole and ultimately only pay for what is approved.

119. BC Hydro will propose how to return any balance to ratepayers in the next RRA. It anticipates proposing to return any balance over the next test period, given that the balance would relate to a prior test period (fiscal 2022).

120. Commissioner Morton asked about using interim rates, i.e., the BCUC's order in the current proceeding could provide for the fiscal 2022 rates to remain interim until BC Hydro's allowed net income is determined through the subsequent proceeding. BC Hydro recognizes that the BCUC typically addresses cost of capital application sequencing issues of this nature using interim rates, and Mr. Wong confirmed that BC Hydro is prepared to accept either approach.¹⁷⁹ The practical difference between the proposed approach and using interim rates from a ratepayer standpoint is as follows. The proposed regulatory account would enable final rates to be set soon, and would see any variances owing to customers being reflected in rates for (e.g.) the next test period. Under the latter approach, rates would remain interim likely past the end of the fiscal year, resulting in the need for later bill adjustments where variances would (for a negative variance) be refunded or (for a positive variance) collected from customers.¹⁸⁰

¹⁷⁹ Tr. 2, p. 279, ll. 9–26 (Wong); p. 337, ll. 6–8 (Wong).

¹⁸⁰ The interim rates approach is typical because it is reciprocal and avoids any issues with International Financial Reporting Standards (IFRS) reporting that might impact financial reporting of a variance owing to the shareholder (Tr. 2, p. 279, ll. 9–26 (Wong)), thus respecting the fair return standard. BC Hydro's acceptance of the regulatory account approach in this instance eliminates any concerns about adherence to the fair return standard that might otherwise arise with it.

PART NINE: TRANSMISSION REVENUE REQUIREMENT

121. The OATT rates are the prices for transmission services purchased from BC Hydro. They are applicable to all usage of the transmission system, including usage by BC Hydro itself and by external OATT customers. BC Hydro and Powerex are the main users of the transmission system and account for approximately 99 percent of the revenue collected through the OATT.¹⁸¹ BC Hydro has determined the OATT rates for fiscal 2022 in the same way as the OATT rates approved by the BCUC in prior proceedings.¹⁸²

122. The rates charged under the OATT are designed to collect the transmission revenue requirement (“TRR”). The TRR is the sum of all costs associated with the assets used to provide transmission service under the OATT, and for which OATT customers are responsible according to the principle of cost causation. The cost causation methodology that BC Hydro has used to calculate the TRR in this Application is consistent with the method used by both BC Hydro and the British Columbia Transmission Corporation (BCTC) in previous RRAs. The BCUC originally approved the cost causation rate design of the OATT rates in Order No. G-43-98. The BCUC subsequently confirmed or altered the design through multiple OATT proceedings, including the comprehensive applications and regulatory processes resulting in Orders Nos. G-58-05, G-127-06 and G-102-09.¹⁸³

123. The proposed OATT rates are set out in Table 9-4.¹⁸⁴ BC Hydro submits that its proposed OATT rates are just and reasonable and should be approved.

¹⁸¹ Exhibit B-2, Application, p. 9-1.

¹⁸² Exhibit B-2, Application, Chapter 9.

¹⁸³ Exhibit B-2, Application, p. 9-17.

¹⁸⁴ Exhibit B-2, Application, p. 9-17.

PART TEN: DEMAND SIDE MANAGEMENT

A. INTRODUCTION

124. This Part addresses BC Hydro's proposed fiscal 2022 traditional DSM expenditures, and LCE projects and programs that are "prescribed undertakings" under sections 4(3)(a) to (d) of the GGRR. BC Hydro makes the following points:

- BC Hydro's DSM expenditures maintain broad customer access to conservation and energy management opportunities, manage the overall level of expenditures to limit forecast rate increases,¹⁸⁵ and comply with the *Demand-Side Measures Regulation* ("DSM Regulation"). The BCUC should find that BC Hydro's traditional DSM expenditure schedule is in the public interest and should be accepted under section 44.2 of the *Utilities Commission Act* ("UCA").
- BC Hydro's LCE expenditures continue the activities that BC Hydro described in the Previous Application and that the BCUC accepted as prescribed undertakings.¹⁸⁶ The LCE expenditures should be recovered through the DSM Regulatory Account, pursuant to the *Direction to the BCUC Respecting Undertaking Costs*.

B. TRADITIONAL DSM REFLECTS CONTINUITY WITH PREVIOUSLY APPROVED PLANS

125. BC Hydro is planning a total of \$82.2 million in traditional DSM expenditures in fiscal 2022 as set out in Table 10-4 of the Application.¹⁸⁷ This is planned to result in 588 GWh/year in new incremental energy savings and 93 MW of new incremental associated capacity savings.¹⁸⁸ The breakdown of DSM costs across customer classes is similar to that presented in the Previous Application, which the BCUC determined to be reasonable.¹⁸⁹

¹⁸⁵ Exhibit B-2, Application, p. 10-1.

¹⁸⁶ Exhibit B-2, Application, p. 10-2.

¹⁸⁷ Exhibit B-2, Application, Table 10-4. BC Hydro's fiscal 2022 DSM Program descriptions and data tables are provided in Appendix M, Exhibit B-2-2. Note that the long-run marginal cost (LRMC) value of \$54/MWh shown in the NIA program table on page 13 of Appendix M to the Application is in error and should indicate an equivalent avoided cost of diesel of \$300/MWh (F2021\$). (Exhibit B-4, BCUC IR 1.67.3.)

¹⁸⁸ Exhibit B-2, Application, Tables 10-5 and 10-6.

¹⁸⁹ Exhibit B-2, Application, pp. 10-10 and 10-11.

(a) DSM Expenditures Reflect Continuation of Similar Activities as the Previous Application

126. BC Hydro's planned DSM expenditures in fiscal 2022 generally reflect a continuation of the activities that were accepted by the BCUC for fiscal 2020 and fiscal 2021. BC Hydro has made some adjustments, as summarized below:

- (a) ***Forecast adjusted to reflect historical results:*** BC Hydro reduced planned industrial expenditures in fiscal 2022, compared to fiscal 2020 and fiscal 2021, to reflect the downward trend in the number of large projects in the mining, forestry, and pulp and paper sectors due to economic uncertainty.¹⁹⁰ While the decline in these large projects has been offset somewhat by smaller projects in other industries, the overall downward trend is expected to continue in fiscal 2022.¹⁹¹
- (b) ***Impacts of COVID-19 pandemic to be mitigated:*** BC Hydro has taken into account the impacts of the COVID-19 pandemic in its planned DSM expenditures.¹⁹² BC Hydro expects to be able to mitigate the effects of the pandemic by implementing activities virtually and by developing and implementing safety protocols where site visits remain necessary. While BC Hydro expects participation and expenditures will remain similar to previously planned levels, there is some uncertainty.¹⁹³
- (c) ***Capacity-focused DSM will continue:*** BC Hydro has planned for \$2.9 million in expenditures to continue work on capacity-focused DSM in fiscal 2022, pending an assessment of the need for new capacity resources in the upcoming IRP.¹⁹⁴ BC Hydro will run Non-Wires Alternative pilots at five substations, including continuing activities at the substations discussed in the Previous Application. BC Hydro will also continue to pilot the use of the demand response management system, refine the management of the initiatives, conduct monitoring and

¹⁹⁰ Exhibit B-2, Application, p. 10-11.

¹⁹¹ Exhibit B-2, Application, pp. 10-4 and 10-5.

¹⁹² Tr. 1, p. 165, ll. 14–18 (Hobson).

¹⁹³ Exhibit B-2, Application, p. 10-12.

¹⁹⁴ Exhibit B-4, BCUC IR 1.70.1.

tracking, and add new technologies and solutions as required for the specific local substations.¹⁹⁵

(b) Moderation Strategy Continues Pending 2021 IRP Examination of Future DSM Levels

127. The fiscal 2022 DSM portfolio continues the moderation strategy originally recommended in the 2013 IRP beginning in fiscal 2014, and then accepted by the BCUC for fiscal 2017 through 2021. The moderation strategy balances a number of considerations to arrive at a level of DSM that allows BC Hydro to continue to offer a broad range of program opportunities and preserve BC Hydro's ability to ramp up DSM efforts in the future, while not increasing BC Hydro's revenue requirements and considering the potential for rate impacts.¹⁹⁶

128. As part of its moderation strategy, BC Hydro uses the market price of \$33/MWh to compare to the net levelized utility cost. This approach ensures that even surplus energy resulting from DSM would have a positive impact on BC Hydro's revenue requirements.¹⁹⁷ However, as Mr. Hobson stressed, even if there is a positive impact on the revenue requirements, DSM can still have a negative impact on rates.¹⁹⁸

The one important thing I think that we've outlined within the moderation strategy is it's a balance of a number of factors and one of the key balances within it is rate impact. And DSM operates a little bit differently than what we might think of with typical expenditures within BC Hydro. So as much as our DSM expenditures can have a downward pressure on the overall cost that BC Hydro has to recover, it doesn't follow necessarily that it has a downward pressure on rates. And so in this surplus environment it doesn't necessarily follow that we have a downward pressure on rates just because we have a downward pressure on revenue requirement. So the \$19 being lower than the 33 is an indication with the utility costs test that we have a lower revenue requirement as a result of our DSM expenditures, but we do have an upward pressure on rates and that was part of the consideration in the moderation strategy going back to the '17 and '19 RRA that was considered and continues to be a consideration for us moving forward.

¹⁹⁵ Exhibit B-2, Application, pp. 10-12 and 10-13; Exhibit B-4, BCUC IR 1.70.2.

¹⁹⁶ Exhibit B-4, BCUC IR 1.69.1; Exhibit B-5, BCSEA IR 1.4.3.

¹⁹⁷ Exhibit B-5, Bryenton IR 1.10.1.

¹⁹⁸ Tr. 2, p. 283, l. 17 – p. 284, l. 12 (Hobson).

129. The continuation of the moderation strategy does not mean keeping precisely the same level of spending each year. Instead, BC Hydro updates its budgets to reflect trends and learnings from past years, such as the decline in large industrial projects discussed above.¹⁹⁹ Over fiscal 2020 and fiscal 2021, BC Hydro's actual DSM expenditures have leveled out and the difference between BC Hydro's planned and actual DSM expenditures has narrowed.²⁰⁰ BC Hydro explained the variation in spending as follows:²⁰¹

BC Hydro does not see a need to maintain its portfolio level expenditures at a precise level year over year in order to maintain the general level of DSM consistent with the moderation strategy. The fiscal 2022 DSM expenditures are consistent with the fiscal 2021 forecast and provide an expenditure level that are expected to achieve a similar level of new incremental program electricity savings.

Even while planning to stay within the same level of DSM, there can be fluctuations in the DSM Plan expenditures from year to year. In Appendix X - Fiscal 2020 to Fiscal 2022 Demand-Side Management Business Plan of the Previous Application, we had forecast our fiscal 2022 DSM Plan expenditures to be \$85.5 million, down from \$89.1 million in fiscal 2021. The fiscal 2022 DSM expenditures were further updated in this Application per the factors identified on page 10-11 of Chapter 10, namely: historical industrial results, new market information, including our plans to mitigate the impacts of COVID-19, and our plans to continue capacity-focused DSM activities.

Two of these factors had a larger impact on sector expenditures. First, the industrial sector planned expenditures were reduced by approximately \$6 million from fiscal 2021 to fiscal 2022 to reflect the trend of the reduced number of projects from large industrial customers. Second, we added approximately \$3 million to continue with capacity-focused DSM in fiscal 2022. Outside of these changes, our total fiscal 2022 DSM expenditure for programs is similar to the prior year expenditure.

130. In the 2021 IRP, BC Hydro will examine future levels of DSM, including whether there is a need to ramp-up to higher levels. The IRP is the appropriate forum to consider levels of DSM

¹⁹⁹ Exhibit B-5, BCSEA IR 1.2.3.

²⁰⁰ Exhibit B-5, BCSEA IR 1.2.1 and 1.2.2.

²⁰¹ Exhibit B-4, BCUC IR 1.69.1.

because the IRP considers BC Hydro's load-resource balance and informs what new resources are required, such as DSM.²⁰² Mr. Hobson explained:²⁰³

Well, I think the question of the level of DSM is really a question for the next IRP. So, when we take a look at the moderation approach, the moderation approach is about striking the right balance, making sure that we've got broad opportunities for customers to be able to participate in our programs, making sure that we have the capability of ramping up if needed, making sure that we are using our market price against utility costs to ensure that we are not having an upward pressure on revenue requirements, recognizing the DSM in the surplus environment comes with a rate impact. And we consider a number of other things around market opportunities and different policy constructs from government and decisions from the Commission. But with all that, we are striking a balance. And I think the thing that you should point to is really the upcoming integrated resource plan, because that's where I think we'll have the opportunity to say what is the level of DSM that we're going to move forward with beyond Fiscal '22. Is it a higher level? A lower level? What are we striving for? And I think it really is the question for that particular process.

(c) BC Hydro's Traditional DSM Complies with Section 44.2 of the UCA

131. Under section 44.2 of the UCA, the BCUC must accept an expenditure schedule if it considers that making the expenditures would be in the public interest. Otherwise, the BCUC must reject the schedule. Alternatively, the BCUC may accept or reject a part of the expenditure schedule. However, it is well established that section 44.2 does not provide the BCUC with the authority to direct BC Hydro to file a DSM expenditure schedule, make additions to a DSM expenditure schedule, or change the design of a particular DSM program.²⁰⁴ BC Hydro submits, for the reasons set out below, that the BCUC should accept BC Hydro's traditional DSM expenditure schedule pursuant to section 44.2 of the UCA.

132. BC Hydro's DSM expenditure schedule meets the factors that the BCUC must consider when deciding whether to accept a DSM expenditure schedule:

²⁰² Exhibit B-4, BCUC IR 1.69.1 and 1.69.2.

²⁰³ Tr. 1, p. 165, l. 26 – p. 166, l. 23 (Hobson).

²⁰⁴ Decision and Order No. G-47-18, March 1, 2018 at p. 73 of 118.

- (a) ***In the interest of persons who receive or may receive service:*** BC Hydro's DSM expenditures reflect activities similar to those described in the Previous Application, which the BCUC accepted as being in the public interest. BC Hydro DSM expenditures continue to reflect a broad and cost-effective range of traditional DSM initiatives. They provide significant energy savings and capacity benefits and provide customers with the opportunity to save electricity and lower their bills, while reducing BC Hydro's revenue requirements. Therefore, BC Hydro's proposed DSM expenditures continue to be in the interest of persons who receive or may receive service.²⁰⁵
- (b) ***Supports British Columbia's energy objectives:*** As shown in Table 10-8 of the Application, BC Hydro's DSM expenditures continue to support the seven applicable energy objectives, including "to take demand-side measures and to conserve energy" and "to encourage economic development and the creation and retention of jobs."
- (c) ***Continues moderation approach consistent with 2013 IRP:*** BC Hydro agrees with the BCUC's Decision on the Previous Application that alignment between the DSM expenditure schedule and the most recent IRP is a moot issue given the passage of time since the 2013 IRP. Nevertheless, BC Hydro notes that the fiscal 2022 DSM level of expenditures continues with the moderation approach first recommended in the 2013 IRP for fiscal years 2014-2016 and continued for fiscal years 2017 to 2021. BC Hydro's next IRP will examine different levels of DSM.²⁰⁶
- (d) ***Meets adequacy requirements of the DSM Regulation:*** Table 10-9 of the Application describes how BC Hydro's traditional DSM satisfies the adequacy requirements of the DSM Regulation, including multiple demand-side measures

²⁰⁵ Exhibit B-2, Application, p. 10-16.

²⁰⁶ Exhibit B-2, Application, p. 10-17.

for low income households, rental accommodations, education programs, support for codes and standards, and support for the adoption of step codes.²⁰⁷

(e) ***BC Hydro's traditional DSM is cost effective:*** Table 10-10 of the Application shows that BC Hydro's traditional DSM initiatives are cost effective in accordance with the requirements of the DSM Regulation.²⁰⁸ As summarized on page 10-21 the Application:

- The net levelized utility cost of \$19 per MWh is lower than the market price of \$33 per MWh. This means that BC Hydro's DSM portfolio is cost-effective under the Utility Cost Test; and
- BC Hydro's DSM initiatives have a Total Resource Cost Test result of \$14 per MWh. This means that BC Hydro's DSM portfolio is cost-effective under the *Demand-Side Measures Regulation*, even using the low end of the preliminary range of the cost of new wind resources (\$54 per MWh).

133. Therefore, BC Hydro submits that its traditional DSM expenditure schedule for fiscal 2022 is in the public interest and should be accepted.

C. BC HYDRO IS MAINTAINING LCE ACTIVITIES THAT ARE PRESCRIBED UNDERTAKINGS

134. BC Hydro plans a total of \$15.5 million in LCE expenditures in fiscal 2022, with 148 GWh/year in new incremental load growth and 29 MW of new incremental associated capacity.²⁰⁹ As described below, BC Hydro is continuing existing LCE activities and cost recovery is directed by regulation.

²⁰⁷ Exhibit B-2, Application, pp. 10-18 and 10-19. See Exhibit B-5, BCSEA IR 1.6.1 for further discussion of program offers available to rental accommodations and multi-unit residential buildings, and low income or social housing customer groups. See Exhibit B-4, BCUC IR 1.74.1 and 1.74.2 for further discussion of the level of expenditures on Codes and Standards.

²⁰⁸ Exhibit B-2, Application, p. 10-21.

²⁰⁹ Exhibit B-2, Application, Tables 10-4, 10-5, and 10-6. BC Hydro provides a detailed account of its LCE expenditures in Appendix N of the Application, Exhibit B-2-2.

(a) BC Hydro Is Continuing Similar LCE Activities as Described in Previous Application

135. BC Hydro's LCE expenditures can be divided into two categories: (1) the "Initial LCE Projects"; and (2) the "LCE Program". BC Hydro has referred to these two categories together as "LCE Project/Programs".²¹⁰

136. BC Hydro's planned LCE Project/Programs for fiscal 2022, totalling \$15.5 million, are similar to those described in the Previous Application:

- (a) In fiscal 2022, BC Hydro expects to complete the last of the Initial LCE Projects that BC Hydro began in fiscal 2018.²¹¹ This accounts for \$6 million of the \$15.5 million fiscal 2022 forecast, and is associated with a customer project which has spanned multiple fiscal years with the final phases expected to be completed in fiscal 2022.²¹²
- (b) The remaining \$9.5 million in LCE expenditures for fiscal 2022 reflect a continuation of the BC Hydro funded LCE Program that BC Hydro developed in fiscal 2019 to complement government programs.²¹³ The increase in expenditures compared to fiscal 2021 is primarily related to the assumed timing of the anticipated projects in the transportation sector.²¹⁴

(a) LCE Project/Programs Are Prescribed Undertakings

137. BC Hydro's LCE Project/Programs fall within one or more classes defined in sections 4(3)(a) to (d) of the GGRR. BC Hydro's LCE Project/Project programs meet the two broad requirements for the LCE expenditures to fall within the class of prescribed undertakings in sections 4(3)(a) to (d) of the GGRR:

²¹⁰ Exhibit B-2-2, Appendix N, p. 1-2.

²¹¹ Exhibit B-2, Application, p. 10-14.

²¹² Exhibit B-2-2, Appendix N, p. 5; Exhibit B-4, BCUC IR 1.75.1.

²¹³ Exhibit B-2, Application, p. 10-14.

²¹⁴ Exhibit B-4, BCUC IR 1.75.1.

- (a) BC Hydro's LCE Project/Programs fall within the descriptions of prescribed undertakings in section 4(3)(a) to (d) of the GGRR.²¹⁵
- (b) At the time BC Hydro decided to undertake the LCE Project/Programs meeting the descriptions in sections 4(3)(a) and 4(3)(b), BC Hydro reasonably expected the LCE Project/Programs to be cost effective as set out in section 4(4) of the GGRR. The net present value of all of BC Hydro's LCE Programs/Projects prescribed under section 4(3)(a) and 4(3)(b) of the GGRR, including BC Hydro's proposed LCE expenditures for fiscal 2022 is \$118.8 million. This indicates that these undertakings are cost-effective within the meaning of section 4(4) of the GGRR.²¹⁶

138. In its Decision, the BCUC agreed that BC Hydro's LCE Project/Programs were prescribed undertakings:²¹⁷

The Panel agrees with interveners and BC Hydro that the Low Carbon Electrification expenditures over the Test Period are prescribed undertakings under the GGRR, and finds that these Low Carbon Electrification expenditures must therefore be deferred to the DSM Regulatory Account as required by the Direction to the BCUC Respecting Undertaking Costs. **Therefore, we approve BC Hydro's request to defer low-carbon electrification expenditures up to the undertaking costs to the DSM Regulatory Account.** [Emphasis in original.]

139. BC Hydro's LCE expenditures continue activities that the BCUC has already accepted as being prescribed undertakings under the GGRR. The activities continue to meet the description of prescribed undertakings. The BCUC should approve BC Hydro's request to defer its LCE expenditures to the DSM Regulatory Account as required by the Direction to the BCUC Respecting Undertaking Costs.

²¹⁵ Exhibit B-2, Application, p. 10-22; Exhibit B-2-2, Appendix N, p. 7.

²¹⁶ Exhibit B-2, Application, p. 10-23; Exhibit B-2-2, Appendix N, pp. 8-10.

²¹⁷ Decision, p. 150.

PART ELEVEN: ELECTRIFICATION

A. INTRODUCTION

140. This Part addresses matters related to electrification not addressed in other sections of this argument, including BC Hydro's development of an electrification plan, cost recovery for its EV charging stations, and revenue from low carbon fuel credits. BC Hydro's larger electrification infrastructure projects are part of the Capital Plan discussed in Part Six. BC Hydro's LCE Project/Program expenditures are part of the DSM activities discussed in Part Ten. BC Hydro makes the following points:

- BC Hydro is developing an electrification plan, but is already moving forward with initiatives.
- BC Hydro has accounted for EV charging station costs and revenues appropriately.
- BC Hydro acquires and transfers low carbon fuel credits in accordance with legislation and all ratepayers benefit from sale proceeds.

B. WORK CONTINUES AS ELECTRIFICATION PLAN DEVELOPMENT IS UNDERWAY

141. BC Hydro is currently developing a five-year electrification plan, which will provide a broader view of BC Hydro's electrification activities.²¹⁸ BC Hydro will be consulting stakeholders on the plan in 2021,²¹⁹ and filing the plan and associated performance metrics in its next RRA.²²⁰ Keith Anderson, BC Hydro's Vice President, Customer Service, stated:²²¹

[The electrification plan] will cover our existing electrification efforts from across the company as well as our plans for additional actions to help drive an increased electrification. We will be hosting engagement workshops over the next couple of months to ensure customers and interveners have input into the type of electrification opportunities and barriers that exist and actions BC Hydro can take to help overcome those barriers.

²¹⁸ Exhibit B-2, Application, p. 10-2; Exhibit B-5, BCSEA IR 1.9.3; Tr. 1, p. 209, ll. 1–9 (O'Riley).

²¹⁹ Exhibit B-2, Application, p. 10-2.

²²⁰ Exhibit B-5, BCSEA IR 1.12.5 and CEC IR 1.61.1.

²²¹ Tr. 1, p. 39, ll. 6–14 (Anderson).

142. Although BC Hydro is still developing its broader electrification plan, its electrification efforts are already extensive. BC Hydro's current efforts include its new industrial electrification rates, EV charging station infrastructure, LCE Projects/Programs, and larger infrastructure projects (e.g., the Peace Region Electric Supply Project,²²² and the North Montney Region – Electrification Project).²²³ Mr. O'Riley elaborated:²²⁴

There is a substantial effort going on today with our base resources. So we have a very large pipeline of projects in the hopper in the province pipeline, if you will, and they include traditional economic development projects like mines and such, oil and gas projects, there's a number of electrification projects including expansions at existing [facilities], and then greenfield projects, and then there's a number of clean tech projects that are a little, you know, newer for B.C.

And our key account management team that Keith is leading is really active in those discussions and doing whatever we can to remove barriers and provide information and get these things over the line. And we do lots of coordination with government to, you know, bring in the resources that they have on the attracting people to B.C. and the like.

This new -- these new rates just came out and they're really important tools, but we're not starting from scratch. And just as an indication, I've joined Keith and his key account managers in 10 meetings this year with customers related to either new, brand new loads or significant electrification loads in the province and those aren't the first meeting in the door, those are meetings after, you know, we've had substantial discussion.

So I want to assure you there is a lot of activity underway today and we're not waiting for the electrification plan or Fiscal '23 to get going and really quite excited by the prospects here.

143. BC Hydro's electrification plan will bring all these current efforts together, along with different opportunities and tools, with a business case for the costs and resources needed to meet electrification plan targets.²²⁵

²²² Exhibit B-2, Application, p. 2-13.

²²³ Exhibit B-4, BCUC IR 1.43.3; Tr. 1, p. 225, l. 13 – p. 226, l. 8 (Anderson).

²²⁴ Tr. 1, p. 214, l. 14 – p. 215, l. 18 (O'Riley).

²²⁵ Tr. 1, p. 212, ll. 3–17 (Anderson).

C. EV CHARGING STATION COSTS AND REVENUES ARE ACCOUNTED FOR APPROPRIATELY

144. BC Hydro is building a network of direct current, fast charging EV charging stations across the province to support the reduction of greenhouse gas (“GHG”) emissions as part of the province’s CleanBC plan. A robust, reliable charging network is important for encouraging EV adoption, as it will address concerns around range anxiety and is essential for customers who do not have access to home or workplace charging. Helping customers switch to EVs will also increase BC Hydro’s load and help take pressure off rates.²²⁶

145. Government has added section 5 to the GRR to make certain EV charging stations “prescribed undertakings.” In this Application, BC Hydro has accounted for its EV charging station costs and revenues so that the BCUC can fulfill its statutory obligation under section 18(2) of the *Clean Energy Act* to set rates for BC Hydro that are sufficient to recover BC Hydro’s costs incurred on its EV charging stations that are prescribed undertakings.

(a) BC Hydro’s EV Charging Stations Are Prescribed Undertakings

146. BC Hydro has correctly identified its EV charging stations that fall within the prescribed undertaking described in section 5 of the GRR. The following paragraphs describe how the stations meet each of the GRR criteria.

Criterion 1: BC Hydro has identified its DCFC stations that are “eligible charging stations”

147. An “eligible charging station” is defined in section 5(1) of the GRR to mean “a fast charging station that (a) is available for use 24 hours a day by any member of the public, (b) does not require users to be members of a charging network, and (c) is capable of charging electric vehicles of more than one make”. A “fast charging station” is defined in section 5(1) of the GRR to mean a fixed device capable of charging an EV using a direct current.

148. By the end of fiscal 2022, BC Hydro expects to have 155 eligible charging stations.²²⁷ This number includes 98 fast charging stations that came into operation prior to fiscal 2022, including

²²⁶ Tr. 1, p. 37, l. 13 – p. 38, l. 14 (Anderson).

²²⁷ Exhibit B-4, BCUC IR 1.1.5.

the station at the Langley Events Centre which will be modified so that the public can use it 24-hours a day starting in fiscal 2022. It also includes the construction of 57 new fast charging stations during fiscal 2022.²²⁸ All of the 155 fast charging stations that BC Hydro is operating or plans to bring into service in fiscal 2022 are eligible charging stations as they:

- (a) are available for use 24-hours a day by any member of the public;
- (b) do not require users to be members of a charging network; and
- (c) are capable of charging EVs of more than one make.²²⁹

149. The station at Powertech Labs in Surrey is not an eligible charging station because it is not available 24-hours a day. It will also be decommissioned by March 2021.²³⁰

Criterion 2: BC Hydro will construct and operate or purchase and operate the eligible charging stations

150. BC Hydro's eligible charging stations meet the requirement in Section 5(2)(a) of the GGRR, which describes a class of prescribed undertakings where "the public utility constructs and operates, or purchases and operates, an eligible charging station".

151. BC Hydro will construct and operate, or purchase and operate, each of its eligible charging stations.²³¹ Two topics explored in information requests are addressed below.

152. First, BC Hydro purchased and operates the eight stations located in the Kootenay area identified as "constructed by Community Energy Association" in Appendix C of the Application.²³² Powertech purchased the stations on BC Hydro's behalf and BC Hydro paid Powertech in full for its costs of purchasing the stations in fiscal 2018 and fiscal 2019. The eight stations have been on BC Hydro's books, have been operated and maintained by BC Hydro, and BC Hydro has entered into agreements such as licences of occupation for the stations. To document the parties

²²⁸ Exhibit B-2, Application, pp. 2-20 and 2-21.

²²⁹ Exhibit B-2, Application, p. 2-16.

²³⁰ Exhibit B-2, Application, p. 2-16; Exhibit B-4, BCUC IR 1.1.5 and 1.4.1.

²³¹ Exhibit B-2, Application, pp. 2-17, 2-20 and 2-21.

²³² Exhibit B-4, BCUC IR 1.2.1.

mutual understanding that these stations are BC Hydro's assets, BC Hydro and Powertech executed a Bill of Sale on February 25, 2021.²³³

153. Second, BC Hydro is the operator of the nine stations that BC Hydro purchased or constructed and currently leases the charging equipment that it owns to a private entity or municipality.²³⁴ Under the current equipment lease agreements, the lessees are generally only responsible for public access to the site, ensuring the site is neat and tidy, and monitoring the site and station. In contrast:²³⁵

- BC Hydro is responsible for the routine maintenance of the charging equipment and for the associated costs;
- BC Hydro is also responsible for service and repair of the charging equipment when required, including procurement of required parts and labour and for the costs if the required service or repair is not covered by any applicable third-party warranties;
- BC Hydro has the discretion to replace the charging equipment or terminate the agreement (with proper notice) if the charging equipment is beyond reasonable repair;
- BC Hydro is responsible for developing, subject to BCUC approval, the pricing for EV charging service chargeable to the end-users of the service. The service at the charging stations is separately metered to allow for such end-uses to be charged;
- The account for the charging station is in the name of BC Hydro. BC Hydro is responsible for billing and collection of charges from the users of the charging stations, for payment of any costs, charges and expenses associated with the

²³³ Exhibit B-4-1, Confidential BCUC IR 1.2.1; Tr. 2, p. 269, ll. 5–9 (Anderson); Exhibit B-9, BC Hydro's Response to Undertaking No. 20.

²³⁴ Exhibit B-2, Application, p. 2-17; Exhibit B-4, BCUC IR 1.2.2, 1.2.7 and 2.9.1; Exhibit B-5, CEC IR 1.6.1. The lease revenue is nominal, at \$1 per month (Exhibit B-4, BCUC IR 1.2.3).

²³⁵ Exhibit B-4, BCUC IR 1.2.5; Exhibit B-2, Application, p. 2-17.

payment system (such as transaction costs or network fees), and for payment of all electricity charges;

- BC Hydro retains the charges collected from the use of the charging stations;
- The charging stations are identified as BC Hydro's stations, and the service number on the charging stations is directed to BC Hydro's contact centre;
- The stations are at locations determined and approved by BC Hydro; and
- The station consumption is separately metered, BC Hydro is entitled to collect and analyze meter data, and BC Hydro has the ability to remotely control the equipment load by working with the equipment lessee.

154. These factors are all indicia of BC Hydro being the operator of these stations.

Criterion 3: BC Hydro reasonably expected that its eligible charging stations will come into operation by December 31, 2025

155. BC Hydro's eligible charging stations meet the description in section 5(2)(b)(i) of the GGRR, which requires that "the public utility reasonably expects, on the date the public utility decides to construct or purchase an eligible charging station, that (i) the station will come into operation by December 31, 2025". The stations for which BC Hydro is seeking recovery in this Application are already in operation or reasonably expected to be in operation well before the effective "deadline" of December 31, 2025.²³⁶

Criterion 4: BC Hydro reasonably expected that its eligible charging stations will not exceed the limited municipality site limits

156. BC Hydro's eligible charging stations meet the description in section 5(2)(b)(ii) of the GGRR, which requires that "the public utility reasonably expects, on the date the public utility decides to construct or purchase an eligible charging station, that...(ii) if the station will be located

²³⁶ Exhibit B-4, BCUC IR 1.3.7.

in a limited municipality, the number of eligible charging sites in the municipality on the date the station will come into operation will not exceed the site limit for the municipality on that date.”

157. BC Hydro has provided evidence showing the municipalities in which its stations are located, whether each municipality is a “limited municipality”, the “site limit”, the number of BC Hydro sites, and the number of other charging sites.²³⁷ BC Hydro’s existing stations do not exceed any site limits, and BC Hydro reasonably expects that its planned stations will not exceed any site limits when they come into operation.

Criterion 5: BC Hydro’s eligible charging stations that come into operation on or after January 1, 2022 will be configured to use open charge point protocol

158. BC Hydro’s eligible charging stations will meet the requirement in section 5(2)(c) of the GGRR, which requires that any eligible charging station coming into operation on or after January 1, 2022 use or be configured to use the Open Charge Point Protocol (OCPP). For BC Hydro’s fast charging stations that come into service on or after January 1, 2022, all will use, or will be configured to use, the OCPP.²³⁸

(b) Section 18 of the *Clean Energy Act* Requires Recovery of All Costs Incurred with Respect to Prescribed Undertakings

159. Section 18(2) of the *Clean Energy Act* requires that, if an EV charging station is a prescribed undertaking under section 5 of the GGRR, all of the “costs incurred with respect to the prescribed undertaking” must be recovered in rates. In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, the Supreme Court of Canada interpreted the phrase “with respect to” very broadly, as follows:²³⁹

15 On a plain reading, the phrase “evidence with respect to the commission of an offence” is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or

²³⁷ Exhibit B-2, Application, pp. 2-17 to 2-22, Appendices C-2 and C-3. Also see Exhibit B-4, BCUC IR 1.5.4 and 1.5.5 for why BC Hydro’s information on other charging stations is reasonable.

²³⁸ Exhibit B-4, BCUC IR 1 3.1.

²³⁹ *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 at paras. 15-17 [Book of Authorities, Tab 6].

rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant.

16 This reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added in the Supreme Court of Canada decision.]

17 We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's *prima facie* case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants.

160. Consistent with the above judgment of the Supreme Court of Canada, the words "with respect to" in section 18 of the *Clean Energy Act* are words of the "widest possible scope": all costs "relevant or rationally connected to" the prescribed undertakings must be recovered in rates.

161. Therefore, section 18 of the *Clean Energy Act* requires recovery in rates of BC Hydro's costs on its prescribed undertakings, including all operating costs associated with operation of the charging station, amortization costs for stations in service, energy costs to charge the EVs, the costs for site preparation, land/site lease, lighting, signage, advertising, or rights-of-way. All of these costs are recoverable because they are all part of the "costs incurred with respect to the prescribed undertaking".²⁴⁰

(c) Section 18 of the *Clean Energy Act* Requires Recovery of the Cost of Eligible Charging Stations that Came into Operation Prior to June 22, 2020

162. Section 18 of the *Clean Energy Act* and section 5 of the GGRR require that the BCUC set rates to recover its past costs on its prescribed undertakings, including the cost of eligible

²⁴⁰ Exhibit B-4, BCUC IR 1.3.8.

charging stations that came into operation prior to June 22, 2020. BC Hydro submits that this is the clear meaning and intention of the legislation.

Principles of Statutory Interpretation Must Be Followed

163. It is essential to interpret the *Clean Energy Act* and the GGRR in accordance with the accepted principles of statutory interpretation. The leading case on statutory interpretation is *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27,²⁴¹ in which the Supreme Court of Canada relied on the following statement from Elmer Driedger in *Construction of Statutes* (2nd ed. 1983):

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.

164. In *Sullivan on the Construction of Statutes*, the author explains further:²⁴²

Under Driedger's modern principle, interpreters are obliged to consider the entire context of the text to be interpreted. As Driedger himself indicated, this includes the external context in its broadest sense.

165. The BCUC must also interpret legislation in B.C. in accordance section 8 of the *Interpretation Act*:

8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

166. Therefore, the BCUC must give section 18 of the *Clean Energy Act* and section 5 of the GGRR a fair, large and liberal interpretation that best ensures the attainment of its objects.

²⁴¹ Book of Authorities, Tab 10.

²⁴² Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014) at p. 655 [Book of Authorities, Tab 11].

Grammatical and Ordinary Meaning is Clear

167. As required by principles of statutory interpretation, the words of the legislation must be read in their grammatical and ordinary sense. There is no ambiguity in the words of section 18 of the *Clean Energy Act* or section 5 of the GGRR:

- (a) Section 18(2) of the *Clean Energy Act* requires the BCUC to set rates that are sufficient for public utilities to recover their “costs incurred” on prescribed undertakings;
- (b) Section 5 of the GGRR describes a class of prescribed undertakings that includes eligible charging stations “the public utility constructs and operates, or purchases and operates” and reasonably expects to come into operation “by December 31, 2025”; and
- (c) There is nothing in the words of the relevant legislation that suggests that stations that came into operation prior to June 22, 2020, or prior to any date, are excluded.

168. Therefore, on the wording of the legislation read in its grammatical and ordinary sense, it is clear that a public utility’s eligible charging station that came into operation prior to June 22, 2020 is within the class of prescribed undertakings described in section 5 of the GGRR. Section 18 of the *Clean Energy Act* requires rates to be set that allow public utilities to recover their costs incurred on those stations.

Object and Remedial Purpose of the Legislation Supports Clear Meaning of Words

169. The object and purpose of section 18 of the *Clean Energy Act* and section 5 of the GGRR supports the clear meaning of the words that the cost of stations that came into operation prior June 22, 2020 must be recovered. The object and purpose of the legislation is clear from its context. This context includes:

- the BCUC's direction in early 2018 to FortisBC Inc. to exclude its EV charging stations from rate base,²⁴³ and the BCUC's commencement of a two-phase Inquiry into the Regulation of Electric Vehicle Charging Service;
- the B.C. Government's legal counsel stating in the February 27, 2019 procedural conference that the B.C. Government "strongly supports investments in EV charging services by those non-exempt public utilities" (e.g., FortisBC Inc. and BC Hydro) and that "it would be appropriate for non-exempt public utilities to recover those costs from ratepayers"²⁴⁴; and
- non-exempt utilities including BC Hydro proceeding with investments in EV charging stations in advance of the provincial government responding to the BCUC's recommendations coming out of the Inquiry.

170. In this context, the remedial purpose of section 5 of the GRR is to ensure that public utilities will recover their investments in eligible charging stations. The object of section 5 of the GRR and section 18 of the *Clean Energy Act* is to encourage non-exempt public utilities to invest in eligible charging stations in order to reduce GHG emissions in B.C. Limiting cost recovery to only those stations that came into operation on or after June 22, 2020 would contradict the wording, remedial purpose and object of the GRR and *Clean Energy Act*. It would be an unreasonable interpretation of the legislation.

There is No Retrospective Effect

171. The BCUC asked BC Hydro whether the GRR has a retrospective effect in the context of whether recovery of costs for stations that came into operation prior to June 22, 2020 should be permitted. BC Hydro provided preliminary comments in response to the information request, but has now done additional legal analysis as set out below. BC Hydro submits that there is no retrospective effect.

²⁴³ BCUC Order No. G-9-18, January 12, 2018.

²⁴⁴ BCUC, *An Inquiry Into The Regulation Of Electric Vehicle Charging Service, Phase Two Report*, June 24, 2019 at p. 2.

172. The fact that the recovery of costs of eligible charging stations that came into operation prior to June 22, 2020 is required is not properly characterized as a retrospective effect. A retrospective effect involves a change in vested rights, a past event or completed transactions. For instance, the Ontario Superior Court of Justice in *Chesterman Farm Equipment Inc. v CNH Canada Ltd.*, stated at paragraph 99: “It is well-established that a statute with retrospective effect is one that takes away or changes tangible rights that have vested in a party.”²⁴⁵ [Emphasis added.] The authorities also similarly describe retrospective legislation as imposing “prejudicial consequences” on a “past event” or “completed transaction”.²⁴⁶

173. Section 5 of the GGRR and section 18 of the CEA do not have the above effect. Instead, they impose an obligation on the BCUC in respect to the exercise of its powers under the UCA going forward. Specifically, they require the BCUC to set rates to allow public utilities to recover their cost incurred with respect to charging stations that are prescribed undertakings. BC Hydro’s rights or abilities to operate charging stations that came into operation prior to June 22, 2020 have not changed. Nor does the legislation impose prejudicial consequences on the operation of such stations. Furthermore, BC Hydro’s charging stations that came into operation prior to June 22, 2020 are not simply a “past event” or “completed transaction”. Rather, these stations continued to operate past June 22, 2020.

174. In *A.G. Quebec v. Expropriation Tribunal*, the Supreme Court of Canada considered the effect of changing provisions for abandoning an expropriation after the commencement of an expropriation.²⁴⁷ The Supreme Court of Canada determined that the amendments did not operate retrospectively as they did not seek to affect any completed past transactions, but instead applied only to the ongoing expropriation process. The B.C. Court of Appeal in *Krangle (Guardian ad litem of) v. Brisco*, 2000 BCCA 147 commented on this case and stated at page 56:²⁴⁸

²⁴⁵ 2016 ONSC 698 at para. 99 [Book of Authorities, Tab 7]; see also *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at pp. 279-284 [Book of Authorities, Tab 8].

²⁴⁶ E.g., Driedger, *Construction of Statutes*, 2nd Edition: “A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction.” As cited in *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)*, 2003 BCCA 436 at para. 62 [Book of Authorities, Tab 3].

²⁴⁷ [1986] 1 S.C.R. 732 [Book of Authorities, Tab 1].

²⁴⁸ 2000 BCCA 147 at para. 56 [Book of Authorities, Tab 9].

In essence, if the relevant facts with which a provision is concerned are not all in the past, the application of the provision, when it is enacted, is “immediate” as opposed to “retrospective”.

175. Similarly, BC Hydro’s eligible charging stations are not “all in the past,” but are assets that BC Hydro continued or continues to operate.

176. BC Hydro submits that section 18 of the *Clean Energy Act* and section 5 of the GGRR simply require the BCUC to set rates going forward that allow BC Hydro to recover the costs of its eligible charging stations. This is not a retrospective effect.

Alternatively, Retrospectivity Is Authorized

177. In the alternative, BC Hydro submits that any retrospective effect is clearly authorized by the words of section 18(2) of the *Clean Energy Act*. The court in *Aheer Transportation Ltd v. Office of the British Columbia Container Trucking Commissioner*, found that a regulation can have retroactive (or retrospective) elements if authorized by its enabling statute: “The only question is whether the enabling legislation authorizes the retroactive elements of the Regulation. If it does, the Regulation is valid and enforceable.”²⁴⁹ This is the case with the GGRR. Section 18(2) of the *Clean Energy Act*, under which the GGRR is enacted, requires the recovery of costs “incurred” (past tense) with respect to a prescribed undertaking:

(2) In setting rates under the Utilities Commission Act for a public utility carrying out a prescribed undertaking, the commission must set rates that allow the public utility to collect sufficient revenue in each fiscal year to enable it to recover its costs incurred with respect to the prescribed undertaking. [Emphasis added.]

Section 18 clearly refers to the recovery of costs incurred in the past.

Alternatively, Presumption Against Retrospectivity Does Not Apply

178. Also in the alternative, the presumption against retrospectivity does not apply. The Supreme Court of Canada stated in *Brosseau v. Alberta Securities Commission*: “The so-called

²⁴⁹ *Aheer Transportation Ltd v. Office of the British Columbia Container Trucking Commissioner*, 2018 BCCA 210 at para. 52 [Book of Authorities, Tab 2].

presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit.”²⁵⁰ In other words, this presumption is inapplicable if (1) there is no prejudice, such as a new penalty, disability or duty, or (2) there is prejudice, but it intended as protection for the public rather than as punishment for a prior event. The presumption against retrospective application of regulation does not apply to section 5 of the GGRR because allowing cost recovery of EV charging stations coming into service on or before June 22, 2020 is not prejudicial – it confers a benefit. Even if the consequence were to somehow be characterized as being prejudicial, the reduction of GHG emissions is for protection of all British Columbians.

(d) BCUC Must Set Rates to Recover BC Hydro’s Fiscal 2020 and Fiscal 2021 Costs on its Eligible Charging Stations

179. Pursuant to the BCUC’s direction in its Decision on the Previous Application, BC Hydro excluded its forecast fiscal 2020 and fiscal 2021 costs on its EV charging stations from its revenue requirements.²⁵¹ Specifically, the Decision directed BC Hydro to remove capital expenditures for EV charging infrastructure from its rate base, and to remove operating costs and cost of energy. Finance costs were not directed to be removed. Finance charges associated with EV charging infrastructure are embedded within fiscal 2022 planned finance charges in the Application. BC Hydro does not attribute specific borrowings or related finance charges to specific projects or assets, but estimated that the finance charges related to EV charging infrastructure in fiscal 2022 to be \$0.3 million.²⁵²

180. In accordance with the requirements of section 18(2) of the *Clean Energy Act*, as discussed above, BC Hydro is now seeking recovery of the portion of those costs that are with respect to charging stations that are prescribed undertakings. BC Hydro forecasts total costs of \$4.8 million over fiscal 2020 to fiscal 2021 for EV charging stations that are prescribed undertakings.²⁵³

²⁵⁰ [1989] 1 S.C.R. 301 at p. 318 [Book of Authorities, Tab 5]

²⁵¹ Exhibit B-2, Application, pp. 7-12 and 7-13.

²⁵² Exhibit B-9, BC Hydro’s Response to Undertaking No. 7.

²⁵³ Exhibit B-2, Application, p. 7-13; Exhibit B-4, BCUC IR 1.1.1.

181. In order for BC Hydro to recover its fiscal 2020 and fiscal 2021 costs incurred with respect to charging stations that are prescribed undertakings, these costs were deferred to a new regulatory account – the Electric Vehicle Costs Regulatory Account. BC Hydro is proposing to recover the forecast balance at the end of a test period over the next test period, until such time that the actual amounts deferred to the account for fiscal 2020 and fiscal 2021 are recovered in rates.²⁵⁴

182. As there may be a difference between forecast and actual amounts deferred to the account in fiscal 2021, BC Hydro expects that there may be a balance remaining in the account in the fiscal 2022 test period that will need to be recovered over the subsequent test period. BC Hydro will propose to close the account once the balance in the account is fully recovered and the account is no longer required. This approach ensures that ratepayers pay the actual costs related to EV charging stations that meet the definition of a prescribed undertaking under the GGRR for fiscal 2020 and fiscal 2021.²⁵⁵

183. Therefore, BC Hydro has requested BCUC approval (i) to establish an Electric Vehicle Costs Regulatory Account to defer any actual operating costs, amortization, and cost of energy amounts related to EV charging stations that meet the definition of a prescribed undertaking under the GGRR for fiscal 2020 and fiscal 2021, (ii) apply interest to the balance of the account based on BC Hydro's current weighted average cost of debt, and (iii) recover the forecast interest charged.²⁵⁶

(e) BCUC Should Set Rates to Recover BC Hydro's Forecast Costs on its Eligible Charging Stations

184. BC Hydro has included in its revenue requirements a reasonable forecast of its fiscal 2022 costs on its charging stations that are prescribed undertakings. The total fiscal 2022 costs are \$2.7 million, consisting of operating costs, cost of energy, and amortization net of third-party contributions.²⁵⁷ While BC Hydro now expects some stations to come into service in fiscal 2023,

²⁵⁴ Exhibit B-2, Application, p. 7-13.

²⁵⁵ Exhibit B-4, BCUC IR 1.1.2.

²⁵⁶ Exhibit B-2, Application, pp. 7-12 to 7-14.

²⁵⁷ Exhibit B-4, BCUC IR 1.1.3.

BC Hydro does not expect these changes to significantly impact the costs included in the Application. A delay in the service date of some stations is not expected to materially impact forecast operating costs, as the stations are new and material operating costs are not anticipated.²⁵⁸

185. The BCUC should approve the recovery of BC Hydro's forecast costs in order to meet the requirement in section 18(2) of the *Clean Energy Act* to set rates that recover the cost incurred with respect to prescribed undertakings.

186. Except for operating costs, all variances from forecast will be captured in regulatory accounts:²⁵⁹

- (a) Amortization variance will be captured in the Amortization of Capital Additions regulatory account;
- (b) Cost of energy variances will be captured in one of the Cost of Energy deferral accounts; and
- (c) Although BC Hydro has not forecast any revenues, any revenues collected in fiscal 2022 under approved rates for public EV fast charging service will be captured in BC Hydro's Cost of Energy deferral accounts.²⁶⁰

(f) BC Hydro Is Seeking Approval of EV Charging Station Depreciation Rates

187. BC Hydro is requesting approval for the depreciation rates for its EV charging stations.²⁶¹ In its next RRA, BC Hydro will request approval for a depreciation rate for EV charging stations based on the rate recommended in the depreciation study. Until the results of the depreciation study are known, BC Hydro submits that the proposed depreciation rates based on manufacturer recommendations are reasonable for the purpose of setting rates for the Test Period.

²⁵⁸ Exhibit B-4, BCUC IR 1.3.7.

²⁵⁹ Tr. 1, p. 236, l. 16 – p. 277, l. 7 (Layton).

²⁶⁰ Exhibit B-4, BCUC IR 1.3.6.1.

²⁶¹ Exhibit B-9, BC Hydro's Response to Undertaking No. 19.

188. BC Hydro has used a ten percent depreciation rate (ten-year useful life) based on the manufacturers recommended life for the majority of the EV chargers (86 per cent of EV chargers). For the other EV chargers, a shorter life of five years (20 per cent depreciation rate) or seven years (14 per cent depreciation rate) was used due to the poor reliability experienced for chargers supplied by one manufacturer. Approximately 35 per cent of the net book value is associated with other distribution equipment (e.g., transformers, cables, ductbanks) that are amortized using existing asset classes and have varying amortization rates.²⁶²

189. The above depreciation rates will be subject to review as part of BC Hydro's depreciation study. BC Hydro has included the assessment of the useful life for EV charging stations in the scope of the depreciation study. BC Hydro expects to seek approval of the depreciation rate for the EV charging stations in its next RRA.²⁶³

190. As noted in Part Seven of these Final Submissions, BC Hydro is proposing to defer variances resulting from the depreciation study in fiscal 2022 to the Amortization of Capital Additions Regulatory Account. This means that to the extent the depreciation study determines a different useful life for the EV charging stations than that included in the Application, resulting variances will be deferred to the regulatory account such that ratepayers only pay the costs associated with the depreciation rate determined in the depreciation study.²⁶⁴

(g) BC Hydro Will Continue to Forecast Costs in RRAs

191. In future RRAs, BC Hydro will continue to forecast the costs of its EV charging stations and provide information on its stations that meet the definition of a prescribed undertaking in section 5 of the GRR. This will enable the BCUC to fulfill its obligation under section 18 of the *Clean Energy Act* to set rates that are sufficient to recover BC Hydro's costs incurred with respect to its prescribed undertakings. BC Hydro submits that this process is adequate and efficient because the sole purpose of providing the information that an EV charging station is a prescribed

²⁶² Exhibit B-9, BC Hydro's Response to Undertaking No. 19.

²⁶³ Exhibit B-9, BC Hydro's Response to Undertaking No. 19.

²⁶⁴ Exhibit B-9, BC Hydro's Response to Undertaking No. 19.

undertaking is to recover the costs with respect to the station in rates in the relevant test period.²⁶⁵

D. BC HYDRO ACQUIRES AND TRANSFERS LOW CARBON FUEL CREDITS IN ACCORDANCE WITH LEGISLATION AND RATEPAYERS BENEFIT

192. The revenue from the sale of low carbon fuel credits resulting from BC Hydro's supply of low carbon fuel from its eligible charging stations will flow to the benefit of all ratepayers through Trade Income and the Trade Income Deferral Account because BC Hydro's investments in its charging stations have been funded by all ratepayers.²⁶⁶

193. As a supplier of low carbon fuel, BC Hydro is able to earn low carbon fuel credits from the operation of its EV charging stations under the program created by the *Greenhouse Gas Reduction (Renewable & Low Carbon Fuel Requirements) Act* and the *Renewable & Low Carbon Fuel Requirements Regulation* (collectively, the "Low Carbon Fuel Standard" or "LCFS").²⁶⁷ The credit market created by the Low Carbon Fuel Standard rewards low-carbon fuels in proportion to the amount of real, measurable emissions reductions they yield when substituted for conventional fuels.²⁶⁸

194. Mr. Anderson explained:²⁶⁹

So it's regulated through the province, through the Low Carbon Fuel Standard Regulation and we, for all transportation electrification, we measure the electricity consumption that's used for that electric -- that transportation. And then on a regular basis either, you know, quarterly, semi-annually or annually we'll gather all of that information together in a filing with government and to government and request credits based on that electricity consumption. And so they then review our report, request clarification where needed, and then ultimately issue credits pursuant to that Low Carbon Fuel Standard. And so then we receive a certain volume of low carbon fuel credits for all of that transportation electrification activity and then we assign that or transfer that to Powerex to

²⁶⁵ Exhibit B-4, BCUC IR 1.7.3.

²⁶⁶ Exhibit B-5, BCOAPO IR 1.67.1 and 1.67.1.3.

²⁶⁷ Exhibit B-9, BC Hydro's Response to Undertaking No. 24.

²⁶⁸ Exhibit B-9, BC Hydro's Response to Undertaking No. 24.

²⁶⁹ Tr. 2, p. 275, l. 9 – p. 276, l. 1 (Anderson).

market. And Powerex determines the frequency of the marketing that they do to optimize the value back to Powerex and BC Hydro.

195. BC Hydro's transfer of low carbon fuel credits to Powerex accords with section 8 of the *Greenhouse Gas Reduction (Renewable and Low Carbon Fuel Requirements) Act* and section 11.11 of the *Renewable and the Low Carbon Fuel Requirements Regulation*. The transfer is made at zero cost, pursuant to an agreement between the parties, and all revenue earned by Powerex from the sale of credits flows back to BC Hydro ratepayers via Trade Income and the Trade Income Deferral Account.²⁷⁰

196. BC Hydro's approach has been to use the revenue from the low carbon fuel credits to reduce the overall revenue requirement for the benefit of all ratepayers. This approach recognizes that investments in clean energy infrastructure, which have been funded by all ratepayers, have resulted in low carbon electricity, which is the primary reason that BC Hydro is able to acquire the credits under the LCFS.²⁷¹

²⁷⁰ Tr. 2, p. 318, l. 11 – p. 320, l. 4 (Layton).

²⁷¹ Exhibit B-9, BC Hydro's Response to Undertaking No. 24.

PART TWELVE: CONCLUSION AND ORDER SOUGHT

197. The evidence in this proceeding makes a compelling case for the proposed rate increase. The proposed rate increase reflects BC Hydro's continued fiscal discipline, balanced against investment in the system. The additional funding will serve customers well, bolstering reliability and BC Hydro's ability to withstand a growing array of external challenges and threats. BC Hydro respectfully submits that the requested orders²⁷² are just and reasonable and should be approved as sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated:	<u>March 18, 2021</u>	<u><i>[original signed by Matthew Ghikas]</i></u> Matthew Ghikas, Counsel for BC Hydro
Dated:	<u>March 18, 2021</u>	<u><i>[original signed by Christopher Bystrom]</i></u> Christopher Bystrom, Counsel for BC Hydro
Dated:	<u>March 18, 2021</u>	<u><i>[original signed by Tariq Ahmed]</i></u> Tariq Ahmed, Counsel for BC Hydro

²⁷² Exhibit B-2-7, Updated Draft Order Sought. The initial orders sought are summarized in Section 1.4 of the Application. As discussed in Part Seven of these Final Submissions, BC Hydro amended its request in Exhibit B-5 (cover letter) to also seek a regulatory account to capture variances between the placeholder net income used in the determination of rates and what flows from BC Hydro's upcoming cost of capital proceeding. As discussed in Part Eleven of these Final Submissions, BC Hydro also amended its requests in Exhibit B-9, BC Hydro's Response to Undertaking No. 19 to include depreciation rates for its EV charging stations.

BRITISH COLUMBIA UTILITIES COMMISSION

IN THE MATTER OF

THE *UTILITIES COMMISSION ACT*, R.S.B.C. 1996, CHAPTER 473

AND

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

FISCAL 2022 REVENUE REQUIREMENTS APPLICATION

BOOK OF AUTHORITIES

FOR FINAL SUBMISSIONS OF

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

FASKEN MARTINEAU DuMOULIN LLP

MATTHEW GHIKAS, CHRISTOPHER BYSTROM and TARIQ AHMED

CONTENTS

CASELAW	TAB #
<i>Attorney General of the Province of Quebec v. Expropriation Tribunal</i> , [1986] 1 S.C.R. 732	1
<i>Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner</i> , 2018 BCCA 210	2
<i>British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)</i> , 2003 BCCA 436	3
<i>British Columbia Hydro and Power Authority v. British Columbia (Utilities Commission)</i> (1996), 20 B.C.L.R. (3d) 106 (available on CanLII) (C.A.)	4
<i>Brosseau v. Alberta Securities Commission</i> , [1989] 1 S.C.R. 301	5
<i>CanadianOxy Chemicals Ltd. v. Canada (Attorney General)</i> , [1999] 1 S.C.R. 743	6
<i>Chesterman Farm Equipment Inc. v. CNH Canada Ltd.</i> , 2016 ONSC 698	7
<i>Gustavson Drilling (1964) Ltd. v. Minister of National Revenue</i> , [1977] 1 S.C.R. 271	8
<i>Krangle (Guardian ad litem of) v. Brisco</i> , 2000 BCCA 147	9
<i>Rizzo & Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27	10
SECONDARY SOURCES	TAB #
Ruth Sullivan, <i>Sullivan on the Construction of Statutes</i> , 6th ed. (Markham, ON: LexisNexis Canada, 2014)	11

TAB 1

Attorney General of the Province of Quebec
Appellant;

and

**Expropriation Tribunal, Judge Léon Nichols
and Laurent Cantin** *Respondents;*

and

Alfred Francœur and Robert Bernier *Mis en
cause.*

File No.: 18359.

1986: February 4; 1986: June 12.

Present: Beetz, Chouinard, Lamer, Le Dain and
La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
QUEBEC

Expropriation — Crown — Discontinuance — Temporal application of the law — Discontinuance pursuant to rules of Code of Civil Procedure though Expropriation Act had come into effect — Whether new Expropriation Act applicable to expropriation by Crown before it came into effect — No vested right in unilateral discontinuance — Expropriation Act, R.S.Q. 1977, c. E-24, s. 55 (formerly Expropriation Act, 1973 (Que.), c. 38, s. 54) — Code of Civil Procedure, art. 797.

In 1970 the Government of Quebec expropriated certain immovables pursuant to the provisions of the *Code of Civil Procedure* then in effect. Three years later, the rules of the Code on expropriation were replaced by a new system applicable to all expropriations authorized by the statutes of Quebec. After the *Expropriation Act* came into effect, the government unilaterally discontinued in reliance on art. 797 *C.C.P.* Under s. 55 of the *Expropriation Act* the expropriating party can always discontinue, but it can do so only with the authorization of the Expropriation Tribunal. Appellant was invited to appear with the expropriated parties before the Expropriation Tribunal to determine the expropriation indemnities and raised an objection to the jurisdiction of the Tribunal, alleging that, as the Minister had discontinued, strictly speaking there was no longer any expropriation. The Tribunal held that s. 55 was applicable and dismissed the objection. Appellant then applied to the Superior Court for a writ of evocation against this decision. The Superior Court allowed the application but its judgment was reversed by the Court of Appeal. The appeal at bar was to determine whether the govern-

Procureur général de la province de Québec
Appelant;

et

**Tribunal de l'expropriation, M. le juge Léon
Nichols et Laurent Cantin** *Intimés;*

et

Alfred Francœur et Robert Bernier *Mis en
cause.*

N° du greffe: 18359.

1986: 4 février; 1986: 12 juin.

Présents: Les juges Beetz, Chouinard, Lamer, Le Dain
et La Forest.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Expropriation — Couronne — Désistement — Application de la loi dans le temps — Désistement selon les règles du Code de procédure civile malgré l'entrée en vigueur de la Loi de l'expropriation — La nouvelle loi sur l'expropriation est-elle applicable à une expropriation faite avant son entrée en vigueur par la Couronne? — Aucun droit acquis au désistement unilatéral — Loi sur l'expropriation, L.R.Q. 1977, chap. E-24, art. 55 (auparavant Loi de l'expropriation, 1973 (Qué.), chap. 38, art. 54) — Code de procédure civile, art. 797.

En 1970, le gouvernement du Québec a exproprié certains immeubles conformément aux dispositions du *Code de procédure civile* applicables à l'époque. Trois ans plus tard, les règles du Code relatives à l'expropriation ont été remplacées par un nouveau régime applicable à toutes les expropriations permises par les lois du Québec. Après l'entrée en vigueur de la *Loi de l'expropriation* (maintenant la *Loi sur l'expropriation*), le gouvernement s'est désisté unilatéralement en s'appuyant sur l'art. 797 *C.p.c.* En vertu de l'art. 55 de la *Loi sur l'expropriation*, l'expropriant peut toujours se désister mais il ne peut le faire désormais qu'avec l'autorisation du Tribunal de l'expropriation. Convoqué avec les expropriés devant ce Tribunal afin de fixer les indemnités pour l'expropriation, l'appelant a soulevé une objection à la compétence du Tribunal alléguant que, compte tenu du désistement, il n'y avait plus à proprement parler d'expropriation. Le Tribunal a statué que l'art. 55 était applicable et a rejeté l'objection. L'appelant s'est alors adressé à la Cour supérieure pour obtenir la délivrance d'un bref d'évocation à l'encontre de cette décision. La Cour supérieure a accueilli la requête mais la

ment could in 1979 file a unilateral discontinuance in the registry office in respect of the expropriations made in 1970, or whether to do so it had to obtain the Expropriation Tribunal's authorization.

Held: The appeal should be dismissed.

Section 55 of the *Expropriation Act* applies to an expropriation begun by the Crown before the new statute came into effect. Though s. 55 does not expressly mention the Crown, such a reference was not necessary despite s. 42 of the *Interpretation Act* since, in view of s. 88 of the *Expropriation Act* of 1973, the Act was clearly applicable as a whole to expropriations by the Crown. Section 88 provided that the new statute replaced arts. 773 to 797 *C.C.P.* At the time, arts. 791 to 797 *C.C.P.* governed expropriations by the Crown. Thus, the Crown in right of the province itself undertook to comply with the provisions of the new statute.

The right which the Crown had to unilaterally discontinue, and which it did not exercise at the time the new statute came into effect, is not a vested right. A vested right is one which exists and produces effects. That does not include a right which could have been exercised but was not, and which is no longer available under the law.

Finally, the case at bar is not one of retroactive legislation but one in which the statute applies immediately. The application of s. 55 to expropriations made before it came into effect does not give it retroactive effect. Section 55 is only intended to remove for the future the right to file a unilateral discontinuance previously enjoyed by appellant. That section has no effect on the right in so far as it was exercised before s. 55 came into effect.

Cases Cited

Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271; *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47; *Bellechasse Hospital v. Pilotte*, [1975] 2 S.C.R. 454, applied; *Procureur général du Québec v. Archambault*, C.S. Bedford, No. 455-05-000105-78, June 13, 1978, referred to.

Statutes and Regulations Cited

Code of Civil Procedure, 1965 (Que.), c. 80, arts. 791 to 797 [rep. 1973 (Que.), c. 38].

Cour d'appel a infirmé le jugement. Le présent pourvoi vise à déterminer si le gouvernement pouvait en 1979 produire au bureau d'enregistrement un désistement unilatéral relatif à des expropriations faites en 1970, ou s'il devait, à cette fin, obtenir l'autorisation du Tribunal de l'expropriation.

Arrêt: Le pourvoi est rejeté.

L'article 55 de la *Loi sur l'expropriation* s'applique à une expropriation faite par la Couronne commencée avant l'entrée en vigueur de la nouvelle loi. Même si l'art. 55 ne mentionne pas expressément la Couronne, cette mention n'était pas nécessaire malgré l'art. 42 de la *Loi d'interprétation* puisque, compte tenu de l'art. 88 de la *Loi de l'expropriation*, cette dernière était clairement applicable dans son ensemble aux expropriations faites par la Couronne. L'article 88 prévoyait en effet que la nouvelle loi remplaçait les art. 773 à 797 *C.p.c.* Or, les art. 791 à 797 *C.p.c.* réglaient à l'époque les expropriations faites par la Couronne. La Couronne provinciale s'est donc elle-même soumise aux dispositions de la nouvelle loi.

Le droit qu'avait la Couronne de se désister unilatéralement et qu'elle n'avait pas exercé au moment de l'entrée en vigueur de la nouvelle loi ne constitue pas un droit acquis. Un droit acquis est un droit qui est né et qui produit des effets. Cela ne comprend pas un droit dont on aurait pu se prévaloir mais dont on ne s'est pas prévalu et que la loi n'accorde plus.

Finalement, il ne s'agit pas en l'espèce d'un cas de rétroactivité de la loi mais d'un cas d'application immédiate. L'application de l'art. 55 à des expropriations antérieures à son entrée en vigueur ne lui donne pas un effet rétroactif. L'article 55 ne vise qu'à retirer pour l'avenir le droit de produire un désistement unilatéral dont l'appelant pouvait se prévaloir auparavant. Cet article n'a aucune incidence sur le droit de produire un désistement unilatéral dans la mesure où il a été exercé avant l'entrée en vigueur de l'art. 55.

Jurisprudence

Arrêts appliqués: *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271; *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] R.C.S. 47; *Hôpital Bellechasse c. Pilotte*, [1975] 2 R.C.S. 454; arrêt mentionné: *Procureur général du Québec c. Archambault*, C.S. Bedford, n° 455-05-000105-78, 13 juin 1978.

Lois et règlements cités

Code de procédure civile, 1965 (Qué.), chap. 80, art. 791 à 797 [abr. 1973 (Qué.), chap. 38].

1986 CanLI 13 (SCC)

Expropriation Act, 1973 (Que.), c. 38, ss. 34, 54, 88, 148 [repl. 1973 (Que.), c. 39, s. 5].

Expropriation Act, R.S.Q. 1977, c. E-24, s. 55 [formerly s. 54 of the *Expropriation Act*, 1973 (Que.), c. 38].

Interpretation Act, R.S.Q., c. I-16, ss. 41, 42, 49, 50.

Authors Cited

Baudouin, L. *Les aspects généraux du droit public dans la province de Québec*, Paris, Dalloz, 1965.

Côté, P. A. *The Interpretation of Legislation in Canada*, Cowansville, Yvon Blais Inc., 1984.

APPEAL from a judgment of the Quebec Court of Appeal, [1983] R.D.J. 432, reversing a judgment of the Superior Court authorizing a writ of evocation to be issued. Appeal dismissed.

Marcus Spivock, for the appellant.

Marcel Cinq-Mars, Q.C., and *André Durocher*, for the respondents.

English version of the judgment of the Court was delivered by

CHOUINARD J.—This appeal raises a question of temporal application of the law.

It concerns two judgments of the Court of Appeal relating to the mis en cause expropriated parties.

In 1973 the legislature adopted new expropriation rules applicable to all expropriations authorized by the statutes of Quebec: the *Expropriation Act*, 1973 (Que.), c. 38.

However, the expropriation of the immovables of the mis en cause dates back to 1970. It was done pursuant to arts. 791 to 797 *C.C.P.*, 1965 (Que.), c. 80, which established special rules for expropriations by the Crown. Under art. 792, depositing a plan and description of the property to be expropriated with the registry office made the government owner of the right "subject only to the obligation of paying the indemnity awarded", and possession of the property vested immediately in the Minister.

Further, art. 797 provided:

797. At any time before the payment of the indemnity, the Minister may declare in writing that the expro-

Loi d'interprétation, L.R.Q., chap. I-16, art. 41, 42, 49, 50.

Loi de l'expropriation, 1973 (Qué.), chap. 38, art. 34, 54, 88, 148 [repl. 1973 (Qué.), chap. 39, art. 5].

a *Loi sur l'expropriation*, L.R.Q. 1977, chap. E-24, art. 55 [auparavant art. 54 de la *Loi de l'expropriation*, 1973 (Qué.), chap. 38].

Doctrine citée

b Baudouin, L. *Les aspects généraux du droit public dans la province de Québec*, Paris, Dalloz, 1965.

Côté, P. A. *Interprétation des lois*, Cowansville, Yvon Blais Inc., 1982.

POURVOI contre un arrêt de la Cour d'appel du Québec, [1983] R.D.J. 432, qui a infirmé un jugement de la Cour supérieure, qui avait autorisé la délivrance d'un bref d'évocation. Pourvoi rejeté.

Marcus Spivock, pour l'appellant.

d *Marcel Cinq-Mars, c.r.*, et *André Durocher*, pour les intimés.

Le jugement de la Cour a été rendu par

e LE JUGE CHOUINARD—Ce pourvoi soulève une question d'application de la loi dans le temps.

Deux arrêts de la Cour d'appel relatifs aux expropriés mis en cause en font l'objet.

f En 1973, la législature adoptait un nouveau régime d'expropriation applicable à toutes les expropriations permises par les lois du Québec. C'était la *Loi de l'expropriation*, 1973 (Qué.), chap. 38.

h Cependant, l'expropriation des immeubles des mis en cause remonte à 1970. Elle a été faite en vertu des art. 791 à 797 *C.p.c.*, 1965 (Qué.), chap. 80, qui prévoyaient un régime particulier pour les expropriations par la Couronne. Suivant l'art. 792, le dépôt au bureau d'enregistrement d'un plan et d'une description du bien à exproprier rendait le gouvernement titulaire du droit «sous la seule obligation de payer l'indemnité adjugée» et la possession du bien était immédiatement dévolue au ministre.

j Par ailleurs, l'art. 797 disposait:

797. En tout temps avant le paiement de l'indemnité, le ministre peut déclarer par écrit que l'immeuble expro-

riated immovable is no longer required in whole or in part, and from the deposit of such declaration at the registry office, the immovable which is not required reverts to the expropriated party, and the indemnity for the expropriation must be fixed or revised accordingly.

In 1979 the Minister in fact deposited such a declaration in respect of the immovables of each of the mis en cause.

Under the new Act the expropriating party can always discontinue. However, it must do so before paying the provisional indemnity required in order to take possession, and it can do so only with the authorization of the Expropriation Tribunal. Section 55 of the *Expropriation Act*, R.S.Q. 1977, c. E-24, in effect at the time in question, read as follows:

55. The expropriating party may, with the authorization of the tribunal, totally or partially discontinue his suit at any time before payment of the provisional indemnity of expropriation. The order of the tribunal to that effect must be registered by deposit in the registry office where the notice of expropriation had been registered. Subject to the registration of that order, the discontinuance is retroactive from the date of registration of the notice of expropriation.

In the case of partial discontinuance, the tribunal shall fix the amount of the indemnity to which the expropriated party is entitled by taking the discontinuance into account and grant damages, if need be, for the portion of which the expropriating party has discontinued his suit.

The specific question raised by this appeal is whether the government could, as it did in 1979, file a unilateral discontinuance in the registry office in respect of the expropriations made in 1970, or whether to do so it had to obtain the Tribunal's authorization.

Appellant, who was invited to appear with the expropriated parties before the Expropriation Tribunal to determine the indemnities, raised an objection to the jurisdiction of the Tribunal. The latter concluded that s. 55 was applicable, dismissed the objection and set a date to hear the matter on the merits.

Appellant then applied to the Superior Court for a writ of evocation.

prié n'est plus requis en tout ou en partie, et à compter du dépôt de cette déclaration au bureau d'enregistrement, l'immeuble non requis redevient la propriété de l'exproprié, et l'indemnité d'expropriation doit être fixée ou révisée en conséquence.

En 1979, le ministre a effectivement déposé une telle déclaration relativement aux immeubles de chacun des mis en cause.

En vertu de la nouvelle loi l'expropriant peut toujours se désister. Cependant il doit le faire avant de payer l'indemnité provisionnelle requise pour prendre possession et il ne peut le faire qu'avec l'autorisation du Tribunal de l'expropriation. L'article 55 de la *Loi sur l'expropriation*, L.R.Q. 1977, chap. E-24, en vigueur à l'époque pertinente, était ainsi rédigé:

55. L'expropriant peut, avec l'autorisation du tribunal, se désister totalement ou partiellement en tout temps avant paiement de l'indemnité provisionnelle d'expropriation. L'ordonnance du tribunal à cet effet doit être enregistrée, par dépôt, au bureau d'enregistrement où l'avis d'expropriation avait été enregistré. Sous réserve de l'enregistrement de cette ordonnance, le désistement rétroagit à la date de l'enregistrement de l'avis d'expropriation.

Au cas de désistement partiel, le tribunal fixe le montant de l'indemnité auquel l'exproprié a droit en tenant compte du désistement et accorde des dommages, s'il y a lieu, pour la partie dont l'expropriant s'est désisté.

La question particulière que pose ce pourvoi est de savoir si le gouvernement pouvait, comme il l'a fait en 1979, produire au bureau d'enregistrement un désistement unilatéral relatif à des expropriations faites en 1970, ou s'il devait, à cette fin, obtenir l'autorisation du Tribunal.

L'appelant, convoqué avec les expropriés devant le Tribunal de l'expropriation afin de fixer les indemnités, souleva une objection à la compétence du Tribunal. Ce dernier, estimant que l'art. 55 était applicable, a rejeté l'objection et a fixé une date pour l'audition des affaires au fond.

L'appelant s'adressa alors à la Cour supérieure en vue d'obtenir l'émission d'un bref d'évocation.

Essentially, appellant alleged that the Expropriation Tribunal had no jurisdiction to determine the expropriation indemnity because, as the Minister had discontinued, strictly speaking there was no longer any expropriation. Appellant further alleged that the Tribunal erred in deciding that the deed of reconveyance was void; in not taking into account the fact that the replacement of the statute, unlike a repeal, was intended to preserve the rights of the parties; in ignoring the presumption that statutes do not have retroactive effect; in disregarding the fact that this was a question of law, not a question of procedure; and finally, in not following a judgment of the Superior Court, *Procureur général du Québec v. Archambault*, C.S. (District of Bedford), No. 455-05-000105-78, June 13, 1978, in which Fortin J. held that, like any other statute, the *Expropriation Act* did not have retroactive effect.

The Superior Court judge found in favour of appellant and authorized a writ of evocation to be issued. He based this finding on s. 42 of the *Interpretation Act*, R.S.Q., c. I-16, and on the transitional provision of s. 148 of the *Expropriation Act* of 1973, *supra*, as amended by 1973 (Que.), c. 39, s. 5.

The first paragraph of s. 42 of the *Interpretation Act* provides:

42. No statute shall affect the rights of the Crown, unless they are specially included.

The relevant portions of s. 148 of the *Expropriation Act* of 1973 read as follows:

148. Expropriations begun before the bodies mentioned in section 147 shall be continued, from September 26 1973, before the Superior Court or, as the case may be, before the tribunal, in accordance with this act, to the extent that it is applicable to them.

The expropriated party may in respect of any such expropriation apply to the tribunal in accordance with article 793 of the Code of Civil Procedure as if such article had not been replaced.

The Superior Court judge wrote:

[TRANSLATION] The Court must determine whether the Crown had special rights here not enjoyed by other expropriating parties, or to use the phrase of Louis-

L'appelant alléguait pour l'essentiel que le Tribunal de l'expropriation n'avait pas compétence pour fixer l'indemnité d'expropriation parce que le ministre s'étant désisté, il n'y avait plus à proprement parler d'expropriation. L'appelant alléguait aussi que le Tribunal avait erré en décidant que l'acte de rétrocession était sans effet; en ne considérant pas que le remplacement de la loi, contrairement à l'abrogation, visait à conserver les droits des parties; en ne tenant pas compte de la présomption de non rétroactivité des lois; en ne faisant pas cas du fait qu'il s'agissait d'une question de droit par opposition à de la procédure et enfin, en ne se conformant pas à un jugement de la Cour supérieure, *Procureur général du Québec c. Archambault*, C.S. (District de Bedford), n° 455-05-000105-78, 13 juin 1978, dans lequel le juge Fortin décidait que la *Loi de l'expropriation*, comme toutes les autres lois, n'avait pas d'effet rétroactif.

Le juge de la Cour supérieure a donné raison à l'appelant et a autorisé l'émission d'un bref d'évocation. Il s'est fondé sur l'art. 42 de la *Loi d'interprétation*, L.R.Q., chap. I-16 et sur la disposition transitoire de l'art. 148 de la *Loi de l'expropriation*, précitée, modifiée par 1973 (Qué.), chap. 39, art. 5.

Le premier alinéa de l'art. 42 de la *Loi d'interprétation* dispose:

42. Nulle loi n'a d'effet sur les droits de la couronne, à moins qu'ils n'y soient expressément compris.

Les parties pertinentes de l'art. 148 de la *Loi de l'expropriation* sont ainsi rédigées:

148. Les expropriations commencées devant les organismes visés à l'article 147 sont continuées, à compter du 26 septembre 1973, devant la Cour supérieure ou, suivant le cas, devant le tribunal, conformément aux dispositions de la présente loi pour autant qu'elles leur sont applicables.

L'exproprié peut, à l'égard de toute semblable expropriation, s'adresser au tribunal conformément à l'article 793 du Code de procédure civile comme si cet article n'avait pas été remplacé.

Le juge de la Cour supérieure écrit:

Il faut rechercher si la couronne avait ici des droits spéciaux que n'avaient pas les autres expropriants, ou pour employer l'expression de Louis-Philippe Pigeon

Philippe Pigeon [*Rédaction et interprétation des lois*, Québec, Éditeur officiel du Québec, 1965, p. 31], whether it enjoyed a special status.

Article 797 is to be found in Section VI, titled "Expropriation by the Crown". The actual wording of art. 797 makes it clear that the Crown enjoys a special status, which may be exercised by the Minister responsible for the expropriation. No other similar article gives such a right to any expropriating party but the Crown.

Accordingly, when the provincial government deposited the notice of expropriation in 1970, art. 797 gave it, and it alone, the right to subsequently discontinue the expropriation by a unilateral act.

Section 55 of the Expropriation Act requires the expropriating party to obtain the Tribunal's authorization for discontinuing an expropriation. If that section applied to an expropriation begun by the Crown before the new statute came into effect, a right of the Crown would be infringed without any express provision. Section 42 of the Interpretation Act does not permit such a construction. The Court finds no specific indication in s. 148 that the new rule will henceforth be applicable to the Crown. At page 32 of his text, Louis-Philippe Pigeon writes: "When the rule applies, any intention to depart from it must be expressly stated to be applicable to Her Majesty, by referring to her specifically".

The Court accordingly concludes, taking the allegations of the motion as proven, that the Expropriation Tribunal has no jurisdiction to set an indemnity for an expropriation by the Crown when the latter has discontinued the expropriation under the right conferred on it by art. 797 C.C.P.

In a unanimous judgment, [1983] R.D.J. 432, the Court of Appeal reversed the judgment of the Superior Court and dismissed the motion in evocation. The Court of Appeal considered that s. 55 of the *Expropriation Act* was applicable to the Crown, which had itself undertaken to comply with the Act. The only question was whether the government had a vested right in the unilateral discontinuance authorized by art. 797 C.C.P., and so whether the discontinuance was simply a matter of procedure as opposed to a substantive right. Jacques J.A. wrote for the Court at p. 434:

[TRANSLATION] A discontinuance before judgment, whether in an expropriation proceeding or otherwise, is a relinquishment of the exercise of a right but it does not entail relinquishing the right itself. Its effect is to return matters to the state they were in before the action. It is

[*Rédaction et interprétation des lois*, Québec, Éditeur officiel du Québec, 1965, p. 31], si elle bénéficiait d'un régime spécial.

L'article 797 se trouvait dans la section VI intitulée "De l'expropriation par la couronne. Le texte même de l'article 797 fait bien voir que la couronne bénéficie d'un régime spécial. C'est le ministre chargé de l'expropriation qui peut l'exercer. Aucun autre article semblable n'accorde un tel droit à l'expropriant qui n'est pas la couronne.

Ainsi donc, lorsque le gouvernement provincial a déposé l'avis d'expropriation en 1970, l'article 797 lui donnait le droit, et à lui seul, de renoncer subséquemment à l'expropriation, par un acte unilatéral.

L'article 55 de la Loi de l'Expropriation oblige l'expropriant à obtenir l'autorisation du tribunal pour se désister d'une expropriation. Si cet article s'appliquait à une expropriation par la couronne commencée avant l'entrée en vigueur de la loi nouvelle on porterait atteinte à un droit de la couronne et sans le dire expressément. L'article 42 de la Loi d'Interprétation ne le permet pas. La Cour ne retrouve pas dans l'article 148 l'expression formelle que la nouvelle règle sera dès lors applicable à la couronne. Louis-Philippe Pigeon écrit à la page 32 de son ouvrage: «Lorsque la règle s'applique, il faut, pour y déroger, exprimer formellement l'intention de rendre la règle applicable à sa Majesté en la nommant».

La Cour en vient donc à la conclusion, en tenant pour avérées les allégations de la requête, que le Tribunal de l'Expropriation n'a pas juridiction pour déterminer une indemnité d'expropriation par la couronne qui a renoncé à l'expropriation en vertu du droit à elle reconnu par l'art. 797 C.P.

Par son arrêt unanime, [1983] R.D.J. 432, la Cour d'appel a infirmé le jugement de la Cour supérieure et rejeté la requête en évocation. La Cour d'appel fut d'avis que l'art. 55 de la *Loi sur l'expropriation* était applicable à la Couronne qui s'y était elle-même soumise. La seule question était de savoir si le gouvernement avait un droit acquis au désistement unilatéral autorisé par l'art. 797 C.p.c., et partant, de savoir si le désistement était une simple procédure par opposition à un droit substantif. Au nom de la Cour le juge Jacques a écrit à la p. 434:

Le désistement avant jugement, qu'il s'agisse d'expropriation ou non, est l'abandon de l'exercice d'un droit sans cependant que cela comporte l'abandon du droit lui-même. Son effet est de remettre les choses dans l'état qu'elles étaient avant la demande. Il fait partie de

part of the procedure governing the exercise of rights. It is not a right which exists independently of the proceedings used to exercise a right, such as the right to expropriate itself, or any other right of action.

A discontinuance is therefore simply a matter of procedure, not a substantive right.

The new Act regulates the way in which the plaintiff, or the expropriating party, may use this procedure. It requires certain formalities to be complied with to prevent the injustices which may sometimes result from discontinuance.

As it is now well established (Pigeon L.-P., *Rédaction et interprétation des lois*, Québec, 1965, p. 49) that a new rule of procedure applies to cases pending when it comes into effect, it follows that the discontinuance which the Attorney General of the province wished to make had to be authorized by the Expropriation Tribunal pursuant to s. 55.

From the factums and arguments of the parties, it appears that in order to dispose of this appeal the Court must consider the following four points, which in my opinion cover all the principal arguments made by appellant and respondents:

- (1)—whether the *Expropriation Act*, and in particular s. 55, applies to the Crown;
- (2)—the presumption that vested rights may not be adversely affected;
- (3)—the presumption against retroactive legislation;
- (4)—the finding by the Expropriation Tribunal that the 1979 deed of reconveyance is invalid because it is contrary to the provisions of s. 55.

1—Applicability of the *Expropriation Act*, in Particular s. 55, to the Crown

The argument accepted by the Superior Court judge was based on s. 42 of the *Interpretation Act*, which provides that no statute shall affect the rights of the Crown unless they are specially included.

In the submission of the appellant, the Crown's right is a "right of ownership". Under art. 792 *C.C.P.*, merely depositing a plan and description made the Crown owner of the expropriated property. Under art. 797 *C.C.P.*, the Crown was entitled in its discretion to convey the property back

l'organisation de l'exercice des droits. Ce n'est pas un droit qui existe indépendamment des procédures utilisées pour faire valoir un droit, comme par exemple le droit à l'expropriation lui-même, ou tout autre droit d'action.

En conséquence, le désistement est une simple procédure et non un droit substantif.

La nouvelle loi règle l'usage que le demandeur, ou l'expropriant, peut faire de cette procédure. Elle exige certaines formalités pour empêcher les injustices qui peuvent parfois résulter du désistement.

Or, comme il est maintenant acquis (Pigeon L.-P., *Rédaction et interprétation des lois*, Québec, 1965, p. 49), qu'une nouvelle règle de procédure s'applique dès son entrée en vigueur aux causes pendantes, il s'ensuit que le désistement que voulait faire le Procureur général de la province devait être autorisé par le Tribunal de l'expropriation conformément à l'article 55.

À partir des mémoires et des plaidoiries des parties, il m'apparaît que pour disposer de ce pourvoi il faut considérer les quatre points suivants qui recouvrent, à mon avis, tous les principaux moyens qu'appelant et intimés ont mis de l'avant:

- 1)—L'applicabilité à la Couronne de la *Loi sur l'expropriation* et en particulier de son art. 55.
- 2)—La présomption voulant qu'on ne puisse porter atteinte aux droits acquis.
- 3)—La présomption à l'encontre de la rétroactivité des lois.
- 4)—La déclaration par le Tribunal de l'expropriation que l'acte de rétrocession de 1979 est sans effet parce qu'il va à l'encontre des dispositions de l'art. 55.

1—L'applicabilité à la Couronne de la *Loi sur l'expropriation* et en particulier de son art. 55

Le moyen retenu par le juge de la Cour supérieure est fondé sur l'art. 42 de la *Loi d'interprétation* qui porte que nulle loi n'a d'effet sur les droits de la Couronne à moins qu'ils n'y soient expressément compris.

Le droit de la Couronne serait, selon l'appelant, son «droit de propriété». Aux termes de l'art. 792 *C.p.c.* le simple dépôt du plan et de la description rendait la Couronne propriétaire du bien exproprié. La Couronne, en vertu de l'art. 797 *C.p.c.* avait le droit de rétrocéder le bien à sa guise à

to the expropriated party simply by registering a notice. If the Crown was under a duty to obtain authorization from the Tribunal, its "right of ownership" would be affected.

It is true that s. 55 of the *Expropriation Act* does not expressly mention the Crown, nor does s. 148.

In addition to this silence, appellant relied on the final words of the first paragraph of s. 148: "to the extent that it is applicable to them".

To weigh the merits of this argument more adequately, I again quote the paragraph in question:

148. Expropriations begun before the bodies mentioned in section 147 shall be continued, from September 26 1973, before the Superior Court or, as the case may be, before the tribunal, in accordance with this act, to the extent that it is applicable to them.

In appellant's submission the words in question clearly show that the legislator did not intend to alter existing rights. Appellant submitted that, in deciding whether the new statute is applicable to expropriations begun before it came into effect, this Court should consider the judgments which the Superior Court and the Expropriation Tribunal can make. If those judgments have an effect retroactive to the time when the new statute was not in effect, and have the consequence of denying rights and creating jurisdiction, the new statute cannot be applied.

Alternatively, s. 55 of the Act makes it a condition of jurisdiction that the discontinuance should be made before the expropriating party pays the provisional indemnity and so before it takes possession and acquires the right of ownership. Appellant submitted that the *Code of Civil Procedure* does not impose on the Crown an obligation to pay a provisional indemnity before taking possession. The Crown became owner immediately by filing the plan and description of the property to be expropriated. In strictly functional terms, therefore, appellant submitted, s. 55 cannot apply to an expropriation done by the Crown before the legislator passed the new statute.

l'exproprié par le simple enregistrement d'un avis. En assujettissant la Couronne à l'obligation d'obtenir l'autorisation du Tribunal, son «droit de propriété» serait affecté.

Il est vrai que l'art. 55 de la *Loi sur l'expropriation* ne mentionne pas expressément la Couronne non plus que l'art. 148.

Outre ce silence, l'appelant invoque les derniers mots du premier alinéa de l'art. 148: «pour autant qu'elles leur sont applicables».

Pour mieux évaluer cet argument je cite de nouveau tout l'alinéa:

148. Les expropriations commencées devant les organismes visés à l'article 147 sont continuées, à compter du 26 septembre 1973, devant la Cour supérieure ou, suivant le cas, devant le tribunal, conformément aux dispositions de la présente loi pour autant qu'elles leur sont applicables.

Les mots en question démontrent clairement, selon l'appelant, l'intention du législateur de ne pas affecter les droits. L'appelant soumet que pour décider si la nouvelle loi est applicable aux expropriations commencées avant qu'elle ne soit entrée en vigueur, il faut considérer les jugements que peuvent rendre la Cour supérieure et le Tribunal de l'expropriation. Si ces jugements rétroagissent au temps où la loi nouvelle n'était pas en vigueur et ont pour effet de nier des droits et de créer une juridiction, il ne peut être question d'appliquer la nouvelle loi.

Subsidiairement, l'art. 55 de la Loi pose comme condition juridictionnelle que le désistement soit fait avant que l'expropriant paie l'indemnité provisionnelle et par voie de conséquence avant qu'il prenne possession et acquiert le droit de propriété. Or, soumet l'appelant, le *Code de procédure civile* n'imposait pas à la Couronne l'obligation de payer une indemnité provisionnelle avant de prendre possession. La Couronne devenait propriétaire immédiatement en déposant le plan et la description du bien à exproprier. Au strict plan fonctionnel donc, suivant l'appelant, l'art. 55 ne peut s'appliquer à une expropriation faite par la Couronne avant que le législateur passe la nouvelle loi.

With respect, this reasoning does not appear to be persuasive. Since the Crown did not have to pay a provisional indemnity, merely a final indemnity, the condition imposed by s. 55 was not broken so long as the final indemnity had not been paid. I see no inconsistency in this which could make s. 55 impossible to apply. The same is true for possession. As the Crown proceeded validly under the provisions of the *Code of Civil Procedure* and was in possession, s. 55 can still be applied: the only result is that if the Crown was authorized to discontinue it would have to hand over possession as well as ownership.

Respondents gave the words "to the extent that it is applicable to them" a completely different meaning. It appears from reading the first paragraph of s. 148 that the powers in an expropriation proceeding are divided between the Tribunal and the Superior Court. This division differs from that under the *Code of Civil Procedure*. The way the matter proceeds is also dealt with differently. Respondents simply concluded:

[TRANSLATION] ... what s. 148 means is that the provisions of the new Act are immediately applicable and that an expropriation proceeding will be conducted in the Superior Court or before the Expropriation Tribunal depending on which one has jurisdiction over the stage in question.

Whatever the meaning of these words, and without deciding although I am inclined to think that respondents are correct, I do not believe that they are conclusive.

In my opinion what is conclusive is that the *Expropriation Act* of 1973 is clearly applicable as a whole to expropriations by the Crown.

Section 88 provides:

88. This act replaces Chapter Three of Title Two of Book Five of the Code of Civil Procedure, comprising articles 773 to 797.

Expropriation by the Crown is included in the articles replaced by the new Act.

Section 34 provides that the Act applies to all expropriations authorized by the laws of the Prov-

Avec égards, ce raisonnement ne me paraît pas concluant. Puisque la Couronne n'avait pas à payer d'indemnité provisionnelle mais seulement une indemnité finale, la condition posée par l'art. 55 ne se trouvait pas enfreinte tant que l'indemnité finale n'était pas payée. Je ne vois pas là une incompatibilité pouvant rendre l'art. 55 impossible à appliquer. Il en va de même en ce qui concerne la possession. La Couronne ayant procédé valablement en vertu des dispositions du *Code de procédure civile* et se trouvant en possession, l'art. 55 peut encore s'appliquer: la seule conséquence est que si la Couronne est autorisée à se désister elle devra remettre la possession comme aussi la propriété.

Les intimés donnent aux mots: «pour autant qu'elles leur sont applicables» un tout autre sens. À la lecture du premier alinéa de l'art. 148 il apparaît que les pouvoirs en matière d'expropriation sont partagés entre le Tribunal et la Cour supérieure. Or, ce partage diffère de celui qui existait en vertu du *Code de procédure civile*. La marche du dossier diffère aussi. De conclure simplement les intimés:

... ce que l'article 148 veut dire, c'est que les dispositions de la loi nouvelle sont immédiatement applicables et que l'instance en expropriation sera poursuivie devant la Cour supérieure ou devant le Tribunal de l'expropriation selon que c'est celui-ci ou celle-là qui a juridiction sur l'étape en question.

Quoi qu'il en soit du sens de ces mots, et sans en décider même si je suis porté à penser que ce sont les intimés qui ont raison, je ne crois pas qu'ils soient déterminants.

Ce qui est déterminant, à mon avis, c'est que la *Loi de l'expropriation* est clairement applicable dans son ensemble aux expropriations par la Couronne.

L'article 88 édicte:

88. La présente loi remplace le chapitre troisième du titre deuxième du livre cinquième du Code de procédure civile, comprenant les articles 773 à 797.

L'expropriation par la Couronne est comprise dans les articles que la nouvelle loi remplace.

L'article 34 édicte que la Loi régit toutes les expropriations permises par les lois du Québec.

ince of Quebec. These provisions are quite adequate and it was not in any way necessary, in order to comply with s. 42 of the *Interpretation Act*, to make a special reference to the Crown in s. 55 or s. 148.

I concur with Jacques J.A. of the Court of Appeal, who wrote at p. 434:

[TRANSLATION] It is thus clear that the Crown in right of the province itself undertook to comply with the expropriation procedure of the ordinary law, and that *inter alia* it undertook to be governed by the provisions of s. 55 of the Act.

Further, appellant did not argue that the new Act, including s. 55, does not apply to an expropriation begun after the Act had come into effect. That at least is what I understand when he writes: [TRANSLATION] "We do not maintain that for . . . an expropriation begun on April 1, 1976 the Crown should not follow the new Act". Rather, he argued that the new Act does not apply to expropriations begun before the Act was passed. For the reasons given above, I dismiss this argument in so far as it is based on s. 42 of the *Interpretation Act*. The fact that the Crown is not specifically mentioned in s. 55 and s. 148 should not have different effects depending on whether the expropriation was begun before or after the new Act came into effect.

2—Presumption that Vested Rights Not Affected

Appellant argued that the right which the government had under the *Code of Civil Procedure* to unilaterally discontinue was a vested right which could only be abolished by an express provision of the law.

In disposing of this argument, the Court of Appeal considered the question of whether the right was a substantive or merely a procedural one. The Court of Appeal concluded that the discontinuance was merely a matter of procedure. It held that since a rule of procedure applies to pending cases as soon as it comes into effect, the discontinuance had to be authorized by the Tribunal pursuant to s. 55.

Ces dispositions sont bien suffisantes et il n'était nullement nécessaire pour se conformer à l'art. 42 de la *Loi d'interprétation* de faire une mention spéciale de la Couronne à l'art. 55 ou à l'art. 148.

Je suis d'accord avec le juge Jacques de la Cour d'appel qui écrit, à la p. 434:

Donc, il est clair que la Couronne provinciale s'est elle-même soumise au régime d'expropriation de droit commun et qu'elle s'est, entre autres, soumise aux dispositions de l'article 55 de la loi.

D'ailleurs l'appellant ne prétend pas que la nouvelle loi, dont l'art. 55, ne s'applique pas à une expropriation commencée après que cette loi eut été mise en vigueur. C'est du moins ce que je crois comprendre lorsqu'il écrit: «Nous ne prétendons pas que pour [. . .] une expropriation commenc[ée] le 1^{er} avril 1976, la Couronne ne devrait pas suivre la nouvelle loi.» Il prétend plutôt que la nouvelle loi ne s'applique pas aux expropriations commencées avant que la Loi ait été passée. Pour les motifs exposés ci-dessus j'écarte cette prétention dans la mesure où elle est fondée sur l'art. 42 de la *Loi d'interprétation*. Le fait que la Couronne ne soit pas mentionnée spécifiquement à l'art. 55 et à l'art. 148 ne saurait avoir un effet différent suivant que l'expropriation a été commencée avant ou après l'entrée en vigueur de la nouvelle loi.

2—La présomption voulant qu'on ne puisse porter atteinte aux droits acquis

L'appellant plaide que le droit qu'avait le gouvernement en vertu du *Code de procédure civile* de se désister unilatéralement constituait un droit acquis auquel il ne peut être porté atteinte que par une disposition expresse de la loi.

Pour disposer de ce moyen la Cour d'appel a examiné la question de savoir s'il s'agissait d'un droit substantif ou d'une simple procédure. La Cour d'appel a estimé que le désistement était une simple procédure. Puisque, dit-elle, une règle de procédure s'applique dès son entrée en vigueur aux causes pendantes, le désistement devait être autorisé par le Tribunal conformément à l'art. 55.

With respect, I will examine this question differently because that is not the position taken by the respondents, in this Court at least. Respondents did not argue that the discontinuance was merely a matter of procedure as against a substantive right. Their submission stated:

[TRANSLATION] The Court of Appeal took the position that the discontinuance was merely a matter of procedure. Under the old law, the Crown had the right to discontinue if it saw fit to do so. This right was abolished by the new Act and, like any other expropriated party, the Crown must first obtain the authorization of the Expropriation Tribunal. We submit that this was more than merely a readjustment of procedure. It ceases to be a question of form when the Expropriation Tribunal can reject a discontinuance.

In the past the Crown had an unlimited right. That right is now subject to authorization being given. To the extent that the Tribunal can reject a discontinuance or allow it subject to conditions, the legislative amendment in our view ceases to be purely a matter of form.

In my opinion the right which the Crown had to unilaterally discontinue, and which it had not exercised at the time the new Act came into effect, is not a vested right.

A vested right is one which exists and produces effects. That does not include a right which could have been exercised but was not, and which is no longer available under the law. The courts and scholarly commentators distinguish between a vested right and what they call either a possibility or an option.

Respondents submitted:

[TRANSLATION] In 1970 the Crown acquired only the right to expropriate the land of the mis en cause. As regards the option which it then had to unilaterally discontinue its expropriation, nothing was done to exercise such a right: the option remained merely a possibility.

I consider that the judgment of this Court in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, supports their argument.

In that case a business wished to deduct from its income for tax purposes expenses which it had incurred earlier, at a time when they could be

Avec égards, j'aborderai cette question d'une façon différente parce que ce n'est pas la position prise par les intimés, du moins devant cette Cour. Les intimés n'ont pas prétendu que le désistement était une simple procédure par opposition à un droit substantif. On peut lire dans leur mémoire:

La Cour d'appel a pris la position que le désistement est une pure question de procédure. Sous la loi ancienne, la Couronne avait la faculté de se désister selon son bon vouloir. Ce privilège a été aboli par la loi nouvelle et la Couronne, comme tous les autres expropriants, doit rechercher préalablement l'autorisation du Tribunal de l'expropriation. Nous soumettons qu'il y a là davantage qu'un pur réaménagement de procédure. Ce n'est plus une question de forme quand le tribunal de l'expropriation peut refuser un désistement.

Dans le passé, la Couronne avait un droit illimité. Dorénavant, ce droit est astreint à une permission. Dans la mesure où le Tribunal peut refuser le désistement ou le permettre conditionnellement, cette modification législative cesse, à notre avis, d'être de pure forme.

À mon avis, le droit qu'avait la Couronne de se désister unilatéralement et qu'elle n'a pas exercé au moment de l'entrée en vigueur de la nouvelle loi ne constitue pas un droit acquis.

Un droit acquis est un droit qui est né et qui produit des effets. Cela ne comprend pas un droit dont on aurait pu se prévaloir mais dont on ne s'est pas prévalu et que la loi n'accorde plus. La jurisprudence et les auteurs distinguent entre un droit acquis et ce qu'ils appellent tantôt une expectative, tantôt une faculté.

Les intimés soumettent ceci:

En 1970, la Couronne avait acquis seulement le droit d'exproprier le terrain des mis en cause. Quant à la faculté qu'elle avait alors de se désister unilatéralement de son expropriation, ce droit n'a nullement été exercé: cette faculté n'étant qu'une simple expectative.

Je suis d'avis que l'arrêt de cette Cour *Gustavson Drilling (1964) Ltd. c. Ministre du Revenu national*, [1977] 1 R.C.S. 271, leur donne raison.

Dans cette affaire, une entreprise voulait déduire de ses revenus pour fins d'impôt des dépenses qu'elle avait encourues antérieurement, à

legally deducted. The amended legislation no longer allowed this.

Dickson J., as he then was, wrote for the majority at p. 282:

The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629, at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation.

Dickson J. went on, at pp. 282-83:

The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the Income Tax Acts of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years .

The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v. Minister of Lands*, [1895] A.C. 425, at p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] C.T.C. 490 (Exch.); *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (P.C.).

Applying these principles to the case before the Court, it follows that appellant had no vested right to a unilateral discontinuance. After 1970 and until the new Act came into effect, he could have unilaterally discontinued. At the time appellant wished to discontinue, he had to seek the Tribunal's authorization.

This interpretation of the new Act must still not give it a retroactive effect not expressly authorized by the Act itself, and this leads me to the third point.

une époque où la loi permettait de les déduire. La loi modifiée ne le permettait plus.

a Le juge Dickson, maintenant Juge en chef, écrit au nom de la majorité, à la p. 282:

b Selon la règle, une loi ne doit pas être interprétée de façon à porter atteinte aux droits existants relatifs aux personnes ou aux biens, sauf si le texte de cette loi exige une telle interprétation: *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*, [1933] R.C.S. 629, à la p. 638. La présomption selon laquelle une loi ne porte pas atteinte aux droits acquis à moins que la législature ait clairement manifesté l'intention contraire, s'applique *c* sans discrimination, que la loi ait une portée rétroactive ou qu'elle produise son effet dans l'avenir.

Le juge Dickson poursuit aux pp. 282 et 283:

d L'appelante fonde son argumentation sur le fait qu'elle possède un droit acquis et continu de déduire dans le calcul de son revenu les dépenses de forage et d'exploration engagées par elle, alors qu'il est clair que la *Loi de l'impôt sur le revenu* de 1960 et des années antérieures *e* n'accorde aucun droit à l'égard des années d'imposition 1965 et suivantes.

f Le simple droit de se prévaloir d'un texte législatif abrogé, dont jouissent les membres de la communauté ou une catégorie d'entre eux à la date de l'abrogation d'une loi, ne peut être considéré comme un droit acquis: *Abbott v. Minister of Lands*, [1895] A.C. 425, à la p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] C.T.C. 490 (Exch.); *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (P.C.).

h Appliquant ces principes à l'espèce il faut conclure que l'appellant n'avait pas de droit acquis au désistement unilatéral. À compter de 1970 et jusqu'à ce qu'entre en vigueur la nouvelle loi, il aurait pu se désister unilatéralement. Au moment où l'appellant a voulu se désister il devait obtenir *i* l'autorisation du tribunal.

Encore faut-il cependant que cette interprétation de la nouvelle loi ne consiste pas à lui donner un effet rétroactif que cette même loi n'autorise pas expressément. Ce qui m'amène au troisième point.

3—Presumption Against Retroactive Legislation

The presumption against retroactive legislation is stated as follows in *Gustavson Drilling, supra*, in which Dickson J. wrote at p. 279:

The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

Section 50 of the *Interpretation Act* reflects this principle:

50. No provision of law shall be declaratory or have a retroactive effect, by reason alone of its being enacted in the present tense.

A distinction must be made between the retroactivity of legislation and its immediate effect.

In *Les aspects généraux du droit public dans la province de Québec*, Paris, Dalloz, 1965, Louis Baudouin writes at p. 197:

[TRANSLATION] New legislation cannot be applied either to immediate effects already produced or to those which, though occurring over an extended period of time since the legal situation was created, yet occurred before the date the legislation came into effect. Allowing this would give a clear retroactive effect to the new legislation.

On the other hand, the new legislation will apply to future effects arising out of these legal situations, which have not yet occurred at the time it came into effect.

In *The Interpretation of Legislation in Canada*, (1984), Pierre-André Côté writes at pp. 132-33:

A statute operates in the present when it governs events occurring after its commencement and before its death. According to Roubier, *Le droit transitoire (conflit des lois dans le temps)*, 2d ed., Paris, Dalloz et Sirey, 1960, "immediate and prospective application of the statute should be the rule: from the day of its commencement, the new statute applies to all future effects of both pending and future legal relations".

3—La présomption à l'encontre de la rétroactivité des lois

La présomption à l'encontre de la rétroactivité des lois est exprimée de la façon suivante dans *Gustavson Drilling*, précité, où le juge Dickson écrit à la p. 279:

Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif.

L'article 50 de la *Loi d'interprétation* reflète ce principe.

50. Nulle disposition légale n'est déclaratoire ou n'a d'effet rétroactif pour la raison seule qu'elle est énoncée au présent du verbe.

Il faut distinguer entre la rétroactivité d'une loi et son application immédiate.

Dans *Les aspects généraux du droit public dans la province de Québec*, Paris, Dalloz, 1965, Louis Baudouin écrit à la p. 197:

La loi nouvelle ne peut s'appliquer ni aux effets instantanés déjà produits, ni à ceux qui, échelonnés dans le temps depuis la création de la situation juridique, se sont produits avant la date de la mise en vigueur. L'admettre serait donner à la loi nouvelle un effet rétroactif certain.

Par contre, la loi nouvelle saisira les effets à venir attachés à ces situations juridiques et qui ne se sont pas encore produits avant sa mise en vigueur.

Pierre-André Côté dans *Interprétation des lois* (1982), écrit aux pp. 144 et 145:

La loi agit dans le présent lorsqu'elle prétend régir les faits survenus entre son entrée en vigueur et son terme. Selon Roubier, *Le droit transitoire (conflit des lois dans le temps)*, 2^e éd., Paris, Dalloz et Sirey, 1960, note 27, p. 11, «l'effet immédiat de la loi doit être considéré comme la règle ordinaire: la loi nouvelle s'applique, dès sa promulgation, à tous les effets qui résultent dans l'avenir de rapports juridiques nés ou à naître.»

As a rule, a statute produces its effect in the present, governing events that take place between its commencement and its death. Saying that it produces its effect in the present and is of prospective application amounts to saying that it does not operate prior to its enactment, that is, that it is not retroactive. A second corollary is that the statute applying immediately in the present does not allow for the survival of previous legislation.

This principle is so obvious and self-explanatory that it rarely appears as such in the case law, but there are numerous examples of its application . . .

In *Gustavson Drilling, supra*, it was held that applying the new provisions of the *Income Tax Act* to the appellant in respect of expenses incurred before they came into effect was not giving them retroactive effect. Dickson J. wrote at pp. 279-80:

The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute.

Similarly, respondents submitted, s. 55 of the *Expropriation Act* is intended to remove for the future the right to file a unilateral discontinuance previously enjoyed by appellant. That section has no effect on the right in so far as it was exercised before s. 55 came into effect.

Respondents further cited ss. 41 and 49 of the *Interpretation Act*:

41. Every provision of a statute, whether such provision be mandatory, prohibitive or penal, shall be deemed to have for its object the remedying of some evil or the promotion of some good.

Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.

49. The law is ever commanding; and whatever be the tense of the verb or verbs contained in a provision, such provision shall be deemed to be in force at all times and under all circumstances to which it may apply.

En principe, la loi exerce son effet dans le présent, c'est-à-dire qu'elle exerce son empire sur le temps qui s'écoule entre son entrée en vigueur et son terme. Dire qu'elle exerce son effet dans le présent, que son effet est immédiat, c'est également admettre qu'en principe elle n'agit pas dans le passé, elle n'est pas rétroactive. Et dire que la loi nouvelle a un effet immédiatement, c'est également affirmer que, dans le présent, elle ne souffre pas, en principe, la survie de la loi antérieure.

Le principe de l'effet immédiat de la loi nouvelle est tellement évident, il va tellement de soi, qu'on le trouve rarement formulé en jurisprudence, bien que les cas de son application y soient légion.

Dans *Gustavson Drilling*, précité, il fut décidé que d'appliquer les nouvelles dispositions de la *Loi de l'impôt sur le revenu* à l'appelante relativement à des dépenses faites antérieurement à leur entrée en vigueur n'était pas leur donner un effet rétroactif. Le juge Dickson écrit aux pp. 279 et 280:

Pour autant que l'appelante soit concernée, cet article ne vise qu'à retirer pour l'avenir le droit de faire certaines déductions dont il était auparavant possible de tirer avantage; l'article n'a aucune incidence sur ce droit dans la mesure où il a été exercé à une date antérieure à l'adoption de la loi modificatrice.

De même, soutiennent les intimés, l'art. 55 de la *Loi sur l'expropriation* ne vise qu'à retirer pour l'avenir le droit de produire un désistement unilatéral dont l'appelant pouvait se prévaloir auparavant. Cet article n'a aucune incidence sur ce droit dans la mesure où il a été exercé avant l'entrée en vigueur de l'art. 55.

Les intimés invoquent en outre les art. 41 et 49 de la *Loi d'interprétation*:

41. Toute disposition d'une loi, qu'elle soit impérative, prohibitive ou pénale, est réputée avoir pour objet de remédier à quelque abus ou de procurer quelque avantage.

Une telle loi reçoit une interprétation large, libérale, qui assure l'accomplissement de son objet et l'exécution de ses prescriptions suivant leurs véritables sens, esprit et fin.

49. La loi parle toujours; et, quel que soit le temps du verbe employé dans une disposition, cette disposition est tenue pour être en vigueur à toutes les époques et dans toutes les circonstances où elle peut s'appliquer.

Respondents submitted that the purpose of the new Act was to abolish the extraordinary privilege of the Crown to discontinue unilaterally. They wrote:

[TRANSLATION] The abuse which the new Act remedies is the fact that the Crown will now no longer be able to unilaterally discontinue an expropriation. Conversely, the advantage it confers on the expropriated party is that the Expropriation Tribunal will be able to protect his interests by controlling the cases in which the Crown discontinues an expropriation.

Thus, respondents argued, the new Act takes effect immediately.

Respondents' position is supported *inter alia* by the following two judgments of this Court: *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] S.C.R. 47, and *Bellechasse Hospital v. Pilotte*, [1975] 2 S.C.R. 454.

Acme Village School involved s. 157 of the *Alberta School Act* of 1931 which stated that, except in June of each year, no notice terminating the employment of a teacher could be given by a school board without the prior approval of an inspector. It was held that this provision applied to a notice given after the new Act came into effect with respect to a contract of employment entered into before it.

In *Bellechasse Hospital*, a board of directors refused to renew the appointment of Dr. Pilotte as a member of the medical staff as of July 31, 1969. The Board was in compliance with internal regulations and private agreements concluded between the parties which expired on July 31, 1969. However, it had not acted in accordance with the new government Regulations adopted pursuant to the *Hospitals Act*, R.S.Q. 1964, c. 164, which became effective on April 1, 1969. It was held that the new Regulations applied to all contracts, even those entered into before the Regulations came into effect, that the hospital's decision was a breach of those Regulations and that Dr. Pilotte had a good cause of action for damages. De Grandpré J. wrote for the Court at pp. 460-61:

As Lajoie J.A. points out, the objective of the *Hospitals Act* and the Regulations is clearly to "unify and

La nouvelle loi, soutiennent les intimés, a voulu éteindre le privilège extraordinaire de la Couronne de se désister unilatéralement. Ils écrivent:

^a L'abus auquel la loi nouvelle remédie, c'est le fait que la Couronne ne peut plus dorénavant se désister unilatéralement d'une expropriation. Réciproquement, l'avantage qu'elle procure à l'exproprié c'est que le Tribunal de l'expropriation, en contrôlant les cas où la Couronne se désistera d'une expropriation, pourra protéger les intérêts de l'exproprié.

Aussi, selon les intimés, la nouvelle loi prend-elle effet immédiatement.

^c La position des intimés est appuyée entre autres par les deux arrêts suivants de cette Cour, *Acme Village School District (Board of Trustees of) v. Steele-Smith*, [1933] R.C.S. 47, et *Hôpital Bellechasse c. Pilotte*, [1975] 2 R.C.S. 454.

^d Dans *Acme Village School* était en cause l'art. 157 de la *School Act*, 1931, de l'Alberta portant que, sauf en juin de chaque année, aucun avis mettant fin à l'emploi d'un professeur ne pourrait être donné par une commission scolaire sans l'autorisation préalable d'un inspecteur. Il a été décidé que cette disposition s'appliquait à un avis donné après l'entrée en vigueur de la nouvelle loi à l'égard d'un contrat de travail conclu avant.

^e Dans l'affaire de l'*Hôpital Bellechasse*, le D^r Pilotte s'était vu refuser par le conseil d'administration le renouvellement de sa nomination comme membre du personnel médical à compter du 31 juillet 1969. Le conseil s'était conformé aux règlements internes et aux convention privées conclues entre les parties qui expiraient le 31 juillet 1969. Toutefois il ne s'était pas conformé aux nouveaux règlements du gouvernement adoptés en vertu de la *Loi des hôpitaux*, S.R.Q. 1964, chap. 164, et entrés en vigueur le 1^{er} avril 1969. Il fut décidé que les nouveaux règlements s'appliquaient à tous les contrats, même à ceux conclus antérieurement à l'entrée en vigueur des règlements, que la décision de l'hôpital violait ces règlements et que le recours en dommages du D^r Pilotte était bien fondé. Le juge de Grandpré écrit au nom de la Cour, aux pp. 460 et 461:

^j Comme le dit M. le Juge Lajoie, le but visé par la *Loi des hôpitaux* et par les règlements est clairement de

standardize organization, administration and operations of hospitals". That objective would not be attained if, after the Order in Council of April 1, 1969 came into effect, different dates were to apply to contractual relations between doctors and hospitals. On the contrary, after that date it was necessary, from the standpoint of discipline as much as of renewal of status, for a single, uniform rule to apply, namely that prescribed by the Regulations. Any other conclusion would necessarily result in recognizing the existence of variations which for an indefinite period would largely render inoperative the legislator's express decision to standardize this whole area of health services. This necessarily leads to two conclusions:

(1) after April 1, 1969 all suspension proceedings had to be in accordance with the provisions of the Regulations;

(2) also after that date, all contracts between doctors and hospitals were to be automatically extended to December 31, 1969, thus enabling the appointment procedure prescribed by the Regulations to be carried out.

I consider that as in *Gustavson Drilling, Acme Village School and Bellechasse Hospital* the case at bar is one in which the statute applies immediately and not retroactively and that s. 55 of the *Expropriation Act* required that, in order to discontinue, appellant should obtain the Tribunal's authorization.

4—Finding by Tribunal that 1979 Deed of Reconveyance is Invalid Because Contrary to Provisions of s. 55

Appellant raised a new ground in this Court. He objected particularly to the following passage from the Tribunal's decision:

[TRANSLATION] For all these reasons, the Tribunal concludes that the reconveyance deed filed with the Richelieu Registry Division at Sorel as No. 178745 and dated March 2, 1979 is invalid because it is contrary to the provisions of s. 55 of the *Expropriation Act*.

Appellant contended that the Tribunal lacked jurisdiction to rule on the validity of the registration of reconveyance notices, and that so long as these remained in the registry office the Tribunal had no jurisdiction to determine indemnities. It is true to say that the Tribunal's finding can have no

«uniformiser et normaliser l'organisation des hôpitaux, leur administration et leurs opérations». Ce but ne serait pas atteint si, à compter de l'entrée en vigueur de l'arrêté-en-conseil du 1^{er} avril 1969, des dates différentes devaient s'appliquer aux relations contractuelles entre les médecins et les hôpitaux. Au contraire, à compter de cette date, il fallait, tant au point de vue disciplinaire qu'au point de vue renouvellement de statut, qu'une seule et même règle s'applique, savoir celle prescrite par les règlements. Toute autre conclusion nous amènerait nécessairement à reconnaître l'existence de variantes qui, pour un temps indéfini, rendraient en partie inopérante la décision formelle du législateur de normaliser tout ce secteur de l'activité des services de santé. La conclusion nécessaire est donc double:

1. à compter du 1^{er} avril 1969, toutes les procédures en suspension doivent être conformes aux prescriptions des règlements;

2. à compter de cette même date, tous les contrats entre médecins et hôpitaux doivent être prolongés automatiquement jusqu'au 31 décembre 1969, permettant ainsi la mise en application de la procédure de nomination prescrite par les règlements.

Je suis d'avis que comme dans *Gustavson Drilling, Acme Village School et Hôpital Bellechasse* il s'agit en l'espèce d'un cas d'application immédiate et non pas rétroactive de la loi et que l'art. 55 de la *Loi sur l'expropriation* exigeait que l'appellant, pour se désister, obtienne l'autorisation du tribunal.

4—La déclaration par le Tribunal que l'Acte de rétrocession de 1979 est sans effet parce qu'il va à l'encontre des dispositions de l'art. 55

Devant cette Cour l'appellant a soulevé un nouveau moyen. Il s'en est pris de façon particulière au passage suivant de la décision du Tribunal:

Pour toutes ces raisons, le Tribunal conclut que l'acte de rétrocession, produit à la Division d'Enregistrement de Richelieu à Sorel sous le numéro 178745 et en date du 2 mars 1979, est sans effet parce qu'il va à l'encontre des dispositions de l'article 55 de la *Loi sur l'expropriation*.

L'appellant fait valoir que le Tribunal n'avait pas la compétence pour se prononcer sur la validité de l'enregistrement des avis de rétrocession et que tant que ceux-ci demeurent au bureau d'enregistrement, le Tribunal est sans compétence pour fixer des indemnités. Il est juste de dire que la

effect on registrations: that is not within its jurisdiction; but the Tribunal did not purport to exercise such jurisdiction. It did not direct that the deed should be struck out, and this will have to be done if necessary at the request of appellant or by an order of a competent tribunal. The passage cited above is only a means of expressing the finding of the Expropriation Tribunal. It simply held, correctly, that s. 55 was applicable to an expropriation dating from before it came into effect.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Roy, Poulin & Associés, Montréal.

Solicitors for the respondents: Martineau, Walker, Montréal.

déclaration du Tribunal ne peut avoir aucun effet sur les enregistrements. Cela n'est pas de sa compétence. Mais le Tribunal n'a pas prétendu exercer pareille compétence. Il n'a pas ordonné la radiation qui devra, le cas échéant, être effectuée soit à l'initiative de l'appellant, soit par ordonnance du tribunal compétent. Le passage précité n'est qu'une façon pour le Tribunal de l'expropriation de s'exprimer. Il a simplement décidé, avec raison, que l'art. 55 était applicable à une expropriation antérieure à son entrée en vigueur.

Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appellant: Roy, Poulin & Associés, Montréal.

Procureurs des intimés: Martineau, Walker, Montréal.

TAB 2

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aheer Transportation Ltd. v. Office of the
British Columbia Container Trucking
Commissioner,*
2018 BCCA 210

Date: 20180530
Docket: CA44623

Between:

**Aheer Transportation Ltd., Bestlink Transport Services Inc., Burton Delivery
Service Ltd., Gantry Trucking Ltd., Gur-ish Trucking Ltd., Indian River
Transport Ltd., Roadstar Transport Company Ltd., Sunlover Holding Co. Ltd.,
Triangle Transportation Ltd., and T S D Holding Inc.**

Appellants
(Petitioners)

And

**British Columbia Container Trucking Commissioner, The Attorney General of
British Columbia and Unifor Local Union No. VCTA**

Respondents
(Respondents)

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated June 30,
2017 (*Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking
Commissioner*, 2017 BCSC 1111, Vancouver Docket S161081).

Counsel for the Appellants Gantry Trucking
Ltd. and T S D Holding Inc.:

D. Gautam

Counsel for the Respondents British
Columbia Container Trucking Commissioner
and The Attorney General of British
Columbia:

K. Horsman, Q.C.
A.K. Harlinton

Counsel for the Respondent Unifor Local
Union No. VCTA

P.R. Shklanka

Place and Date of Hearing: Vancouver, British Columbia
March 1, 2018

Place and Date of Judgment: Vancouver, British Columbia
May 30, 2018

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Harris

Summary:

Two trucking companies appeal the decision that retroactive rates for truckers were authorized by the enabling legislation. Held: Appeal dismissed. Applying a contextual approach to the interpretation of statutes, the Act authorizes the regulation that imposes the retroactive rates.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] In February 2014, container truck drivers who provided services to the Port of Vancouver withdrew their services over ongoing disputes concerning their rates of remuneration. This walkout represented the third time in 15 years that the drivers had withdrawn their services. These work stoppages were economically disruptive in the drayage industry (the transportation of containerized cargo by trucking companies to and from an ocean port). As a result, both the provincial and federal governments engaged in extensive negotiations with industry to resolve the 2014 walkout and restore stability to the sector.

[2] The result of these negotiations was the creation of a 15-point joint action plan (the “Joint Action Plan”) in March 2014. The Joint Action Plan was designed to provide increased compensation for the truckers. On the basis of that plan, the truckers resumed work on March 27, 2014.

[3] A subsequent report in September 2014 recommended that a provincially regulated agency be established to, among other things, set remuneration and fuel surcharge rates for the drayage sector. In October 2014, the Government of British Columbia introduced legislation to establish a British Columbia Container Trucking Commissioner. Initial compensation rates for truckers would be set by regulation, but could later be amended and fixed by the Commissioner.

[4] The *Container Trucking Regulation*, B.C. Reg. 248/2014 came into effect on December 22, 2014, the same day as the *Container Trucking Act*, S.B.C. 2014, c. 28. The *Regulation* set trip rates with a starting date of April 3, 2014 and in the case of the increased fuel surcharge, March 27, 2014.

[5] This appeal concerns the legality of the initial rates set by the *Container Trucking Regulation* [the “*Regulation*”].

[6] The respondents say that these rates were intended to begin on the specified dates in order to meet the commitments of the Joint Action Plan, in reliance on which the truckers ended their 2014 walkout. The appellants say that for the rates to have that effect would offend the presumption against retroactivity.

[7] There is no doubt that the *Regulation* is intended to have retroactive effect. The question is whether the enabling legislation is sufficient to authorize this retroactive effect, or whether the presumption against retroactivity operates to invalidate the *Regulation* insofar as it purports to apply to a date prior to the effective date of the *Regulation*.

[8] In my opinion, this question must be answered by reading the statutory provisions in the context in which the legislation was enacted. This context includes the circumstances in which the legislation was passed, statements made in the Legislature as to the purpose of the retroactive elements of the legislative scheme, and the degree to which the *Container Trucking Act* and the *Regulation* form an integrated statutory scheme.

[9] For the reasons that follow, it is my opinion that having in mind these contextual factors, the *Container Trucking Act* authorizes the retroactive elements of the *Container Trucking Regulation*. Accordingly, I would dismiss the appeal.

Background to the Legislation

[10] The following overview provides the context for the enactment of the provincial *Container Trucking Act* and the *Regulation* in December 2014.

1999 Dispute

[11] In 1999, truck drivers, frustrated by low rates of compensation and dysfunctional operating practices that limited driver productivity, withdrew their services and Vancouver ports shut down between July 22 and August 23, 1999. The dispute ended following the implementation by Vancouver Port Authority (which is

now called Port Metro Vancouver) of a licensing system that required trucking companies to sign a memorandum of agreement (“MOA 1999”) in exchange for access to the port terminals.

[12] MOA 1999 provided for increased trip rates for independent owner-operators to be followed at a later date by the adoption of hourly rates.

[13] In response to the operational concerns, Port Metro Vancouver established a number of committees, including the Container Stakeholder Working Group, the Container Terminal Scheduling Committee, and the Empty Container Dynamics Study Committee, to address port inefficiencies with the goal of increasing the productivity of terminal and trucking operations.

[14] Despite the efforts to resolve the issues underlying the 1999 dispute, many of the problems persisted. Notwithstanding MOA 1999, most trucking companies reverted back to trip based rates for independent owner-operators within weeks to months of the agreement to move to hourly rates.

2005 Dispute

[15] Another dispute arose in 2005, resulting in approximately 1000 independent owner-operators and 200 company drivers withdrawing their services. The main grievances were wage undercutting and the industry’s lack of response to increased fuel costs.

[16] In an effort to resolve the dispute and the work stoppage that was resulting in hundreds of millions of dollars in losses to the economy and serious damage to the reputation of Vancouver’s ports, the provincial and federal governments jointly appointed Vince Ready, who, working with Peter Cameron as facilitators, released a new memorandum of agreement (“MOA 2005”) in July 2005.

[17] MOA 2005 reflected the truckers’ agreement to resume work on or before August 2, 2005, provided trucking companies would pay truckers at stipulated minimum per trip rates on their return to work, with a further schedule of rates to come into effect in 2006. These prescribed rates are referred to in the industry as

the “Ready Rates”. MOA 2005 also provided that truckers would be paid a one percent fuel surcharge if average fuel prices exceeded \$1.05 per litre in any quarter.

[18] The federal government subsequently issued *Order Amending the Order Authorizing Negotiations for the Settlement of the Dispute Causing the Extraordinary Disruption of the National Transportation System in Relation to Container Movements into and out of Certain Ports in British Columbia*, P.C. 2005-1365, (2005) C. Gaz. II, 1823, on August 4, 2005, directing Port Metro Vancouver to implement MOA 2005 as a condition of licensing trucking companies. Thereafter, a truck licensing system was established for a period of two years and drayage operations recommenced in Vancouver ports.

[19] In addition to these measures, the federal and provincial governments established a task force to provide recommendations aimed at avoiding future work stoppages. The federal government also undertook measures to ensure compliance with the minimum rate floor stipulated in MOA 2005, and in 2006, the Federal Cabinet enacted s. 31.1(2)(b) of the *Port Authorities Operation Regulation*, SOR/2000-55, enacted under *Canada Marine Act*, S.C. 1998, c. 10, which imposed a legal obligation on Port Metro Vancouver to ensure that the Ready Rates were complied with. In July 2007, the Federal Cabinet amended the *Port Authorities Operation Regulation* to make compliance with the minimum rates of remuneration a requirement for non-unionized companies using independent operators, as MOA 2005 was expiring in August of that year.

[20] Several other initiatives were also undertaken to address the concerns underlying the 2005 dispute. The provincial government established the Container Truck Dispute Resolution Program in 2007 to ensure compliance with the minimum rates; Port Metro Vancouver began working with the provincial government to improve enforcement of the licensing provisions; a moratorium on the issuance of new licenses or permits to independent owner-operators not operating at the port within a certain timeframe was established; a two-tier licensing system was implemented; the Vancouver Port Container Truck Steering Committee was created; and Port Metro Vancouver launched a stakeholder engagement process.

2014 Dispute

[21] Despite these initiatives, the issues underlying the previous disputes persisted, and in February 2014, a substantial group of unionized and non-unionized container truckers stopped servicing Port Metro Vancouver, in response to what they perceived to be a persistent and consistent pattern of trucking companies undercutting the Ready Rates.

[22] On March 6, 2014, Vince Ready and Corinn Bell were appointed to conduct an independent review directed at resolving the dispute.

[23] Port Metro Vancouver and the provincial and federal governments met with worker representatives which included United Truckers' Association and Unifor. These discussions led to the 15-point Joint Action Plan (dated March 26, 2014), which set out commitments in exchange for the truckers' agreement to immediately return to work. The following paragraphs of the Joint Action Plan provide necessary background for the legislative scheme at issue in these proceedings:

2. The Government of Canada commits to take appropriate measures to increase trip rates by 12% over the 2006 Ready Rates. The rates will take effect within 30 days of the return to work and will apply to all moves of containers (whether full or empty). To make drivers whole for the interim period between 7 days following the return to work and the date the new rates take effect, a temporary rate increment will be put in place.

These rates shall be calculated on a round trip basis, and shall apply to all moves. A mechanism will also be established to attach a benchmark minimum rate for all hourly drivers to the federal regulation. The rate is anticipated to be initially instituted at \$25.13 on hire and \$26.28 after one year of service. ...

4. As per the current federal regulation, upon return to work the fuel surcharge multiplier will be amended from 1% to 2% which will result in a 14% fuel surcharge immediately upon a return to work. ...

[24] On March 27, 2014, the truck drivers and owner-operators who had withdrawn their services returned to work. The effect of this was that the effective date for the "rate increment" under the Joint Action Plan was seven days later, or April 3, 2014 and the effective date for the new fuel surcharge was March 27, 2014.

[25] On April 3, 2014, Parliament amended s. 31.1 of the *Port Authorities Operation Regulation*. Section 31.1(1) provided that the Vancouver Fraser Port Authority would not permit unlicensed trucks or road transportation equipment to access its port for the purposes of delivery, pick-up, or movement of containers, and licence holders were required to comply with minimum conditions. The amended minimum conditions included that, in the absence of a collective agreement or any applicable law, the licence holder must ensure that remuneration of an owner-operator be in accordance with the rates set out in MOA 2005, plus an increase by an amount prescribed by subsection 2.1. Subsection 2.1 reflected the commitments made in the Joint Action Plan by providing for the 12% increase over the 2006 Ready Rates as well as the increased fuel surcharge.

[26] In *Recommendation Report – British Columbia Lower Mainland Ports* (the “Ready/Bell Report”), published in September 2014, Vince Ready and Corinn Bell concluded that many of the issues underlying the 1999 and 2005 disputes persisted in 2014, including frustration with inefficient operations of the ports, low remuneration rates, and inadequate fuel charges. The report also confirmed that rates had decreased since 2006 for most drivers due to undercutting of the Ready Rates that had largely gone unenforced.

[27] The Ready/Bell Report issued a number of recommendations, including that a provincially regulated agency be created to oversee licensing of trucks and the enforcement and setting of remuneration and fuel surcharge rates in the drayage sector; that any rates not paid in accordance with the Joint Action Plan to date were owed to drivers; and that Port Metro Vancouver should continue with its licensing system reform to deal with concerns, including the over supply of trucks, while the provincial agency was being constituted.

[28] The provincial government acted promptly, and on October 23, 2014, approximately a month after publication of the Ready/Bell Report, the provincial Minister of Transportation and Infrastructure introduced new legislation.

[29] The intent of the legislation, and in particular the intention that the new rates were to be retroactive, was explained by Minister Stone during debate in the British Columbia Legislature concerning s. 22(2) (British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, 40th Parl., 3rd Sess., Vol. 17 No. 10 (18 November 2014) at 5371). After explaining that “our number one priority here is to fulfil the commitments that have been made in good faith to the truckers”, he responded to a question about the intended retroactivity in this way:

C. Trevina: Going on to [s. 22](2), this is where the minister says the retroactivity will come in. How broad is the retroactivity? Is it going back to April? From the point of the legislation coming into force? How is this actually going to work in the real world?

Hon. T. Stone: With respect to the fuel surcharge, the retroactive date or the start date would be March 27, 2014. For all other rates – the hourly and trip rates – April 3 would be the retroactive date.

[30] While not determinative, this type of evidence can be useful in confirming the purpose of the legislation: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 35.

[31] As noted earlier, the new legislation came into force on December 22, 2014, as the *Container Trucking Act*. The *Regulation* also came into effect on the same day.

The Statutory Scheme for Rates

[32] This appeal concerns the interplay between s. 22 of the *Container Trucking Act* and Part 4 of the *Regulation*.

[33] Sections 22 (1) and (2) of the *Container Trucking Act* read as follows:

22 (1) The Lieutenant Governor in Council may, by regulation,

(a) establish an initial minimum rate that a licensee must pay to a trucker who provides, in specified circumstances, specified container trucking services to or on behalf of the licensee,

(b) establish a rate under paragraph (a) based on one or more of the following:

- (i) a rate per trip;
- (ii) an hourly rate;

(iii) any other basis the Lieutenant Governor in Council considers appropriate,

(c) for the purposes of paragraph (a), specify one or more circumstances and one or more container trucking services on any one or more of the following:

- (i) the starting point of the container trucking services;
- (ii) the end point of the container trucking services;
- (iii) the geographic area within which the container trucking services are carried out;
- (iv) the dates or times of the container trucking services;
- (v) the duration or distance travelled during the carrying out of the container trucking services;
- (vi) any other basis the Lieutenant Governor in Council considers appropriate,

(d) for the purposes of paragraph (b) (i), specify which container trucking services or which parts of the container trucking services constitute a trip to which a rate established under paragraph (b) is to apply,

(e) specify the time by which a rate established under paragraph (a) must be paid, and

(f) establish an initial minimum fuel surcharge, based on a specified unit of fuel used during the provision of container trucking services, that a licensee must pay to a trucker who provides, in specified circumstances, specified container trucking services to or on behalf of the licensee.

(2) For certainty, an initial minimum rate and an initial minimum fuel surcharge established under subsection (1) may be based on container trucking services provided before this section comes into force.

[Emphasis added.]

[34] Relevant provisions of the *Regulation* include ss. 19, 22 and 23, which read as follows:

Back pay

19 (1) On the date this regulation comes into force, it is a condition of every licence that the licensee pay each trucker who performed an on-dock trip on behalf of the licensee on or after April 3, 2014 any amounts owed under this section.

(2) A trucker is owed the difference, if any, between the following:

(a) the amount the trucker would have been paid for container trucking services performed on behalf of the licensee on or after April 3, 2014 if this regulation had been in force on the date the container trucking services were performed;

(b) the amount the trucker was in fact paid for the container trucking services, not including amounts the trucker was paid as a fuel surcharge.

(3) An independent operator paid per trip is owed the difference, if any, between the following:

(a) the amount the independent operator would have been paid for any on-dock or off-dock trips performed on behalf of the licensee on or after April 3, 2014 if this regulation had been in force on the date the trip was performed;

(b) the amount the independent operator was in fact paid for the on-dock or off-dock trip, not including any amounts the independent operator was paid as wait time remuneration or fuel surcharges.

[am. B.C. Reg. 72/2015, s. 11.]

Back fuel surcharge for independent operators

22 On the date this regulation comes into force, it is a condition of every licence that a licensee pay each independent operator who performed container trucking services on behalf of the licensee on or after March 27, 2014, the difference, if any, between the following:

(a) the amount the licensee would owe the independent operator in fuel surcharge if this regulation had been in force when the independent operator performed the container trucking services on behalf of the licensee;

(b) the amount the licensee paid the independent operator for the fuel surcharge.

Wait time remuneration

23 On the date this regulation comes into force, it is a condition of every licence that a licensee pay each trucker who performed container trucking services on behalf of the licensee on or after April 3, 2014, and is, or was, paid per trip, all amounts paid to the licensee as wait time remuneration.

[Emphasis added.]

[35] It is apparent that the references in the *Regulation* to the dates of March 27, 2014, when the truckers went back to work, and April 3, 2014, seven days after the truckers went back to work, evince an intent to backdate or make retroactive trucking rates to the dates identified in the Joint Action Plan. The issue on this appeal is whether the *Container Trucking Act* authorizes a regulation that has retroactive effect.

The Parties' Positions

[36] To be valid, regulations must be authorized by enabling legislation. The *Container Trucking Act* confers explicit authority on the Lieutenant Governor in Council to make regulations setting initial rates. The question before the chambers judge and now before this Court is whether that authority empowers Cabinet to fix rates that apply to activities undertaken before the regulation was in effect.

[37] The Attorney General relies on ss. 22(1) and (2) as authority for the retroactive rates, with particular reference to the provision in s. 22(2) that the initial rate “may be based on container trucking services provided before this section comes into force”. In effect, the Attorney General argues that s. 22(2) should be read as authorizing an initial rate “[*in respect of*] container trucking services provided before this section comes into force”.

[38] The position of the Attorney General is that the purpose of the legislative scheme was to honour the commitments that had been made to truckers to encourage them to end their walkout, which included increased compensation rates with immediate effect.

[39] The appellants submit that s. 22(2) in particular is ambiguous and does not with any clarity authorize retroactive rates. They say further that the statutory language “based on container trucking services” is unclear and could as easily relate to units of measurement as actual trip rates. The appellants then rely on the presumption against retroactivity in the interpretation of statutory instruments to argue that the *Container Trucking Act* provides authority to set rates prospectively only.

[40] The chambers judge rejected the appellants’ interpretation of s. 22(2) by reviewing the entire portion of the regulations at issue:

[98] Section 19 states that a trucker or an independent operator is owed the difference between what they were paid between April 3, 2014 and the coming into force of the Regulation and what they would have been paid for those services if the Regulation had been in effect during that period. Section 22 takes the same approach to the amount of fuel surcharges that would have been owed to an independent operator if it had been in force. The initial

minimum rate and fuel surcharges are therefore “based on” these earlier services and surcharges, in the sense that the work done and fuel costs before the Regulation took effect are, by the operation of s-s (2), made part of the work done and fuel costs that are specified as being the basis of the measurements under s. 22 of the Act. In other words, the scope of those measurements has been expanded -- to encompass activities and expenses that would have fallen within them if the Regulation had been in effect.

[41] The parties agree that the conclusion that the *Regulation* is authorized by the statute is reviewable on a standard of correctness.

Analysis

[42] The appellants’ argument relies heavily on the presumption against retroactivity and the unclear nature of s. 22(2). I agree with the appellants that s. 22(2) is unclear. Standing alone, it would be challenging to interpret the subsection in the way urged by the Attorney General. But statutory provisions are not interpreted on a stand-alone basis; they are interpreted in context. For many years, the Supreme Court of Canada has emphasized contextual interpretation as the “modern approach to interpretation”.

Contextual Approach to Interpretation

[43] This modern approach was articulated by the Court in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42:

[26] In Elmer Driedger’s definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

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.

Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings ... I note as well that, in the federal legislative context, this Court’s preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

[27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article “Statute

Interpretation in a Nutshell” (1938), 16 *Can. Bar Rev.* 1, at p. 6, “words, like people, take their colour from their surroundings”. ...

[Citations omitted.]

[44] The reference to Professor Willis’ seminal article in 1938 is a reminder that what is referred to as the “modern approach” of contextual interpretation has a long history in the construction of statutes. In *Upper Canada College v. Smith* (1920), 61 S.C.R. 413, Justice Duff explained the relationship between the presumption against retroactivity and contextual interpretation in this way (at 418):

As Parke B. said in *Moon v. Durden* [(1848), 2 Ex. 22 at 42-43], the rule is “one of construction only” and “will certainly yield to the intention of the legislature”; and that intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation.

[Emphasis added.]

[45] This approach was summarized in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, in these terms:

[9] As this Court has reiterated on numerous occasions, “[t]oday 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”. ... This means that, as recognized in *Rizzo & Rizzo Shoes* “statutory interpretation cannot be founded on the wording of the legislation alone” (para. 21).

...

[12] ... In interpreting legislation, the guiding principle is the need to determine the lawmakers’ intention. To do this, it is not enough to look at the words of the legislation. Its context must also be considered.

[Citations omitted.]

[46] The principle of contextual interpretation to construe statutes in accordance with purposes and objects of the legislation was applied directly to the determination whether a regulation is inconsistent with its enabling statute in *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64:

[24] A successful challenge to the *vires* of regulations requires that they be shown to be inconsistent with the objective of the enabling statute or the scope of the statutory mandate (Guy Régimbald, *Canadian Administrative Law* (2008), at p. 132). This was succinctly explained by Lysyk J.:

In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.

(*Waddell v. Governor in Council* (1983), 8 Admin. L.R. 266, at p. 292 [B.C.S.C.]

[25] Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).

[26] Both the challenged regulation and the enabling statute should be interpreted using a “broad and purposive approach . . . consistent with this Court’s approach to statutory interpretation generally” (*United Taxi Drivers’ Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v. Hydro-Québec*, 2004 SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64).

The Integrated Statutory Scheme

[47] Where a statute and regulations form an integrated scheme to achieve a particular object, review of the regulation can assist in determining the legislative purpose. This principle was explained by the Supreme Court of Canada in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54:

[35] ... While it is true that a statute sits higher in the hierarchy of statutory instruments, it is well recognized that regulations can assist in ascertaining the legislature's intention with regard to a particular matter, especially where the statute and regulations are "closely meshed" (see *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 26; *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 282). In this case, the statute and the regulations form an integrated scheme on the subject of surplus treatment and the thrust of s. 70(6) can be gleaned in light of this broader context.

[48] The continuing vitality of this principle has been confirmed in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para. 84 and was recently relied upon by this Court in *Carvalho v. British Columbia (Medical Services Commission)*, 2018 BCCA 95 at para. 28.

[49] In the case at bar, the statute and the *Regulation* both came into effect the same day. They are "closely meshed" within the meaning of *Monsanto*, and together form an integrated scheme to carry out the evident intent of the legislature to honour the commitments made at the time the truckers' walkout ended in 2014.

The Presumption against Retroactivity

[50] The appellants have relied heavily on the presumption against retroactivity. Statutes are generally not to be construed as having retroactive operation unless such a construction is expressly or by necessary implication authorized by the Act: *Gustavson Drilling (1964) Limited v. Minister of National Revenue*, [1977] 1 S.C.R. 271 at 279. The reason for this presumption is that one must know what the law is in order to comply with the law: *Newton v. Crouch*, 2016 BCCA 115 at para. 54.

[51] The appellants propose an elaborate analytical framework for the interpretation of the legislation at issue based on a comparison of presumptions, but without reference to context. First, the appellants begin by acknowledging that subordinate legislation is presumed to be valid. Second, the presumption of validity is said to be rebutted once the petitioners show that the subordinate legislation is retroactive. Third, at that point the subordinate legislation is said to be presumptively invalid. Finally, the appellants submit that the presumption of invalidity of the regulation can be rebutted only if the presumption against retroactivity in the enabling legislation is rebutted.

[52] In my opinion, this analytical framework does not reflect the proper way to approach the interpretation of statutory instruments. The *Regulation* at issue is clearly intended to have retroactive effect. The only question is whether the enabling legislation authorizes the retroactive elements of the *Regulation*. If it does, the *Regulation* is valid and enforceable. If it does not, the *Regulation* is invalid to the extent of its retroactivity.

[53] Whether the enabling legislation authorizes the retroactive elements of the *Regulation* is a question of statutory interpretation. The objective of statutory interpretation is always to read the words of an Act 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 the enacting legislature. The goal, in other words, is to give effect to the intention of the legislature by reading the statutory language in context.

[54] If the intention of the legislature can be fulfilled without retroactive operation, the presumption against retroactivity will operate to give the legislation prospective effect only. But if the purpose of the legislation can be achieved only by giving the legislative scheme retroactive effect, it is no answer to argue that the specific words used in the statute do not clearly convey that result.

[55] The appellants have argued that s. 22(2) is ambiguous, and that this ambiguity itself is sufficient to invoke the presumption against retroactivity. However, ambiguity of a particular statutory provision cannot be abstracted from a consideration of the object of the legislation. Justice Iacobucci discussed the relevance of ambiguity in *Bell ExpressVu Limited Partnership* at para. 29 in a passage relied upon by both parties:

... In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

[Emphasis added by Iacobucci J.]

[56] It follows from this that if the proposed reading of the statute (such as the appellants' interpretation of s. 22(2) as referring to units of measurement) cannot be regarded as equally in accordance with the purpose of the legislation as the respondents' construction of the statute, other principles of interpretation such as the presumption against retroactivity cannot be invoked to defeat the purpose of the legislation.

[57] An illustration of the importance of reading the statutory scheme as a whole to determine legislative intention can be found in the case of *Nova, An Alberta Corporation v. Amoco Canada Petroleum Company Ltd.*, [1981] 2 S.C.R. 437. That case also had to do with retroactive rates. The question was whether a Public Utilities Board which had been given the power to "vary or confirm" rates set by a utilities company could do so retroactively. The statute itself did not confer such authority expressly, but the focus in the Supreme Court of Canada's reasons was on the statutory scheme and what Estey J. described as "the general legislative pattern it establishes" (at 448). In concluding that the Board could issue orders retroactively, at least until the date of the initiating complaint, Estey J. cited the following passage from *Re Eurocan Pulp & Paper Co. Ltd. and British Columbia Energy Commission et al.* (1978), 87 D.L.R. (3d) 727 (B.C.C.A.), where Chief Justice Farris of this Court stated:

Reading the Act as a whole, it is my opinion that the Commission has been empowered to make rates effective to the date of application, even though there is no specific language in the Act to that effect.

[58] A similar approach was taken in *Québec (Attorney General) v. Healey*, [1987] 1 S.C.R. 158. In discussing whether a statute had retroactive effect, the Supreme Court of Canada said the following (at 177-178):

It is clear that the 1919 Act contains no express provision making it retroactive or giving retroactive effect to the amendment made to s. 2252 of the Revised Statutes, 1909.

However, the legislator's intent can be deduced from the purpose of the legislation and the circumstances in which it was adopted. It can also be manifested by the procedure employed by the legislator. Finally, it may be inferred from the only possible interpretation which is likely to make sense of it.

[59] In the case at bar, there is language in the statute that appears to be intended to provide for trip rates to be set retroactive to the date one week after the truckers returned to work in accordance with the provisions of the Joint Action Plan. The statutory language is not particularly well worded, but the interpretation of this language is not wholly dependent on the literal meaning of the words used. The statutory meaning is to be determined by assessing that language in the context of what the legislature was intending to achieve with this legislation.

[60] Here, an integrated statutory scheme was created for the specific purpose of implementing the agreement made at the time of the Joint Action Plan to end the truckers' walkout in 2014 and restore stability in the drayage sector. This intention was well known at the time the walkout ended and was made clear during the consideration of the draft legislation. There is no substantial risk that those companies who are called upon to pay the rates will be surprised to discover that they are effective as of the dates set out in the *Regulation*. To interpret the legislation in a way that precludes the rates coming into effect before the statute was formally enacted would thwart the purpose of the legislative scheme.

[61] For these reasons, it is my view that the chambers judge was correct to dismiss the petition. Accordingly, I would dismiss the appeal.

“The Honourable Mr. Justice Hunter”

I AGREE:

“The Honourable Madam Justice Bennett”

I AGREE:

“The Honourable Mr. Justice Harris”

TAB 3

Court of Appeal for British Columbia

Citation: **British Columbia Hydro and Power
Authority v. British Columbia
(Environmental Appeal Board),
2003 BCCA 436**

Date: 20030729
Docket: CA027158

Between:

British Columbia Hydro and Power Authority

Appellant
(Petitioner)

And

**Environmental Appeal Board, the Attorney General
of British Columbia, North Fraser Harbour Commission,
Canadian Pacific Railway, General Chemical Canada Ltd.,
and Deputy Director of Waste Management**

Respondents
(Respondents)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse
The Honourable Madam Justice Newbury

J.R. Singleton, Q.C. and D.G. Perry Counsel for the Appellant

E.J. Rowbotham and N.E. Brown Counsel for the Respondent,
Attorney General of B.C.

K.E.W. Mitchell Counsel for the Respondent,
North Fraser Harbour Commission

P.A. Spencer Counsel for the Respondent,
Canadian Pacific Railway

D.K. Jones Counsel for the Respondent,
General Chemical Canada Ltd.

Place and Dates of Hearing: Vancouver, British Columbia
December 5 and 6, 2002

Place and Date of Judgment: Vancouver, British Columbia
July 29, 2003

Written Reasons by:

The Honourable Madam Justice Newbury

Appendix A - Page 72

Appendix B - Page 84

Appendix C - Page 86

Appendix D - Page 88

Concurring Reasons by:

The Honourable Madam Justice Prowse (P. 90, para. 79)

Dissenting Reasons by:

The Honourable Madam Justice Rowles (P. 93, para. 84)

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] On April 1, 1997, Part 4 of the *Waste Management Act*, R.S.B.C. 1996, c. 482, was proclaimed in force, almost four years after it had been enacted by the Legislature. In general terms, Part 4 was obviously intended to strengthen and extend already existing provisions in the *Act* aimed at implementing the principle of 'polluter-pay' – the notion that a person who has contaminated or contributed to the contamination of real property should bear the costs of remedying such contamination.

[2] Part 4 requires that anyone seeking the subdivision or rezoning of land that is or was used for industrial or commercial activity, prepare and file a "site profile" with the authority specified in the *Act*. The profile may lead to the ordering of a site investigation the purpose of which is to determine whether the site is contaminated. Division 3 of Part 4, headed "Liability" and attached as Appendix A to these Reasons, provides for the "remediation" of a contaminated site by the "responsible persons". This is a key phrase defined in s. 26.5 of the *Act*. It includes both current and previous "owners" and "operators" of the site, as well as present and past transporters of contaminating substances, and even

certain secured creditors. Responsible persons are subject to two main consequences under Part 4: first, under s. 27.1, a manager appointed under the **Act** may issue a remediation order to any responsible person, requiring that he or she undertake the remediation of contaminated property or contribute "in cash or kind" to a person who has incurred remediation costs. Second, s. 27 provides that a person who is responsible for remediation is "absolutely, retroactively, jointly and severally liable" to any person or governmental body for reasonably incurred remediation costs.

[3] The central question posed by this appeal is whether B.C. Hydro and Power Authority ("B.C. Hydro") may be made the subject of a remediation order under s. 27.1 not by reason of its own acts or conduct, but by reason of the acts of B.C. Electric Corporation ("B.C. Electric") in and about a site in Vancouver between 1920 and 1957. B.C. Electric is no longer in existence: it amalgamated with two other corporations in 1965 to form B.C. Hydro, following which it was "declared to be dissolved" by special statute. Can B.C. Hydro be fixed now with the 'responsibility' under the **Waste Management Act** that B.C. Electric would attract if it still existed?

[4] The answer to this question involves two avenues of inquiry. First, it is argued that by virtue of the amalgamation, B.C. Electric continues to exist in some sense in the amalgamated corporation such that B.C. Hydro is subject to all the obligations of B.C. Electric, including even those arising under legislation enacted in 1997. B.C. Hydro argues, on the other hand, that given the unusual circumstances and terms of its amalgamation, it is subject only to those obligations of B.C. Electric that existed "immediately before the amalgamation" - words that appear in both the amalgamation agreement and an Order-in-Council approving it. If B.C. Hydro's argument is correct, then the second question is whether all or part of the **Waste Management Act** operates retroactively such that B.C. Electric may now be said to have been a responsible person with remediation obligations as of the time immediately before its amalgamation.

[5] This court is the third level of review of a decision of a manager under the **Waste Management Act** to the effect that B.C. Hydro could not be named as a "responsible person" by reason of the activities of B.C. Electric involving the site in question. At the first level of review, the Environmental Appeal Board held that the manager had erred and that B.C. Hydro could, by virtue of B.C. Electric's earlier conduct, be

named in a remediation order under s. 27.1. This determination was upheld on appeal to the British Columbia Supreme Court, from which decision the present appeal is taken.

[6] As will be seen below, I am of the view that the court below and the Board erred in concluding that the amalgamation agreement between the predecessor corporations of B.C. Hydro did not have the effect of limiting the liabilities and obligations assumed by the amalgamated corporation to those existing immediately prior to the amalgamation. Although the issue was not addressed by counsel, I conclude in the alternative that as a result of its amalgamation and dissolution in 1965, B.C. Electric cannot now be said to be a "person" and therefore cannot be said to be a previous or current "operator" or "owner" as those terms are defined in the **Act**. Further, like the manager under the **Act**, I conclude that Part 4 does not operate retroactively to attach remediation obligations to B.C. Electric as of the time immediately before its amalgamation on August 20, 1965. Accordingly, I would allow the appeal.

THE SITE

[7] In the early years of the 20th century, the property now known as 9250 Oak Street in Vancouver was the site of a plant

that manufactured roofing materials. Who exactly owned and operated the manufacturing facility at what times is not clear from the materials before us; but it would appear that one or more predecessors of the respondent General Chemical Canada Ltd. ("GCC") did so, and that beginning in or about 1920, one of those predecessors, referred to as "Barrett", entered into an agreement with B.C. Electric (until 1946, known as B.C. Electric Power and Gas Company) under which the latter supplied coal tar to the site from its gas plant in Vancouver. (In addition, B.C. Electric Railway Company, whose operations were eventually merged into those of B.C. Electric, operated a railway spur constructed in 1919 under an agreement with CPR which was used for transporting coal tar to and from the Oak Street site, but this fact was not developed by counsel). It appears the arrangements between Barrett and B.C. Electric continued until approximately August 1957, when GCC began to use oil-based asphalt rather than coal tar in its manufacturing process.

[8] In October 1966, the Oak Street property was acquired by Canadian Gypsum Company (now called "CGC Inc."), which operated the business until it sold to Globe West Products Inc. ("Globe West") in 1980. The respondent Mr. Lawson, a resident of Ontario, has been identified as a former director

and officer of the 'Globe West' companies. Globe West's parent, Globe Asphalt Products Ltd., underwent some corporate reincarnations but its ultimate parent company, GN Industries Inc., ceased carrying on business in 1991 and was wound up. In 1986, Globe West ceased manufacturing asphalt-based products on the site and sold the property to the North Fraser Harbour Commission. The Commission now uses the site for storage and vehicle parking.

[9] On May 20, 1998, the Deputy Director of Waste Management, acting as a "manager" under the **Waste Management Act**, found that the site had been polluted by "serious, extensive and highly coal tar-related contamination" and that the property and others it had in turn contaminated, including the Fraser River, were "among the most severely contaminated sites in British Columbia." The manager found that GCC, CGC, GN Industries Ltd., North Fraser Harbour Commission, Her Majesty the Queen in Right of the Province as represented by B.C. Lands, and Mr. Lawson were "responsible persons" as defined in the **Act**. The named parties took various appeals to the order, and GCC and CGC applied to have B.C. Hydro also named as a responsible party in the order.

B.C. ELECTRIC AND B.C. HYDRO

[10] The famous (or perhaps infamous) history of the provincial government's attempt in 1961 to obtain control of the generation and sale of electricity in British Columbia is perhaps not well-known to many born since then, but at the time it created a huge political controversy, as well as one of the longest trials in the (then) history of the Supreme Court of British Columbia. The legislature of the day passed three statutes in 1961 – the *Power Development Act, 1961*, (2nd Session), c. 4, the *Power Development Act, 1961 Amendment Act, 1962*, c. 50, and the *British Columbia Hydro Power and Authority Act, 1962*, c. 8 – which purported to expropriate all the shares of B.C. Electric (then a wholly-owned subsidiary of British Columbia Power Corporation Ltd.) and to amalgamate it with British Columbia Power Commission into a corporation to be known as B.C. Hydro and Power Authority. The legislation purported to cancel all the obligations of B.C. Electric under any agreement, deed or trust or otherwise to allot or issue shares in its capital stock, thus impinging upon the terms of a private trust agreement between B.C. Power and B.C. Electric providing for the conversion of debentures of B.C. Electric into shares of B.C. Power Corporation. The legislation also purported to limit the access of the latter company to the

courts to dispute the compulsory acquisition of the B.C. Electric shares.

[11] On July 29, 1963 Lett, C.J.S.C. declared the three statutes *ultra vires* the province as effectively purporting to sterilize the functions and activities of B.C. Power Corporation, a Dominion corporation, by a law not of general application. (See **British Columbia Power Corporation Ltd. v. Attorney-General of British Columbia** (1963) 47 D.L.R. (2d) 633.) In the words of the Chief Justice:

In the light of this evidence and on these authorities, I can come to no other conclusion than that the effect of the impugned legislation would be to make it impossible "in a practical business sense" or "in a practical way" for the plaintiff company to exercise its powers and therefore, to use the words of Lord Atkin in *Lymburn v. Mayland*, [1932] 2 D.L.R. 6 at p. 10 ..., "... the functions and activities of [the] company were sterilised or its status and essential capacities impaired in a substantial degree." [at 703]

[12] Although the Court's conclusion stated above now appears to be of doubtful validity (see **Churchills Falls (Nfld.) Corp. v. Attorney General of Newfoundland** (1984) 8 D.L.R. (4th) 1 (S.C.C.), at 26), it obliged the government of the day to take a more conciliatory view to B.C. Power Corporation and its shareholders. Eventually, the dispute, and an appeal taken from the trial judgment, were resolved by agreement.

[13] Following the settlement, the Province in March, 1964 enacted another **British Columbia Hydro and Power Authority Act, 1964**, this one cited as S.B.C. 1964, c. 7, and the **Power Measures Act, 1964**, S.B.C. 1964, c. 40. The former statute successfully created British Columbia Hydro and Power Authority (the "Authority") as an agent of Her Majesty in Right of the Province. The Authority was given various powers relating to the generation, manufacture, distribution and supply of power. It was authorized to "amalgamate in any manner with or enter into partnership with any corporation, firm or person." (My emphasis.) Consistent with its status as an agent of the Crown, it was also given powers of expropriation, and immunity from certain actions and proceedings described at s. 52(3) of the **British Columbia Hydro and Power Authority Act, 1964**. Section 53(1) stated that the Authority was not bound by any statute of the Province, except as provided by the 1964 Act.

[14] By the **Power Measures Act, 1964**, the Province "validated and confirmed" everything "done as directors of the Company [B.C. Electric] by the persons who [had] been named as directors of the Company" in the invalid legislation of 1962. This statute also validated and confirmed the creation and exchange by B.C. Electric of certain bonds and the

cancellation of preferred shares in B.C. Electric, the redemption of certain debentures, and the termination and cancellation of "any obligation of [B.C. Electric] incurred or that may or shall arise under any agreement, deed of trust or otherwise to allot or issue shares in the capital stock of the Company". (s. 6(2).) Section 9(1)(a) empowered B.C. Electric or B.C. Power Commission or both to "amalgamate or enter into partnership with each other or with each other and any other corporation or corporations".

[15] It was not long before the powers of amalgamation given to the three entities were exercised. On August 29, 1965, the Authority, B.C. Power Commission and B.C. Electric entered into an Amalgamation Agreement. (See Appendix B to these Reasons.) The Agreement stated that the three corporations amalgamated in such a manner that:

- (a) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964,
- (b) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
- (c) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise,

and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation. [Emphasis added.]

The amalgamation became effective as of 5:00 p.m. Vancouver time on August 20, 1965.

[16] When the **Power Measures Act, 1966**, S.B.C. 1966, c. 38, was enacted in 1966, the signed Amalgamation Agreement was appended as a schedule. This statute ratified and confirmed the Agreement as having been validly made and as being in full force and effect since August 20, 1965. Section 4 stated that the amalgamation would not constitute a breach of any covenant or an event of default under any trust deed or other document under which bonds, debentures or other securities of the predecessor companies had been issued. Under s.5, all the common shares in the capital of B.C. Electric owned by the Province "immediately before the amalgamation" were deemed to have been surrendered to B.C. Hydro and Power Authority "and cancelled immediately upon the amalgamation having become effective." Section 6(1) stated that all assets, undertakings powers and rights purported to have been made, and all debts, liabilities and obligations purported to have been incurred "in the name of British Columbia Hydro and Power Authority but

not made, acquired or incurred by or issued by the Authority" were deemed to have been made, acquired, issued, incurred by, to, for or on behalf of B.C. Power Commission or B.C. Electric or both, as the case required; and that the amalgamated corporation (which I refer to as "B.C. Hydro") was possessed of all such "properties, assets, undertakings ... and franchises to the extent that they have not been disposed, and ... subject to the *Power Measures Act, 1964*, subject to all such debts, liabilities, and obligations to the extent that they have not been discharged."

[17] Also on August 20, 1965, Order-in-Council No. 2386 was passed approving the amalgamation of the three corporations, again in such a manner that:

(a) they continue as one amalgamated corporation which is British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964, and

(b) the said British Columbia Electric Company Limited and the said British Columbia Power Commission cease to exist as separate corporations, and

(c) the said British Columbia Hydro and Power Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise and subject to the *Power Measures Act, 1964* be liable for all duties, liabilities and obligations, whether conferred or

imposed by statute or otherwise, of each of the said British Columbia Hydro and Power Authority, British Columbia Electric Company Limited and British Columbia Power Commission immediately before the amalgamation: [Emphasis added.]

A copy of the Order is appended to these Reasons as Appendix C.

[18] Last, another Order-in-Council, No. 2387, was passed on August 23, 1965. (See Appendix D hereto). The operative paragraph of that Order "recommended" that:

. . . pursuant to the *Power Measures Act, 1964*, and all other powers thereunto enabling section 212 of the *Companies Act* shall apply to the British Columbia Electric Company Limited, and that pursuant to that section the incorporation of British Columbia Electric Company Limited be revoked and cancelled and that British Columbia Electric Company Limited be declared to be dissolved, and that such other provisions of the *Companies Act* apply to the British Columbia Electric Company Limited to the extent necessary to effect the revocation, cancellation and dissolution hereby made. [Emphasis added.]

Thus ended the long and contentious process by which the generation of hydro-electric power throughout most of the Province became the function of a public utility which since 1965 has played such an important role in British Columbia's industrial and economic life.

THE WASTE MANAGEMENT ACT

[19] Before reviewing the operation of Part 4 of the **Waste Management Act** in detail, I will note briefly its predecessor, the **Pollution Control Act, 1967** (S.B.C. 1967, c. 34). Section 26 thereof contained what by comparison to the present legislation is a narrow version of the polluter-pay principle. It provided in material part:

26. (1) Where, in the opinion of the Minister
- (a) pollution has been, is being, or is likely to be caused, suffered or permitted within the territorial jurisdiction of the Province, on land, on or in water, or in air,
 - (b) the pollution is not being or is unlikely to be prevented, controlled, removed, or abated by a person causing, suffering, or permitting it, or by the local authority for the areas suffering the pollution, or by any other agency, and
 - (c) immediate action is required to prevent, control, remove, or abate the pollution, he may, by order approved by the Lieutenant-Governor in Council, declare a pollution emergency exists in a part or the whole of the Province.
- (2) Where the Minister makes an order under subsection (1), he, or a person authorized in writing by him, may require any person to provide labour, services, material or equipment for the purpose of preventing, controlling, removing or abating the pollution . . .

(4) A certificate signed by the Minister showing the total costs and expenses incurred by the Government and the amount of money paid out by the Government under this section may be filed in the Supreme Court and, on being filed, shall, for all purposes except an appeal, be deemed to be a judgment of the court and enforceable as such against the person named in it as the person causing or permitting the pollution and liable for the costs and expenses incurred and money paid. [Emphasis added.]

[20] In **Re Rempel-Trail Transportation Ltd. and Neilsen** (1978) 93 D.L.R. (3d) 595 (B.C.S.C.), Taylor J. (later J.A.) considered s. 26 in connection with a highway accident that had occurred six months before s. 26 came into force. The accident resulted in the petitioner's truck dumping an oily substance into a lake. Three weeks after s. 26 came into force, the Minister issued an order under s. 26(1) alleging that the substance had been observed seeping from land adjacent to the highway and that the substance was "entering onto the waters of Red Rocky Lake and environs." The Minister incurred various costs in containing and cleaning up the pollution. Several months later, he issued a certificate under s. 26(4), naming the petitioner.

[21] One of the petitioner's arguments on judicial review was that the certificate was invalid because it related to an event that had occurred prior to the coming into effect of the

relevant provisions of the **Pollution Control Act**. The Minister argued, on the other hand, that it was an "existing condition of pollution" which gave rise to liability on the petitioner's part for the clean-up costs, rather than the "act of polluting" itself. Taylor J. did not accede to this view.

In his analysis:

If the Minister's position is right, those whose conduct caused pollution, within the meaning of the Act many years, or even decades ago without in any way breaking the law, could now be charged with the costs of cleaning up that pollution; these costs could be very substantial indeed in the case of many manufacturing or mineral extraction operations according to the applicant.

Authorities were cited on both sides in which statutes not expressly retroactive have been held to have, or not to have, retrospective effect. But I think the issue is determined by the clear words of the section. While s-s. (1) refers to a situation in which pollution "has been, is being, or is likely to be caused", this subsection does not authorize imposition of liability. The wording of s-s. (4), which authorizes the charging of clean-up costs to a party responsible for pollution, says that the Minister's certificate is to be enforceable against "the person causing or permitting the pollution". The tense is present. The subsection seems to refer to those who at the time of the declaration of the emergency were "causing or permitting" the pollution. [at 598-9; emphasis added.]

[22] Taylor J. added that had he not reached this conclusion on the words of the subsection itself, he would have arrived at the same result "on the basis of the authorities concerning

construction of statutory provisions not expressly made retroactive in circumstances in which new obligations, burdens, or disabilities may be imposed as a consequence of events pre-dating their enactment." (At 599.) He discussed the meaning of retroactivity and the presumption against it in statutory construction, to which reference will be made below. Turning then to the argument that the presumption does not apply to a statute intended "for the protection of the public", he said:

While the principle intent of the statute undoubtedly is the protection of the public, it cannot be said that this is the purpose of s. 26(4); the purpose of the subsection is to recover from an individual money expended by the Minister under authority of the statute, a result which, like the raising of tax revenues, certainly benefits the public, but cannot be said to constitute a form of public protection. [at 601]

[23] It was against this background that the **Waste Management Act**, R.S.B.C. 1979, c. 428.5, and later amendments became law.

Section 22 of the early form of the **Act** provided:

22. (1) Where a manager is satisfied on reasonable grounds that a substance is causing pollution, he may order the person who had possession, charge or control of the substance at the time it escaped or was emitted, spilled, dumped, discharged, abandoned or introduced into the environment, or any other person who caused or authorized the pollution to do any of the things referred to in subsection (2).
[Emphasis added.]

Subsection (2) stated that such an order could require the person on whom it was served to undertake site investigations and ultimately to carry out measures reasonably necessary to abate or stop the pollution in question.

[24] Section 22 was considered by Lander J. in *West Fraser Timber Co. v. British Columbia (Regional Waste Manager)* [1988] B.C.J. No. 2127 (B.C.S.C.), where one of the defendants, Domtar, had operated a mill and wood treatment plant on land part of which it owned and part of which it leased from B.C. Rail. Domtar sold the former property and assigned the lease to West Fraser in 1978. On the expiration of the lease, the property sat vacant. In 1987, a manager under the **Act** issued an order naming four parties, including Domtar. Domtar contested the order, arguing that s. 22 was not retroactive or retrospective, and relied on *Re Rempel-Trail Transportation, supra*. However, Lander J. took a somewhat different view of the new **Act**. He reasoned as follows:

Under the new legislation, and particularly having regard to s. 22:

- (1) there is no express provisions [sic] of retroactivity;
- (2) the clear words of the section refer to "the person who had possession, charge or control of the substance at the time it escaped ... or was abandoned or introduced into the

environment, or any other person who caused or authorized the pollution ...;

(3) there is no new obligation imposed which was not created by the 1967 legislation, which was in force at the time of this incident;

(4) the intent of the legislation, including the amendments which included the clarification of the word "person", is clearly to protect the public; and to place the responsibility for pollution abatement and cleanup on those private parties who caused the pollution or were in control of the problem material.

(5) further, such amendments are in the nature of procedural clarification in view of the earlier legislation.

Even if the presumption against retrospective operation applies, and it is not at all apparent that it does, the clear intent of the legislation is to allocate the cost of pollution on those people who caused it in the protection of the public interest. There was no error of law or jurisdiction in this regard in the order of October 20, 1987. [at 7-8; emphasis added.]

In the result, the Court held that the manager's order had been validly made under s. 22 of the *Waste Management Act*.

[25] Section 22 of the early *Act* was also considered in *British Columbia Railway Co. v. Driedger* [1988] B.C.J. No. 3053 (aff'd at [1990] B.C.J. No. 1207 (B.C.C.A.)), where Gibbs J. (as he then was) held that the provision could not apply to "an innocent, ignorant (in the sense of not knowing) owner who had nothing to do with, and no knowledge of" the contamination

of the site in question, or the attempts of others to rectify the problem. Gibbs J. observed:

The theme of the Act is that the person who has custody of polluting substances is responsible for safe custody, that the person who uses is responsible for safe use, that the person who transports is responsible for safe transportation, and that the person who fails to discharge his responsibility must accept liability for the remedial measures. It is the safe use responsibility which arises here, and although it may be possible to strain the words of Section 22(1) to fit B.C. Rail, I am satisfied that the legislature did not have that intent. I would have to see much stronger and more specific words. . . . [para. 10]

Part 4 of the Present Act

[26] As earlier mentioned, Part 4 of the **Act**, headed "Contaminated Site Remediation", was proclaimed in force on April 1, 1997. Division 1 of Part 4 contains various definitions, including the following:

"contaminated site" means an area of land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains

- (a) a special waste, or
- (b) another prescribed substance in quantities or concentrations exceeding prescribed criteria, standards or conditions;

"operator" means, subject to subsection (2), a person who is or was in control of or

responsible for any operation located at a contaminated site, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3);

"owner" means a person who is in possession of, has the right of control of, occupies or controls the use of real property, including, without limitation, a person who has any estate or interest, legal or equitable, in the real property, but does not include a secured creditor unless the secured creditor is described in section 26.5 (3);

"person" includes a government body and any director, officer, employee or agent of a person or government body;

"remediation order" means a remediation order under section 27.1;

"responsible person" means a person described in section 26.5;

The term "remediate" is not defined; however, the **Act** defines "remediation" to mean action "to eliminate, limit, correct, counteract, mitigate or remove" any contaminant or the negative affects thereof on the environment.

[27] Division 2 and regulations thereto establish the conditions under which a property owner, a person applying for subdivision or zoning approval, a vendor of land or a trustee, receiver or liquidator or person commencing foreclosure proceedings in respect of land that has been used for industrial, commercial or other prescribed activities, is

required to prepare a site profile and provide it to a manager appointed under the **Act**. The manager may then order a preliminary or detailed site investigation and, under s. 26.4(1), may determine whether a site is contaminated. Notice in writing of the manager's preliminary determination is given to various interested persons, who are given the opportunity to comment on the preliminary determination. The manager may then make a final determination, which decision may be appealed under Part 7 of the **Act**.

[28] Division 3, the most important for purpose of this appeal, is headed "Liability". I have appended the whole of Division 3 as Appendix A to these Reasons, but will note here the provisions of particular relevance. It will be recalled that the term "responsible person" is defined to mean a person described in s. 26.5. Section 26.5(1) states:

- 26.5 (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:
- (a) a current owner or operator of the site;
 - (b) a previous owner or operator of the site;
 - (c) a person who
 - (i) produced a substance, and

- (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
- (d) a person who
 - (i) transported or arranged for transport of a substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
- (e) a person who is in a class designated in the regulations as responsible for remediation. [Emphasis added.]

Subsection (2) contains similar provisions defining "responsible person" in connection with property contaminated by the migration of a substance from elsewhere to the contaminated site.

[29] Section 26.5(3) establishes the conditions under which a secured creditor is or is not responsible for remediation of a contaminated site, and s. 26.6(1) lists a series of persons who are not responsible for remediation, including those described in subpara. (d):

- (d) an owner or operator who establishes that
 - (i) at the time the person became an owner or operator of the site,
 - (A) the site was a contaminated site,
 - (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
 - (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
 - (ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
 - (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;

Under s-s. (3), a person seeking to establish that he or she is not a "responsible person" has the burden of proving "all elements of the exemption on a balance of probabilities."

[30] The concept of "responsible person" or 'responsibility' under Part 4 is, as the Deputy Director of Waste Management suggested in his factum, a statutory term of art. As he submitted, s. 26.5 is not so much a definition section "as much as it is a detailed description (along with s. 26.6) of

the persons subject to two distinct consequences, which collectively comprise 'responsibility' in this novel statutory regime." He characterizes the two consequences as "regulatory" – as described in s. 27.1 – and "financial" – as described in s. 27(1).

[31] Under s. 27.1(1), a manager may issue a remediation order to any responsible person, requiring that that person undertake remediation, contribute "in cash or in kind" to another person who has reasonably incurred remediation costs, or give security on conditions specified by the manager. When considering "who will be ordered to undertake or contribute to" remediation, the manager must take certain factors into account, including the terms of any private agreements between responsible persons regarding liability for remediation. Also under s-s. (4), the manager must "name one or more persons whose activities, directly or indirectly, contributed most substantially" to the contamination of the site. The manager may obtain a (non-binding) opinion of an "allocation panel" as to whether a person is a responsible person or was a "minor contributor" to the contamination; or concerning the share of remediation costs that should be attributed to a particular responsible person. (I note parenthetically that no argument was advanced in this case as to whether s. 27.1 confers on the

manager the powers of a superior court judge contrary to s. 96 of the **Constitution Act**. I shall assume the section is valid for purposes of this appeal.) Section 27.1(5) states that a remediation order does not affect the right of a person affected by the order to obtain relief under an agreement, other legislation or common law.

[32] Section 27, the "financial" provision, deals with the recovery by "any person or government body" of remediation costs. It states in part:

- 27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site. . . .
- (3) Liability under this Part applies
- (a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and
- (b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated operational certificate that authorizes the discharge of waste into the environment.

- (4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part. [Emphasis added.]

[33] It will be noted that s. 27(1) does not on its face require the issuance of a remediation order before it operates: all that the person or government body seeking recovery needs to show is that it has incurred, reasonably, remediation costs in respect of a contaminated site. Whether a person seeking recovery must nevertheless satisfy various regulatory conditions under Part 4 has been the subject of considerable litigation: see *Swamy v. Tham Demolition Ltd.* (2000) 81 B.C.L.R. (3d) 293 and [2001] B.C.J. No. 721, *O'Connor v. Fleck* (2000) 79 B.C.L.R. (3d) 280, and *No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd.* [2001] B.C.J. No. 1922, all decisions of the Supreme Court of British Columbia; and the recent decision of this court in *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2003 BCCA 56, [2003] B.C.J. No. 165. Noteworthy for purposes of this appeal, however, is that for the "absolute" liability to arise, it appears the remediation costs must have been incurred by the person or

government suing for recovery. That is not necessarily the case where an order is made under s. 27.1, which contemplates that the responsible person or persons named in the order may be required to carry out or contribute to remediation work yet to be done.

[34] Section 27.1 is the foundation for the proceeding in this case. An order was issued by a manager on May 20, 1998 identifying six entities as "persons responsible" for the remediation of the site at 9250 Oak Street in Vancouver and neighbouring land. Certain of the entities so named applied to the manager to add B.C. Hydro as a "responsible person" under the order. Thus the proceeding is not an action taken by one responsible person to recover remediation costs from another (allegedly) responsible person under s. 27(4); rather, the proceeding was initiated by the issuance of a remediation order by a manager under s. 27.1, and concerns an application to him by those originally named, to amend his order. In the Deputy Director's terminology, this proceeding is "regulatory" rather than "financial".

THE ISSUES AND THE DECISIONS BELOW

[35] As noted earlier, the central question posed on this appeal is whether B.C. Hydro is or may be a "responsible

person" under the **Waste Management Act** by reason of the activities of B.C. Electric in and around the Oak Street property between 1920 and 1957. Counsel for B.C. Hydro conceded, rightly in my view, that if B.C. Electric were still in existence, it would be a "responsible person" by reason of its activities at the site until 1957. To this extent the **Waste Management Act**, unlike its predecessor the **Pollution Control Act**, operates in respect of events - polluting conduct - predating its enactment. But since B.C. Electric no longer exists, B.C. Hydro must be shown to have somehow 'assumed' or 'inherited' (I use those terms loosely) its obligations either expressly or by implication, in order to be fixed with 'responsibility' under the **Act**. The respondents say that it did - that both under the terms of the Amalgamation Agreement and by virtue of the essential nature of a corporate amalgamation, B.C. Hydro is fixed with the liabilities to which B.C. Electric would have been subject had it not amalgamated.

[36] In answer, B.C Hydro contends that the effect of an amalgamation depends on the meaning and intent of the statute under which it was carried out; and that in the unusual circumstances surrounding this amalgamation, B.C. Hydro became subject only to the liabilities and obligations of B.C.

Electric that existed "immediately before the amalgamation."
As well, B.C. Hydro submits that although the word
"retroactively" appears in s. 27(1) of the **Waste Management
Act**, there is nothing in s. 26.5(1) or elsewhere in Part 4
that operates retroactively to result in B.C. Electric's
having been a "responsible person" with remediation
obligations as of 4:59 p.m., August 20, 1965 – immediately
before the amalgamation.

[37] The manager appointed under the **Waste Management Act**
addressed both these issues in his reasons of October 15,
1998. He began by noting that had the 1965 amalgamation been
an 'ordinary' one – one carried out pursuant to the British
Columbia **Companies Act**, for example – all obligations and
liabilities of B.C. Electric would have "flowed on" into B.C.
Hydro. However, he said:

There is . . . one critical difference. The
amalgamated BC Hydro was limited to the obligations
of BC Electric that existed as of a particular
moment in time - 5:00 p.m. on August 20, 1965. This
amalgamation clearly gives BC Hydro greater
protection from legal liability than would be the
case in the usual corporate amalgamation. This
limitation of liability, ratified by Order in
Council and by legislation, is critical. The courts
have made clear that the effect of any particular
amalgamation depends ultimately on the terms of the
applicable legislation: *R. v. Black & Decker*.

As well, he noted, if B.C. Hydro's actions or status had been at issue – either before or after 1965 – it could clearly be named as a responsible person under s. 26.5. But again, he said:

. . . on the information before me, BC Hydro had nothing to do with 9250 Oak Street. BC Hydro only came into existence in 1964. At that time, it was separate and distinct from B.C. Electric. The Amalgamation Agreement is dated August 20, 1965.

As for BC Electric, it is now dissolved and has no separate existence. Both today and on April 1, 1997, the date on which the 1993 amendments came into force, BC Electric did not exist as a separate entity. If BC Electric had retained separate status, or had amalgamated with B.C. Hydro in the ordinary fashion under British Columbia law, I would have no hesitation in considering its responsibility under s. 26.5 as part of the new amalgamated entity: *Witco Chemical Co. v. Oakville (Town)*, [1975] 1 S.C.R. 273.

One is therefore left with what the Amalgamation Agreement says about *BC Hydro's liability for the acts of BC Electric*. The law, as set out in the Amalgamation Agreement and as approved by Cabinet Order and subsequent legislation, tells me that in this particular amalgamation, B.C. Hydro can only be liable for the statutory obligations of BC Electric as they existed immediately before August 20, 1965. [Underlining represents my emphasis.]

[38] The manager found that the "responsible person" provisions of the **Waste Management Act** could apply to B.C. Electric only if those provisions were "fully retroactive" – i.e., "if the 1993 amendments which came into effect in 1997,

reached back in time and changed the law as it existed in 1965 by making B.C. Electric a responsible person at that time."

He noted the distinction between "retroactive" and

"retrospective" legislation described by Professor E.A.

Driedger in 1978 in an article entitled "*Statutes: Retroactive Retrospective Reflections*", 56 **Can. Bar Rev.** 264, which

distinction I will discuss more fully below. The manager

concluded that s. 26.5 of the **Waste Management Act** was not

retroactive. In his analysis:

In my opinion, for the purpose of the power to issue a remediation order in s. 27.1(1) of the Act, the definitions of responsible person in the 1993 amendments to the *Waste Management Act* are not retroactive. Nothing in the language of s. 26.5 suggests that the definitions operate backward in time and change the law from what it was in 1965. The provisions are instead a clear example of retrospective legislation which - in relation to the definition of responsible person - operates for the future, but in so doing imposes new legal consequences in respect of past actions, events or status. Thus, on April 1, 1997, a person who was a past or present owner or operator of a contaminated site, or a person who in the past was a producer or transporter, became a responsible person subject to a remediation order. While the effect of the amendments was to *dramatically expand in the present the responsibility of persons for their past actions or status*, the amendments do not change the law as it existed before the legislation came into force. Because the 1993 amendments do not reach back in time and change the law so that, as of August 20, 1965, BC Electric was a responsible person, the only logical conclusion is that BC Hydro cannot be legally responsible for the actions of BC Electric.

In arriving at this conclusion, I have given careful consideration to the express use of the word "retroactive" in s. 27(1). However, this does not speak to the 1993 amendments generally, or to the power to issue a remediation order in particular. Instead, the word is used specifically in the liability provision:

27(1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively, jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

Section 27(1) does not, as I read it, make retroactive the entire set of 1993 amendments or the definitions of responsible persons so as to change past laws. Instead, what it plainly says is that where persons are responsible for remediation under these amendments, *their liability to others for the reasonably incurred costs of remediation by those others (including government) is retroactive (as well as absolute, joint and several).*

BC Hydro states that whether this use of the term "retroactive" might make BC Hydro liable in damages for BC Electric's actions in a s. 27 claim is not an issue I have to decide here. I agree. Whether ordered parties might rely on s. 27 to recover remediation costs against BC Hydro (either in its own right or as a result of the actions of any existing former officers or directors of BC Electric who might be indemnified by BC Hydro) is a question they can pursue as they see fit. However, I am satisfied that s. 27 does not take the 1993 amendments back in time and change the law as it existed on August 20, 1965 such that as of that date, BC Electric was a responsible person subject to a remediation order. [Underlining represents my emphasis.]

[39] Later in his reasons, the manager (whose name happens to be Mr. R.J. Driedger) acknowledged that he had come to this conclusion reluctantly, since B.C. Hydro had found "a 'legal gap' which has little moral or policy justification in so far as avoidance of contaminated sites legislation is concerned." He noted it was open to the Legislature to close this 'gap' and suggested that B.C. Hydro might co-operate in remediation efforts on a voluntary basis "either as part of good corporate citizenship or in the context of lawsuits filed by the parties."

The Environmental Appeal Board

[40] The Harbour Commission, GCC and CGC appealed to the Environmental Appeal Board on the basis that the manager had erred in law. The Board allowed the appeal for reasons dated August 23, 1999. It began its reasons by describing the arguments made by GCC and the Harbour Commission concerning the effect of a corporate amalgamation, as illuminated by the Supreme Court of Canada's decision in ***R. v. Black and Decker Manufacturing Co.*** [1975] 1 S.C.R. 411. In that case, the Court noted that the language used in the ***Canada Corporations Act***, RSC 1970, c. C-32, to the effect that an amalgamated company "is subject to all the contracts, liabilities, debts

and obligations of each of the amalgamating companies", was "all-embracing" and "merely supportive of a general principle".

[41] The Board also noted that *Black and Decker* had been considered by the Supreme Court of British Columbia in *Rossi v. McDonald's Restaurants of Canada Ltd.* [1991] B.C.J. 429. There, the Court declined to follow earlier case law to the effect that on an amalgamation under the British Columbia *Companies Act*, the amalgamating companies do not continue to exist. On a consideration of cases decided under federal, Ontario and British Columbia corporate legislation, the Court in *Rossi* held that a corporate amalgamation does not constitute an assignment (in *Rossi*, of a lease). In the words of Shaw J., ". . . there is not the complete divestiture of property or rights which is a fundamental characteristic of an assignment." (at 5)

[42] The Board in the instant case considered the argument of GCC and the Harbour Commission that the words "immediately before the amalgamation" (which did not appear in the B.C. *Companies Act* and do not now appear in the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44), were intended to have a similar effect to the word "thereafter" in the *Companies Act*

"by establishing that from the moment of amalgamation, the new entity assumes the obligations of the amalgamating entities." Following a review of the steps by which B.C. Hydro had been created and amalgamated in 1964, the Board concluded that the Legislature had intended "to combine the three amalgamating entities in such a way that they continue to exist as one unified entity." In the Board's analysis:

As a consequence of their amalgamated status, they no longer exist as **separate** entities. Specifically, B.C. Electric continues as an element of the amalgamated B.C. Hydro, though it is no longer a discrete entity. The analogy of three streams merging and mixing to form one river illustrates this concept. Therefore, based on the nature of the amalgamation process, the amalgamated B.C. Hydro cannot avoid liability for the past acts of a part of itself, i.e. B.C. Electric, unless there is a clear legislative intent to stop this liability from flowing to B.C. Hydro.

[43] The Board then considered the meaning of the words "immediately before the amalgamation" contained in the Amalgamation Agreement and Order-in-Council. As before, GCC and the Harbour Commission argued that the phrase merely denoted "the time from which the amalgamated B.C. Hydro takes on the liabilities of the amalgamating entities". Noting that the words of a statute are to be read in their entire context, the Board observed that:

. . . the Agreement contains no phrases such as "is only liable for" or "is not liable thereafter for" which would clearly indicate an intention to limit liability. Rather, the Agreement contains broad and inclusive language, providing that the amalgamated B.C. Hydro "shall be liable for **all the duties, liabilities and obligations**" of each of the amalgamating companies, "whether conferred or imposed by statute or otherwise . . . immediately before the amalgamation."

[44] After reviewing various corporations statutes and the 1964 statutes dealing with B.C. Hydro, as well as the objects and purposes of the **Waste Management Act** (to which B.C. Hydro is subject by virtue of s. 32(7)(y) of the present **British Columbia Hydro and Power Authority Act**, R.S.B.C. 1996, c. 212), the Board concluded:

. . . the purpose of the words "immediately before the amalgamation" in the Agreement is to recognize the date from which the amalgamated B.C. Hydro became liable for all of the liabilities, duties and obligations of the amalgamating entities, and became seized of and possessed all their assets, rights, undertakings, powers, privileges, etc. The Agreement contains no language showing an express or clear intention to limit the amalgamated B.C. Hydro's liability for the actions of the amalgamating entities, including B.C. Electric.

Therefore, the Panel finds that B.C. Hydro can be liable for the pre-amalgamation actions of B.C. Electric, and may be named a responsible person under Part 4 of the **Waste Management Act** on that basis. The Panel orders that this matter be remitted to the Deputy Director for a determination, as to whether, on the facts, this is an appropriate case in which to find that B.C. Hydro should be

named as a responsible person to the Order and subsequent amendments. [Emphasis added.]

[45] Given this finding, the tribunal agreed with GCC and the Harbour Commission that it was unnecessary to determine whether the **Waste Management Act** is "retroactive, such that B.C. Electric could have been a 'responsible person' at the time of amalgamation." The Board nevertheless expressed the view that although s. 27(1) (the "liability" provision) of the **Waste Management Act** was clearly retroactive, s. 26.5 operated only retrospectively "to define who may be a responsible person". In their words:

The Panel agrees that an important purpose of Part 4 is to make polluters pay for cleaning up contamination that results from both their actions, regardless of whether those actions occur in the past or the present. This serves the public interest in preventing and reducing harm to the environment and human health, and correctly places the costs of clean up on those responsible, rather than on tax payers. With this purpose in mind, section 26.5 casts a broad net in defining "responsible person." However, the Panel finds that section 26.5 need not be applied retroactively in order for Part 4 to achieve its purpose. Rather, Part 4 imposes a duty, as of the law's coming into force, on responsible persons to pay "absolutely, retroactively and jointly and severally" for the cost of cleaning up contamination resulting from their past and present activities. By applying section 26.5 retrospectively and section 27(1) retroactively, the *Waste Management Act* makes responsible persons pay to the full extent possible, without having to make them responsible persons in the past.

However, the Board did not find it necessary to reach a conclusive finding on this issue.

Supreme Court of British Columbia

[46] In October, 1994, B.C. Hydro filed a petition in the Supreme Court of British Columbia pursuant to the **Judicial Review Procedure Act**, seeking an order quashing the Board's decision or relief in the nature of *certiorari*. The Chambers judge dismissed the appeal from the bench on April 6, 2000. I quote below the material part of his reasoning:

In my opinion, the clear purpose of [clause 1(c)] of the Amalgamation Agreement] is to prevent the expiration of B.C. Electric's legal responsibilities upon amalgamation. Its clear purpose is to transfer those responsibilities to the new single entity formed from three pre-amalgamation entities. B.C. Electric lives on in the petition as the result of a transition intended by the Legislature to be seamless. The acts giving rise to contamination had been completed prior to the amalgamation and any legal responsibility for those acts arising before or after the amalgamation was assumed by the petitioner. If the Legislature had intended to limit the transfer only to legal responsibility that arose or materialized before the amalgamation and not after, it would have and should have made that intention clear by explicit language to that effect. I agree with the conclusion of the Board that the words "immediately before the amalgamation" are not words of limitation. They do not limit the legal responsibility. I agree with the reasoning of the Board, at page 21 of its decision, that the purpose of the four concluding words in the clause is to identify the date on which the petitioner became the beneficiary of all the property of B.C. Electric and

on which it assumed all of that company's duties, liabilities and obligations. Those duties, liabilities and obligations did not terminate on August 20, 1965. They were ongoing and it was the clear intention of the Legislature that they be assumed by the petitioner. Therefore, any legal responsibility under the **Waste Management Act** that would have fallen on B.C. Electric falls on the petitioner. [para. 9; emphasis added.]

The Chambers judge found further support for his conclusion in *R. v. Black and Decker, supra*, and was not persuaded that the concluding clause of the Amalgamation Agreement in the case at bar distinguished it from the reasoning in that case.

[47] This appeal was brought in May 2000, by which time the manager had been ordered by the Board to determine whether B.C. Hydro was a "responsible person" on the merits, and had determined that it was. At the time of that decision (November, 1999) some remediation work at the Oak Street site had been done, but a "significant amount" remained undone.

ANALYSIS

What Liabilities of B.C. Electric Became Liabilities of B.C. Hydro?

[48] I turn first to the submission of the respondents GCC and the Harbour Commission that the nature of a corporate amalgamation is such that all obligations and liabilities

necessarily carry through to the amalgamated corporation - despite what may be terms to the contrary in the amalgamation agreement. This raises squarely the meaning and effect of the concluding words of clause (c) of the 1965 Agreement by which B.C. Hydro came into being. For convenience, I set out again the operative part of that document:

- (1) The Authority, the Commission and the Company hereby amalgamate with each other in such a manner that
 - (a) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as a established by the British Columbia Hydro and Power Authority Act, 1964,
 - (b) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
 - (c) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the authority, the Company and the Commission immediately before the amalgamation.
[Emphasis added.]

This was followed, of course, by the Order-in-Council 'revoking' and 'cancelling' B.C. Electric's "incorporation", and declaring it to be "dissolved."

[49] At the outset, it bears noting that the rules of construction of contract mandate that the words used be construed in their plain and ordinary sense and that "the literal meaning must be given to the language of the contract unless this would result in an absurdity." (See Fridman, **The Law of Contract in Canada**, 1994, at 454). A contract, like a statute, should be construed as a whole, giving effect to everything in it if at all possible. (*Supra*, at 469). What then is the ordinary and natural meaning of what Mr. Spencer called the "four little words" at the end of clause (c), read in the context of the Amalgamation Agreement as a whole?

[50] It is fair to say that none of the counsel appearing before us sought to defend the idea that the purpose of the words "immediately before the amalgamation" at the end of clause (c) was to "identify the date on which [B.C. Hydro] became the beneficiary of all the property of B.C. Electric and on which it assumed all of that company's duties, liabilities and obligations." (Chambers judge, Reasons for Judgment, para. 9.) With respect, I agree it would be nonsensical to say that B.C. Hydro acquired all the properties and assumed all the obligations and liabilities of B.C. Electric "immediately before the amalgamation" when that did not happen until the moment of amalgamation. The effective

time and date of the amalgamation were in any event clearly stated in clause 2 of the Agreement, and the Order-in-Council confirmed that the amalgamation "shall become effective at the date and time provided in the amalgamation agreement" - not the moment immediately before.

[51] At the same time, Mr. Mitchell for the Harbour Commission argued strongly that the four words were not "words of limitation" but were intended to ensure a seamless continuance of B.C. Electric's assets and liabilities, or were the "flip side" of the word "thereafter" in the phrase ". . . and thereafter the amalgamated company shall be seized of and shall hold and possess . . ." appearing in statutes such as the **Companies Act**, R.S.B.C. 1960, c. 67, at s. 178(11). This submission is indistinguishable in my view from the Chambers judge's explanation of the four words. For his part, Mr. Spencer on behalf of the C.P.R. submitted that the phrase modifies "the Authority, the Company, and the Commission" appearing immediately before. With respect, I believe there can be little doubt that as a matter of grammatical construction, the four words modify (at least) the phrase "duties, liabilities and obligations" in clause (c) of the Agreement. On an ordinary reading of the document, these words limit the duties, liabilities and obligations being

assumed. They answer the question "Which duties, liabilities and obligations are being assumed?" The answer appears to be, "All those to which B.C. Electric and the other predecessor corporations were subject immediately before the amalgamation."

[52] The respondents naturally cautioned against over-emphasizing the four words and contended that to read them as limiting the liabilities assumed by B.C. Hydro would be inconsistent with the notion that upon an amalgamation the predecessor corporations "live on" in some sense, though not as separate corporate entities. In this regard Mr. Spencer noted the words "as a separate corporation" in clause (b) of the Agreement and the reference to "continuing" as one amalgamated corporation. He relied heavily on *Black and Decker, supra*, where it was held that after an amalgamation under the *Canada Corporations Act*, R.S.C. 1970, c. C-32, an amalgamated corporation remained liable to be prosecuted for criminal offences allegedly committed by a predecessor prior to the amalgamation. One would have been very surprised to see any other result, given that the statute (like the *Companies Act* at the time) provided that upon the issuance of letters patent of amalgamation, an amalgamated company was "subject to all the contracts, liabilities, debts and

obligations of each of the amalgamating companies." As Dickson J. (as he then was) noted, if Parliament had intended that a company could, by the simple expedient of amalgamating with another, free itself of accountability under the **Combines Investigation Act** or the **Criminal Code**, clearer language would surely have been necessary. (At 417-8.) In the case at bar, of course, there was no attempt to rid B.C. Hydro of liabilities or obligations to which B.C. Electric was subject at the time of amalgamation: those liabilities were expressly "inherited" by B.C. Hydro.

[53] The Court went on, however, to say in **Black and Decker**:

Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the Canada Corporations Act no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition"- *Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state; [at 417; emphasis added.]

and:

If ss. 137(13)(b) and 137(14) are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibility, must be regarded as severed from the amalgamating companies and outside the amalgamated company. . . . The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution. [at 422]

[54] Like s. 137 of the **Canada Corporations Act**, the Amalgamation Agreement in the case at bar stated that the predecessor corporations would "continue" as one corporation, which would "possess" all the assets of the predecessors. However, neither **Black and Decker** nor its companion case, **Witco Chemical Co., Canada, Ltd. v. The Corporation of the Town of Oakville** [1975] 1 S.C.R. 273, nor any of the other cases to which we were referred dealt with obligations or liabilities which were created after the date of amalgamation; nor did they deal with statutory wording similar to the terms of clause (c) of the Agreement. Thus, observations about the "blending" and "continuance" of the predecessors are not of great assistance in construing the terms of a private agreement in which the parties appear to have done what it was in their commercial interest to do - limit the liabilities

flowing through to B.C. Hydro, to those in existence at the time of amalgamation.

[55] Mr. Singleton on behalf of B.C. Hydro relied first on the four words themselves. In his submission, they limited the liabilities of B.C. Electric being assumed by B.C. Hydro under the Agreement, which was not subject to or informed by any statute of general application. If the words were unclear, he relied also on the context of the Agreement and the factual matrix in which it was written, to argue that they were intended to, and did, limit the obligations assumed by B.C. Hydro at the time of amalgamation. Obviously, this was no ordinary amalgamation, as shown by the litigation between the Province and B.C. Power Commission; the special legislation enacted in 1964-5; B.C. Hydro's immunity from most provincial enactments; and the care taken by the author of the Amalgamation Agreement and by the legislative draftsman concerning what liabilities were being assumed, what shares were being surrendered to the Province, and what the effect of the re-organization was to be on the predecessors' secured and unsecured debt obligations and commitments regarding share allotments and conversions. Mr. Singleton noted that although the language in the Amalgamation Agreement for the most part paralleled that of s. 178(11) of the *Companies Act* and the

counterpart provisions in the *Canada Corporations Act* at the time, the "four little words" distinguished this amalgamation from amalgamations under those statutes, and must be given meaning if at all possible. Last, the statutory dissolution of B.C. Electric, though perhaps redundant, could leave no doubt that it did not "live on" in any sense - formal, substantive, or metaphysical.

[56] Applying the "golden rule" that words used in a contract must be given their plain and ordinary meaning unless an absurdity would result, I cannot read the concluding words of clause (c) of the Agreement as meaning anything other than that the liabilities which B.C. Hydro was assuming at the time of amalgamation were limited - the literal and ordinary meaning, and a result consistent with the commercial interests of all three parties to the Agreement. (The concluding words may also have limited the assets being assumed, but that is irrelevant to this appeal.) The words were obviously chosen deliberately and the fact they are not "unique" in the annals of corporate precedents does not mean they are mere surplusage or were not intended to have meaning. They have the effect of protecting B.C. Hydro from any obligations other than those that would have properly appeared on the balance sheet of B.C. Electric immediately prior to the amalgamation.

[57] This result is not in my view inconsistent with the concept of an amalgamation as a "continuance" of the predecessors as one, or the flowing of three rivers into one. The three predecessors did become one and their undertakings, including existing liabilities, were merged. But as stated in **Black and Decker** at 420, the word "amalgamation" is not a legal term and is "not susceptible of exact definition." (In this regard see, e.g., **Re South African Supply and Cold Storage Co.** [1904] 2 Ch. 268 and **Re Seaboard Life Insurance Co. and Attorney General of British Columbia** (1986) 30 D.L.R. (4th) 264 (B.C.S.C.)) At the end of the day, as Dickson J. stated in **Black and Decker**, the statute under which the amalgamation is authorized will govern. In this case, the **British Columbia Hydro and Power Authority Act, 1964** empowered the Authority to amalgamate "in any manner" with other corporations, and it was in B.C. Hydro's interest and indeed the public interest not to have the amalgamated corporation assume more obligations than it intended to assume. The amalgamation was not carried out under B.C. Electric's constating statute, the **Companies Act**, presumably so that it would not be subject to the 'usual' provisions. This was an exceptional case, to which a great deal of legislative attention was devoted. The predecessor corporations ceased to

exist as such, and in case there was any doubt on the point, B.C. Electric was also dissolved, and its certificate of incorporation was cancelled, by special order. In my opinion, it is not tenable to maintain that B.C. Electric lived on in some sense sufficient to attract liability for an obligation arising more than 30 years later.

Alternate Conclusion

[58] Before leaving this part of the analysis, I note my alternate conclusion that even if the Amalgamation Agreement had not contained the 'limiting' words in clause (c), B.C. Hydro could not be brought within the definition of "responsible person" in Part 4. "Responsible person" refers to a "previous owner or operator of the site": s. 26.5(1)(b). The term "operator" means "a person who is or was in control of or responsible for" operations at the site, and "owner" means "a person" who has certain possessory or other rights in the property. The term "person" is not defined to include bodies corporate that previously existed but no longer exist. It is obvious that B.C. Hydro itself was never in control of any operation at the site, and never was in possession of or in occupation or control of the property. Is B.C. Electric "a person who is or was" in control or in possession of rights in

the property? Counsel did not address this question directly, but if my views expressed above on the meaning of the "four little words" were incorrect, it might be helpful for me to do so for purposes of any further appeal.

[59] In my opinion, regardless of the effect of the four words, it cannot now be said that B.C. Electric is a "person" as required by the definitions of "owner" and "operator". Under the Amalgamation Agreement and the Order-in-Council of August 20, 1965, B.C. Electric ceased to exist as a separate corporation, and under the Order-in-Council of August 23, 1965, its incorporation was "revoked and cancelled" and it was "declared to be dissolved." Whatever happened to its assets, undertaking and liabilities, B.C. Electric is no longer a "person" – i.e., a body corporate that may sue and be sued.

[60] I reach this conclusion notwithstanding **Black and Decker** and **Witco**, *supra*. In the latter case, the Court ruled that a corporation which had amalgamated with another effective as of the day after it had issued a writ against the defendants, should be permitted to amend its writ and statement of claim – even though a limitation period would have barred the action against one of the defendants in the interim. The Court, *per* Spence J., emphasized that the "error" of the plaintiff had

been *bona fide* and that no defendant had been misled or prejudiced by the plaintiff's "error". He therefore allowed the appeal. Having done so, he went on in *obiter* to note the wording of the amalgamation provisions of the Ontario statute (which was almost identical to that considered in ***Black and Decker***, discussed at para. 52 above), and expressed the opinion that the statute "ha[d] a strong indication that the corporate entity Witco Chemical Company, Canada, Limited, did continue to exist as a corporate entity despite the fact that by s. 197(4)(a) and (b) all its powers had passed to the amalgamated corporation." (At 282-3.) In the end, "there was not an extinguishment of the corporate identity of [Witco] sufficient to justify the Court in holding that the writ had been issued in the name of a non-existent plaintiff." (At 283-4.) The opposite seems true in the case at bar, where the Order-in-Council of August 23, 1965 could not have been clearer in extinguishing B.C. Electric's corporate identity or 'personhood', and where there was no statutory wording comparable to the wording of Ontario's ***Business Corporations Act*** or the wording at issue in ***Black and Decker***.

[61] On their face, then, the terms "previous owner or operator" and "responsible person" do not in my opinion reach corporations such as B.C. Electric which have ceased to exist,

either by being wound up (and not revived under applicable legislation) or dissolved in some other way. Is there some other aspect of Part 4 that mandates a different conclusion? I turn next to that question, which I will address on the understanding that whether B.C. Electric is now a "person", it would be open to the Legislature to attach a liability or obligation to it as of some point prior to 5:00 p.m. on August 20, 1965, which liability would have attached at that time to B.C. Hydro, making B.C. Electric's present lack of 'personhood' irrelevant.

Does the Waste Management Act have the effect of making B.C. Electric a "responsible party" immediately before the amalgamation?

[62] Proceeding on the assumption that the "four little words" do have the effect I have stated, does the **Waste Management Act** operate so as to fasten B.C. Electric with the obligations of a "responsible person" as at the moment immediately before its amalgamation in 1965? This question raises squarely the distinction between the retrospective and retroactive operation of statutes. The distinction has gained recognition in Canada due in large part to the writing of Professor Driedger, the author of the first and second editions of

Construction of Statutes. Professor Driedger stated the distinction succinctly in his 1978 article, *supra*:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forward*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [at 268-9; emphasis added.]

In so writing, Professor Driedger would appear to have articulated the reasoning of Dickson J. for the majority of the Court in *Gustavson Drilling (1964) Ltd. v. M.N.R.* (1975) 66 D.L.R. (3d) 449, at 460. (In England, the judgment of Buckley, J. in *West v. Gwynne* [1911] 2 Ch. 1 (C.A.), at 11-12, was evidently pivotal in making this distinction.) In the second edition of *Construction of Statutes*, Driedger elaborated further:

A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative

with respect to past transactions as of a past time, as, for example, the Act of Indemnity considered in *Phillips v. Eyre*. A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. Thus, for example, the Act to amend the Customs Tariff, S.C. 1969-70, c. 6, assented to on December 19, 1969, provided that the amendments to the Customs Tariff should be deemed to have come into force on June 4, 1969 (the date of the Budget Speech of the Minister of Finance) and to have applied to goods imported after that day; thus, a new and higher rate of duty was applied to past transactions as of a past time, namely, importations prior to the date the Act was enacted.

A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. As Lord Goddard said in *Re a Solicitor's Clerk* [[1957] 1 W.L.R. 1219, at p. 1223] an Act is retrospective if it

provided that anything done before the Act should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force....

A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future. [at 186; emphasis added.]

(With respect to the first underlined emphasized sentence above, I note that the **Waste Management Act** does not contain any statement of a specific time prior to its enactment when it was intended to change the law. Counsel for the Attorney General suggested that the **Act** should be taken as being

retroactive to the date on which British Columbia entered Confederation.)

[63] Although many writers and courts use the words "retroactive" and "retrospective" interchangeably, the distinction suggested by Driedger has been adopted on many occasions by this court, including *Bera v. Marr* (1986) 27 D.L.R. (4th) 161, *MacKenzie v. British Columbia (Commissioner of Teachers' Pensions)* (1992) 69 B.C.L.R. (2d) 227, at paras. 11-14, and *Hornby Island Trust Committee v. Stormwell* (1988) 30 B.C.L.R. (2d) 383, where Lambert J.A. said for the Court:

A retroactive statute operates forward in time, starting from a point further back in time than the date of its enactment; so it changes the legal consequences of past events as if the law had been different than it really was at the time those events occurred. A retrospective statute operates forward in time, starting only from the date of its enactment; but from that time forward it changes the legal consequences of past events. [at 389-90]; emphasis added.]

(See also Lambert J.A. (in dissent on another point) in *Johnstone v. Wright* [2002] B.C.J. No. 1422, at para. 5.)

[64] In the third edition of *Construction of Statutes*, edited by Professor R. Sullivan, she notes a "growing confusion around the term 'retrospective' in Canadian case law." She writes that the word "retroactive" is ambiguous:

Two meanings of "retroactive legislation". To say of legislation that it is retroactive is an ambiguous statement. It might mean that the legislation itself is retroactive, that is, it is intended to operate retroactively as evidenced by provisions that expressly make it applicable to the past. This is the sense intended by Beetz J. when he said, in *Venne v. Quebec (Commission de protection du territoire agricole)*, that "[t]rue retroactivity can generally be seen simply from reading a statute". Because it is strongly presumed that legislation is not intended to operate retroactively, statements rebutting the presumption tend to be obvious and clear.

The statement that legislation is retroactive can also mean that, whether or not it is intended to be retroactive, its application to certain circumstances would in fact give it a retroactive effect. This is usually the sense intended when litigants claim that legislation is retroactive. They mean that its application to *them* would be retroactive and therefore presumably was not intended. Unlike retroactivity in the first sense, retroactivity in the second sense cannot be seen simply from reading the statute. Recognizing whether a given application of legislation is retroactive is often a difficult judgment. [at 512]

[65] Professor Sullivan avoids using the term "retrospective" altogether in her analysis, which uses a model developed by J.-P. Côté, dividing fact-situations into "ephemeral", "continuing" and "successive". (See Côté, *The Interpretation of Legislation in Canada* (2nd ed., 1991) at 279.) That nomenclature appears to have been abandoned by Côté in his third edition, published in 2000 (at 125-139) and receives less emphasis from Professor Sullivan in the fourth edition of

Driedger (2002), at 548-553. I do not propose to complicate the law in British Columbia further by departing from Professor Driedger's analysis and the jurisprudence of this court cited above. I will also pass by the interesting question, not discussed by any of the foregoing authors, of how a statutory limitation or postponement thereof would operate in connection with retrospective or retroactive legislation.

[66] Applying Driedger's terminology to the case at bar, there is no disagreement among counsel that Part 4 of the **Waste Management Act** is at least retrospective – i.e., that at a minimum, it changes the law from what it would otherwise be with respect to prior events. It holds previous owners and operators, as well as present ones, responsible, and secured creditors who "at any time" exercised control over the treatment or disposal of a substance which resulted in contamination. The liability provision (s. 27(1)) applies even though the conduct in question "is or was not prohibited by any legislation", and despite the terms of any "cancelled, expired, abandoned or current permit or approval or waste management plan. . . ." Thus it seems clear the perceived deficiencies of the previous legislation revealed by cases such as *Rempel-Trail* and *B.C. Railway v. Driedger*, *supra*, are

cured - the **Act** "reaches back into the past" in the sense that it attaches responsibility to past events or conduct. As I have already mentioned, counsel for B.C Hydro therefore conceded that if B.C. Electric were still in existence, it would be subject to being named as a responsible person by reason of its activities in and about the Oak Street site between 1920 and 1954. But does Part 4 operate retroactively such that B.C. Electric can be said to have been a "responsible" person as of 4:59 p.m. on August 20, 1964? Does Part 4 make the law different from what it was at that time?

[67] As noted earlier, Professor Driedger states that a retroactive statute is "easy to recognize" since it must contain a provision that changes the law as of a time prior to its enactment." (See also Côté, *supra*, 3rd ed., at 127.) The **Waste Management Act** as a whole does not contain any statement that it is meant to apply as of a date earlier than April 1, 1997, nor that it shall be deemed always to have been law, or that it has always been the law. The only express reference in Part 4 to retroactivity is the word "retroactively" in s. 27(1), which applies to the liability of persons "who are responsible for remediation" of a contaminated site - a phrase which all counsel assumed, correctly in my view, is meant to refer to "responsible persons" as defined by s. 26.5(1). The

definition does not suggest that such persons "are and have always been" responsible persons or that they "are and have since British Columbia entered Confederation, been" responsible for remediation. Nor is any reference made to the predecessor corporations of previous or present owners or operators, or to the estates of deceased owners or operators.

[68] Does retroactive operation arise by necessary implication? B.C. Hydro argues that the presumption against retroactivity answers this question in the negative. The presumption, which applies both to the retroactive and retrospective operation of statutes, is founded in the belief that legislation of this kind infringes on the rule of law and is unfair. Professor Sullivan states the reasons for the presumption most strongly:

The reasons for presumption. Because a retroactive law applies to past events, its practical effect is to change the law that was applicable to those events at the time they occurred. To change the law governing a matter after it has already passed violates the rule of law. In fact, it makes compliance with the law impossible. As Raz points out, the fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is. [J. Raz, "The Rule of Law and its Virtue" in *The Authority of Law* (New York: Oxford University Press, 1979).] By definition, a retroactive law is unknowable until it is too late.

No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is not only arbitrary but also unfair. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retroactive legislation.

In short, retroactive legislation is undesirable because it is arbitrary and because it tends to be unfair. [at 513]

(See also Côté, *supra*, 3rd ed., at 148; Driedger, *supra*, 2nd ed., at 185; M. McDonald, *An Enquiry into the Ethics of Retrospective Liability: The Case of British Columbia's Bill 26*, (1995) 29 *U.B.C. Law Rev.* 63; and R. Crowley and F. Thompson, *Retroactive Liability, Superfund and the Regulation of Contaminated Sites in British Columbia*, at p. 87 of the same volume, especially at 110.)

[69] However, the presumption does not apply in all cases. Professor Driedger, in a passage approved by the Supreme Court of Canada in *Brosseau v. Alberta Securities Commission* [1989] 1 S.C.R. 301, at 318-19, explains:

. . . there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract

the presumption. Second, there are those that attach prejudicial consequences to a prior event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption. [at 198]

[70] L'Heureux-Dubé, J. summarized this passage of **Brosseau** by saying the presumption applies "only to prejudicial statutes" (p. 318), and that since the statutory amendment under consideration in **Brosseau** was "designed to protect the public, the presumption . . . [was] effectively rebutted" (p. 321). As noted by Professor Sullivan (*supra*, 4th ed., at 561), the latter comment of L'Heureux-Dubé J. was, with respect, perhaps misleading: the presumption is not rebutted simply by showing that the purpose of a provision is to protect the public. The emphasis is not on the intention or motivation of the Legislature, but on the consequences attached by the legislation to the past acts or conduct. Moreover, as Mr. Singleton argued, virtually every statute is designed to protect the public or the public interest in some way. Obviously, the **Waste Management Act** is intended to do so. But Part 4 clearly does not attach "benevolent consequences" to prior events. It attaches new liabilities to conduct (even conduct expressly authorized under permits issued by the

Crown) that previously did not attract liability; and that consequence is "prejudicial" to those affected, though perhaps not "punitive" or "penal".

[71] I have little doubt that the presumption applies to Part 4. But since it applies to both retroactive and retrospective legislation (though with less force to the latter: see *Driedger, supra*, 2nd ed., at 197-8), it is in any event not of great assistance to the question being addressed in this case. So, setting aside the presumption and considering only that a statute generally speaks prospectively, I return to whether Part 4 or the definition of "responsible person" in s. 26.5 is by implication to be read retroactively to some point in time prior to August 20, 1965. In answering this question, counsel for the Attorney General said that recent cases have shown a "policy trend" towards recognizing the desirability of environmental protection and remediation. This argument was not helpful, assuming as it does that the meaning and operation of statutes may or should be decided by judges on the basis of the laudability (in their opinion) of the policy objective in question. Mr. Singleton, counsel for B.C. Hydro, rightly responded that the role of the courts is to interpret the law, including statutes, in accordance with recognized

rules of law and that if the meaning of a statute is clear, a court must give effect to it.

[72] At the same time, s. 8 of the **Interpretation Act**, R.S.B.C. 1996, c. 238, states that every enactment must be construed as being remedial and must be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Further, the "modern" approach to statutory construction (endorsed on many occasions by the Supreme Court of Canada) tells us that "the words of an Act should 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." (Driegder, 2nd ed., *supra*, at 87.) In this regard, the Attorney General submitted in his factum that the express words of the **Waste Management Act** clearly show a legislative intent that all the provisions of Part 4 be interpreted retroactively and that such interpretation is necessary to give effect to the purposes of Part 4. The primary purpose of Part 4, Ms. Rowbotham argued, is the "expeditious remediation of contaminated sites", which purpose would be undermined "if the Ministry [of the Environment] was limited as to the parties it could order to remediate a property." More specifically:

. . . to hold that a person could be retroactively liable in a private cost recovery action for remediation, but could not be retroactively responsible for causing the contamination, would rob even the private cost recovery action of its intent. The private cost recovery is designed to enable persons who incur remediation costs to recover those costs from anyone who caused or contributed to the contamination. However, these persons are described in s. 27(4) as 'responsible persons'. If responsibility is not retroactive under a remediation order, then the pool of persons liable under s. 27(4) would be similarly restricted.

[73] With respect, I am not persuaded that Part 4 must be given retroactive, as opposed to retrospective, operation to achieve its apparent purpose of subjecting a large class of persons to remediation obligations. As already noted, Part 4 undoubtedly "reaches into the past". It fastens responsibility on previous owners and operators of contaminated sites and persons who transported or arranged for the transport of contaminating substances at some time in the past, i.e., prior to April 1, 1997. Presumably, Part 4 permits the recovery of remediation costs incurred before that date. In Driedger's terminology, new "prejudicial consequences" are attached to completed transactions or events. The reasoning in *Rempel-Trail* and *B.C. Railway v. Driedger*, *supra*, is no longer tenable. Furthermore, once a person has been shown to be a "responsible person" as defined, his or her liability under s. 27(1) is very arguably - we need

not finally decide the point in this case - retroactive, although when it is retroactive to is unclear. (Since as already mentioned, a plaintiff suing under s. 27(1) must have incurred remediation costs, it may be that the liability dates back to when the costs were incurred. I leave this issue to be resolved on another day.) But with respect to the Attorney General's submission that "to be liable is to be responsible", it must be remembered that under Part 4, liability follows responsibility. The statute clearly contemplates that before one may be "liable" under s. 27(1), he or she must be a "responsible person" as defined by s. 26.5.

[74] In summary, Part 4 casts a very wide net indeed, both in terms of past events and in terms of persons caught by the definition of "responsible person." It cannot be said, in my opinion, that its objects would be undermined unless the definition also operated retroactively. Indeed, I consider that in drafting the **Act** to operate retrospectively, the draftsman must have attained the Legislature's main objective and that cases in which retroactive operation would yield many practical results would be very rare indeed.

[75] By the same token, if all of Part 4 or the definition of "responsible person", did operate retroactively, the

implications would be breathtaking in terms of legal theory. Any individual or body corporate who had contributed to the contamination of real property in British Columbia since the time it entered Confederation would be caught in the net as of the time of the contamination. Individuals have died, estates and corporations have been wound up, businesses and properties have been bought and sold, financial statements have been relied upon – the finality of a host of transactions and representations would be cast into doubt by a statute that imposes liability retroactively to 1871 – subject, I suppose, to any bar arising under the *Limitation Act* (concerning which we received no submissions). Quite apart from any presumption of construction, this fact should cause any court to require that clear language be used to effect such a result.

[76] In short, I agree with Deputy Director Driedger, who stated in his reasons:

. . . for the purpose of the power to issue a remediation order in s. 27.1(1) of the Act, the definitions of responsible person in the 1993 amendments to the *Waste Management Act* are not retroactive. Nothing in the language of s. 26.5 suggests that definitions operate backward in time and change the law from what it was in 1965. The provisions are instead a clear example of retrospective legislation which – in relation to the definition of responsible person – operates for the future but in so doing imposes new legal consequences in respect of past actions, events or

status. Thus, on April 1, 1997, a person who was a past or present owner or operator of a contaminated site, or a person who in the past was a producer or transporter, became a responsible person subject to a remediation order. While the effect of the amendments was to dramatically expand in the present the responsibility of persons for their past actions or status, the amendments do not change the law as it existed before the legislation came into force.

[Emphasis added.]

(I note that in an article entitled "*Retrospectivity in Law*" (1995) 29 *U.B.C. Law Rev.* 5, Professor E. Edinger takes a similar view concerning Part 4 (see paras 10-12), as does Professor M. McDonald, *ibid*, at 63-71.)

[77] It follows in my judgement that B.C. Electric cannot be said to have been a "responsible person" as at 4:59 p.m. on August 20, 1965 or to have had a liability under s. 27(1) of the **Waste Management Act** at that time. As well, for the reasons stated earlier, it is my view that B.C. Hydro assumed only the obligations and liabilities to which B.C. Electric was subject immediately before the amalgamation in 1964, and alternately, that even had B.C. Electric amalgamated in the 'usual way', it cannot now be said to be a "person" as required by the chain of statutory definitions encompassed by the term "responsible person" in Part 4. I would allow the

appeal and reinstate the decision of the Deputy Director dated October 15, 1998 as it relates to B.C. Hydro.

[78] We are indebted to counsel for their able arguments.

"The Honourable Madam Justice Newbury"

APPENDIX A

Waste Management Act

Part 4 - Contaminated Site Remediation

Division 3 - Liability

Persons responsible for remediation at contaminated sites

- 26.5 (1) Subject to section 26.6, the following persons are responsible for remediation at a contaminated site:
- (a) a current owner or operator of the site;
 - (b) a previous owner or operator of the site;
 - (c) a person who
 - (i) produced a substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
 - (d) a person who
 - (i) transported or arranged for transport of a substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the site to become a contaminated site;
 - (e) a person who is in a class designated in the regulations as responsible for remediation.
- (2) In addition to the persons referred to in subsection (1), the following persons are responsible for remediation at a contaminated site that was contaminated by migration of a substance to the contaminated site:
- (a) a current owner or operator of the site from which the substance migrated;

- (b) a previous owner or operator of the site from which the substance migrated;
 - (c) a person who
 - (i) produced the substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site;
 - (d) a person who
 - (i) transported or arranged for transport of the substance, and
 - (ii) by contract, agreement or otherwise caused the substance to be disposed of, handled or treated in a manner that, in whole or in part, caused the substance to migrate to the contaminated site.
- (3) A secured creditor is responsible for remediation at a contaminated site if
- (a) the secured creditor at any time exercised control over or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the control or requirements, in whole or in part, caused the site to become a contaminated site, or
 - (b) the secured creditor becomes the registered owner in fee simple of the real property at the contaminated site,
- but a secured creditor is not responsible for remediation if it acts primarily to protect its security interest, including, without limitation, if the secured creditor
- (c) participates only in purely financial matters related to the site,
 - (d) has the capacity or ability to influence any operation at the contaminated site in a way that would have the effect of causing or

increasing contamination, but does not exercise that capacity or ability in such a way as to cause or increase contamination,

- (e) imposes requirements on any person if the requirements do not have a reasonable probability of causing or increasing contamination at the site, or
- (f) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.

Persons not responsible for remediation

26.6 (1) The following persons are not responsible for remediation at a contaminated site:

- (a) a person who would become a responsible person only because of an act of God that occurred before the coming into force of this section and who exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
- (b) a person who would become a responsible person only because of an act of war and who exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
- (c) a person who would become a responsible person only because of an act or omission of a third party, other than
 - (i) an employee,
 - (ii) an agent, or
 - (iii) a party with whom the person has a contractual relationship,if the person exercised due diligence with respect to any substance that, in whole or in part, caused the site to become a contaminated site;
- (d) an owner or operator who establishes that

- (i) at the time the person became an owner or operator of the site,
 - (A) the site was a contaminated site,
 - (B) the person had no knowledge or reason to know or suspect that the site was a contaminated site, and
 - (C) the person undertook all appropriate inquiries into the previous ownership and uses of the site and undertook other investigations, consistent with good commercial or customary practice at that time, in an effort to minimize potential liability,
- (ii) while the person was an owner of the site, the person did not transfer any interest in the site without first disclosing any known contamination to the transferee, and
- (iii) the owner or operator did not, by any act or omission, cause or contribute to the contamination of the site;
- (e) an owner or operator who owned or occupied a site that at the time of acquisition was not a contaminated site and during the ownership or operation the owner or operator did not dispose of, handle or treat a substance in a manner that, in whole or in part, caused the site to become a contaminated site;
- (f) a person described in section 26.5 (1) (c) or (d) or (2) (c) or (d) who
 - (i) transported or arranged to transport a substance to a site if the owner or operator of the site was authorized by or under statute to accept the substance at the time of its deposit, and
 - (ii) received permission to deposit the substance from the owner or operator described in subparagraph (i);

- (g) a government body that involuntarily acquires an ownership interest in the contaminated site, other than by government restructuring or expropriation, unless the government body caused or contributed to the contamination of the site;
 - (h) a person who provides assistance or advice respecting remediation work at a contaminated site in accordance with this Act, unless the assistance or advice was carried out in a negligent fashion;
 - (i) a person who owns or operates a contaminated site that was contaminated only by the migration of a substance from other real property not owned or operated by the person;
 - (j) an owner or operator of a contaminated site containing substances that are present only as natural occurrences not assisted by human activity and if those substances alone caused the site to be a contaminated site;
 - (k) subject to subsection (2), a government body that possesses, owns or operates a roadway, highway or right of way for sewer or water on a contaminated site, to the extent of the possession, ownership or operation;
 - (1) a person who was a responsible person for a contaminated site for which a conditional certificate of compliance or a certificate of compliance was issued and for which another person subsequently proposes or undertakes to
 - (i) change the use of the contaminated site, and
 - (ii) provide additional remediation;
 - (m) a person who is in a class designated in the regulations as not responsible for remediation.
- (2) Subsection (1) (k) does not apply with respect to contamination placed or deposited below a roadway, highway or right of way for sewer or water by the

government body that possesses, owns or operates the roadway, highway or right of way for sewer or water.

- (3) A person seeking to establish that he or she is not a responsible person under subsection (1) has the burden to prove all elements of the exemption on a balance of probabilities.

General principles of liability for remediation

- 27 (1) A person who is responsible for remediation at a contaminated site is absolutely, retroactively and jointly and severally liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.
- (2) For the purpose of this section, "**costs of remediation**" means all costs of remediation and includes, without limitation,
- (a) costs of preparing a site profile,
 - (b) costs of carrying out a site investigation and preparing a report, whether or not there has been a determination under section 26.4 as to whether or not the site is a contaminated site,
 - (c) legal and consultant costs associated with seeking contributions from other responsible persons, and
 - (d) fees imposed by a manager, a municipality, an approving officer, a division head or a district inspector under this Part.
- (3) Liability under this Part applies
- (a) even though the introduction of a substance into the environment is or was not prohibited by any legislation if the introduction contributed in whole or in part to the site becoming a contaminated site, and
 - (b) despite the terms of any cancelled, expired, abandoned or current permit or approval or waste management plan and its associated

operational certificate that authorizes the discharge of waste into the environment.

- (4) Subject to section 27.3 (3), any person, including, but not limited to, a responsible person and a manager, who incurs costs in carrying out remediation at a contaminated site may pursue in an action or proceeding the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

Remediation orders

- 27.1** (1) A manager may issue a remediation order to any responsible person.
- (2) A remediation order may require a person referred to in subsection (1) to do all or any of the following:
 - (a) undertake remediation;
 - (b) contribute, in cash or in kind, towards another person who has reasonably incurred costs of remediation;
 - (c) give security in an amount and form, which can include real and personal property, subject to conditions the manager specifies.
 - (3) When considering whether a person should be required to undertake remediation under subsection (2), a manager may determine whether remediation should begin promptly, and must particularly consider the following:
 - (a) adverse effects on human health or pollution of the environment caused by contamination at the site;
 - (b) the potential for adverse effects on human health or pollution of the environment arising from contamination at the site;
 - (c) the likelihood of responsible persons or other persons not acting expeditiously or satisfactorily in implementing remediation;

- (d) in consultation with the chief inspector appointed under the *Mines Act*, the requirements of a reclamation permit issued under section 10 of that Act;
 - (e) in consultation with a division head under the *Petroleum and Natural Gas Act*, the adequacy of remediation being undertaken under section 84 of that Act;
 - (f) other factors, if any, prescribed in the regulations.
- (4) When considering who will be ordered to undertake or contribute to remediation under subsections (1) and (2), a manager must to the extent feasible without jeopardizing remediation requirements
- (a) take into account private agreements respecting liability for remediation between or among responsible persons, if those agreements are known to the manager, and
 - (b) on the basis of information known to the manager, name one or more persons whose activities, directly or indirectly, contributed most substantially to the site becoming a contaminated site, taking into account factors such as
 - (i) the degree of involvement by the persons in the generation, transportation, treatment, storage or disposal of any substance that contributed, in whole or in part, to the site becoming a contaminated site, and
 - (ii) the diligence exercised by persons with respect to the contamination.
- (5) A remediation order does not affect or modify the right of a person affected by the order to seek or obtain relief under an agreement, other legislation or common law, including but not limited to damages for injury or loss resulting from a release or threatened release of a contaminating substance.

- (6) If a remediation order or a pollution abatement order requiring remediation under section 31 is issued, and a manager has not yet determined if a site is a contaminated site under section 26.4, the manager must, as soon as reasonably possible after the issuance of the order,
- (a) determine whether the subject site is a contaminated site, in accordance with section 26.4, and
 - (b) make a ruling as to whether the person named in the order is a responsible person under section 26.5,

and if the person is not found to be a responsible person under paragraph (b), the manager making the order must compensate, in accordance with the regulations, the person for any costs directly incurred by the person to comply with the order.

- (7) A person receiving a remediation order under subsection (1) or actual notice of a remediation order under subsection (11) must not, without the consent of a manager, knowingly do anything that diminishes or reduces assets that could be used to satisfy the terms and conditions of the remediation order, and if the person does so, the manager, despite any other remedy sought, may commence a civil action against the person for the amount of the diminishment or reduction.
- (8) A manager may provide in a remediation order that a responsible person at a contaminated site is not required to begin remediation for a specified period of time if the contaminated site does not present an imminent and significant threat or risk to
- (a) human health, given current and anticipated human exposure, or
 - (b) the environment.
- (9) A person who has submitted a site profile under section 26.1 (8) must not directly or indirectly diminish or reduce assets at a site designated in the site registry as a contaminated site, including, without limitation,

- (a) disposition of real or personal assets, or
- (b) subdivision of land

until he or she requests and obtains written notice from a manager that the manager does not intend to issue a remediation order, and if the manager gives notice of the intention to issue a remediation order, or if the manager issues a remediation order, subsection (7) applies.

- (10) A manager may amend or cancel a remediation order.
- (11) A manager making a remediation order must, within a reasonable time, provide notice of the order in writing to every person holding an interest with respect to the contaminated site that is registered in the land title office at the time of issuing the order.

Allocation panel

- 27.2** (1) The minister may appoint up to 12 persons with specialized knowledge in contamination, remediation or methods of dispute resolution to act as allocation advisors under this section.
- (2) A manager may, on request by any person, appoint an allocation panel consisting of 3 allocation advisors to provide an opinion as to all or any of the following:
 - (a) whether the person is a responsible person;
 - (b) whether a responsible person is a minor contributor;
 - (c) the responsible person's contribution to contamination and the share of the remediation costs attributable to this contamination if the costs of remediation are known or reasonably ascertainable.
 - (3) When providing an opinion under subsection (2) (b) and (c), the allocation panel must, to the extent of available information, have regard to the following:

- (a) the information available to identify a person's relative contribution to the contamination;
 - (b) the amount of substances causing the contamination;
 - (c) the degree of toxicity of the substances causing the contamination;
 - (d) the degree of involvement by the responsible person, compared with one or more other responsible persons, in the generation, transportation, treatment, storage or disposal of the substances that caused the site to become contaminated;
 - (e) the degree of diligence exercised by the responsible person, compared with one or more other responsible persons, with respect to the substances causing contamination, taking into account the characteristics of the substances;
 - (f) the degree of cooperation by the responsible person with government officials to prevent any harm to human health or the environment;
 - (g) in the case of a minor contributor, factors set out in section 27.3 (1) (a) and (b);
 - (h) other factors considered relevant by the panel to apportioning liability.
- (4) A manager may require, as a condition of entering a voluntary remediation agreement with a responsible person, that the responsible person, at his or her own cost, seek and provide to the manager an opinion from an allocation panel under subsection (2).
- (5) A manager may consider, but is not bound by, any allocation panel opinion.
- (6) Work performed by the allocation panel must be paid for by the person who requests the opinion.

Minor contributors

- 27.3 (1) A manager may determine that a responsible person is a minor contributor if the person demonstrates that
- (a) only a minor portion of the contamination present at the site can be attributed to the person,
 - (b) either
 - (i) no remediation would be required solely as a result of the contribution of the person to the contamination at the site, or
 - (ii) the cost of remediation attributable to the person would be only a minor portion of the total cost of the remediation required at the site, and
 - (c) in all circumstances the application of joint and several liability to the person would be unduly harsh.
- (2) When a manager makes a determination under subsection (1) that a responsible person is a minor contributor, the manager must determine the amount or portion of remediation costs attributable to the responsible person.
- (3) A responsible person determined to be a minor contributor under subsection (1) is only liable for remediation costs in an action or proceeding brought by another person or the government under section 27 up to the amount or portion specified by a manager in the determination under subsection (2).

**APPENDIX B
Amalgamation Agreement**

SCHEDULE

THIS AGREEMENT is made the 20th day of August, 1965,

Between:

BRITISH COLUMBIA HYDRO AND POWER AUTHORITY, established by the British Columbia Hydro and Power Authority Act, 1964, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Authority"),

AND

BRITISH COLUMBIA POWER COMMISSION, established by the Power Act, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Commission"),

AND

BRITISH COLUMBIA ELECTRIC COMPANY LIMITED, a company incorporated under the laws of British Columbia, of 970 Burrard Street, in the City of Vancouver, in the Province of British Columbia (hereinafter called "the Company").

WHEREAS, by Order in Council made on the 20th day of August, 1965, pursuant to section 14(1) of the British Columbia Hydro and Power Authority Act, 1964, and pursuant to section 9(1) of the Power Measures Act, 1964, and pursuant to all other powers thereunto enabling, approval has been given to the Authority, the Commission and the Company having power to amalgamate with each other in the manner therein set out;

AND WHEREAS by the said Order in Council the procedure to be followed for effecting such amalgamation is prescribed to be by agreement between the Authority, the Commission and the and the Company;

NOW THEREFORE THIS AGREEMENT WITNESSES THAT:

(1) The Authority, the Commission and the Company hereby amalgamate with each other in such a manner that

(a) they continue as one amalgamated corporation which is the British Columbia Hydro and Power

- Authority as established by the British Columbia Hydro and Power Authority Act, 1964,
- (b) the Company and the Commission cease to exist as separate corporations, and
 - (c) the Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation.

(2) This agreement and the amalgamation effected hereby are effective at and from 5 p.m. local time in Vancouver, British Columbia, on Friday, the 20th day of August, 1965.

IN WITNESS WHEREOF this agreement has been executed by the parties hereto.

The Common Seal of BRITISH COLUMBIA)
HYDRO AND POWER AUTHORITY was)
hereto affixed in the presence of:)
"G.M. Shrum") [SEAL]
Chairman.)
"P.R. Kidd")
Assistant Secretary.)

The official seal of BRITISH COLUMBIA)
POWER COMMISSION was hereto affixed)
in the presence of:)
"H.L. Keenleyside") [SEAL]
Chairman.)
"P.R. Kidd")
Secretary.)

The Common Seal of BRITISH COLUMBIA)
ELECTRIC COMPANY LIMITED was)
hereto affixed in the presence of:)
"G.M. Shrum") [SEAL]
Chairman.)
"P.R. Kidd")
Assistant Secretary.)

APPENDIX C

Order-in-Council No. 2386

Approved and ordered this 20th day of August, A.D. 1965.

"George R. Pearkes"
Lieutenant-Governor.

At the Executive Council Chamber, Victoria,

PRESENT:

The Honourable "W.A.C. Bennett"	In the Chair.
Mr. "R.W. Bonner"	
Mr. "R.G. Williston"	
Mr. "E.C.T. Martin"	
Mr. "W.D. Black"	
Mr.	

*To His Honour
The Lieutenant-Governor in Council:*

The undersigned has the honour to recommend:

THAT, pursuant to section 14(1) of the British Columbia Hydro and Power Authority Act, 1964 and pursuant to section 9(1) of the Power Measures Act, 1964 and pursuant to all other powers thereunto enabling, approval be given to the British Columbia Hydro and Power Authority established by the British Columbia Hydro and Power Authority, 1964 and to the British Columbia Electric Company Limited and to the British Columbia Power Commission having power to amalgamate with each other in such a manner that

- (a) they continue as one amalgamated corporation which is British Columbia Hydro and Power Authority as

2003 BCCA 436 (CanLII)

established by the British Columbia Hydro and Power Authority Act, 1964, and

- (b) the said British Columbia Electric Company Limited and the said British Columbia Power Commission cease to exist as separate corporations, and
- (c) the said British Columbia Hydro and Power Authority shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise and subject to the Power Measures Act, 1964 be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the said British Columbia Hydro and Power Authority, British Columbia Electric Company Limited and British Columbia Power Commission immediately before the amalgamation:

AND THAT the procedure for effecting such amalgamation shall be as follows:-

- (a) British Columbia Hydro and Power Authority, established by the British Columbia Hydro and Power Authority Act, 1964, British Columbia Electric Company Limited, and British Columbia Power Commission, shall enter into an agreement providing for the amalgamation; and
- (b) the amalgamation effected by the amalgamation agreement shall become effective at the date and time provided in the amalgamation agreement.

DATED this 20th day of August A.D. 1965

"W.A.C. Bennett"
PREMIER

APPROVED this 20th day of August A.D. 1965

"W.A.C. Bennett"
PRESIDING MEMBER OF THE EXECUTIVE COUNCIL.

APPENDIX D

Order-in-Council No. 2387

Approved and ordered this 23rd day of August, A.D. 1965.

"George R. Pearkes"
Lieutenant-Governor.

At the Executive Council Chamber, Victoria,

PRESENT:

The Honourable

In the Chair.

Mr. Bennett
Mr. Bonner
Mr. Williston
Mr. Martin
Mr. Black
Mr.
Mr.

To His Honour

The Lieutenant-Governor in Council:

The undersigned has the honour to report:

THAT British Columbia Electric Company Limited is a company incorporated under the Companies Act:

AND THAT by Order of the Lieutenant-Governor in Council made pursuant to the British Columbia Hydro and Power Authority Act, 1964, and the Power Measures Act, 1964, and all other powers thereunto enabling, the amalgamation of British Columbia Hydro and Power Authority established by the British Columbia Hydro and Power Authority Act, 1964, and the British Columbia Electric Company Limited and the British Columbia

Power Commission has been approved, and that by agreement made pursuant to that Order-in-Council the amalgamation aforesaid has taken place, and that the British Columbia Electric Company Limited has ceased to exist as a separate corporation:

AND THAT the Power Measures Act, 1964 provides that the Companies Act has not applied and does not apply to the British Columbia Electric Company Limited except to the extent that may be provided by Order of the Lieutenant-Governor in Council:

AND TO RECOMMEND THAT pursuant to the Power Measures Act, 1964 and all other powers thereunto enabling section 212 of the Companies Act shall apply to the British Columbia Electric Company Limited, and that pursuant to that section the incorporation of British Columbia Electric Company Limited be revoked and cancelled and that British Columbia Electric Company Limited be declared to be dissolved, and that such other provisions of the Companies Act apply to the British Columbia Electric Company Limited to the extent necessary to effect the revocation, cancellation and dissolution hereby made.

DATED this 21st day of August, A.D. 1965.

"R.W. Bonner"
ATTORNEY GENERAL.

APPROVED this 21st day of August, 1965.

"W.A.C. Bennett"
PRESIDING MEMBER OF THE EXECUTIVE COUNCIL.

Reasons for Judgment of the Honourable Madam Justice Prowse:

[79] I have had the privilege of reading, in draft form, the reasons for judgment of my colleagues. With respect, I agree with Madam Justice Newbury that the British Columbia Hydro and Power Authority ("Hydro") cannot be fixed with liability under the *Waste Management Act*, R.S.B.C. 1996, c. 482, in these circumstances. I am also in substantial agreement with her reasons for reaching this conclusion. I would prefer not to express any view, however, with respect to her alternative basis for finding that Hydro is not liable, discussed at para. 6, and paras. 58-60 of her draft, since this point was not raised, or addressed, by the parties.

[80] While I take no issue with Madam Justice Rowles' discussion of the general law of amalgamation and the application of *R. v. Black and Decker Manufacturing Co.*, [1975] 1 S.C.R. 411 as a general rule, I agree with Newbury J.A. that neither the general law of amalgamation nor the *Black and Decker* decision governs the result in this case. As counsel noted at the outset of this appeal, the resolution of this case turns primarily on the Agreement between the parties, with particular emphasis on the words "immediately before the amalgamation" in clause (c) of the Agreement.

[81] Madam Justice Rowles directly addresses the meaning of this phrase in para. 115 of her reasons where she states that "saying that the new enterprise has the obligations of the old as they existed 'immediately before the amalgamation', is no different in substance from saying that 'thereafter' (meaning after amalgamation) the new enterprise has all the obligations of the old." For the reasons given by Newbury J.A., I am unable to agree with this interpretation.

[82] I also note that the spectre of companies at large avoiding liability to third parties through amalgamation is effectively precluded by various legislation governing amalgamations, including the **Company Act**, R.S.B.C. 1996, c. 62, the **Business Corporations Act**, S.B.C. 2002, c. 57 [not yet enacted], and the **Canada Business Corporations Act**, R.S.C. 1985, c. C-44. It is only because Hydro is not subject to such legislation, because of the specific wording of this Agreement, and because of the other factors mentioned by Newbury J.A., that the result in this case, which I agree is anomalous, could occur. In other words, this case is not of precedential value.

[83] In the result, I, too, would allow the appeal and reinstate the decision of the Deputy Director dated October 15, 1998, as it relates to Hydro.

"The Honourable Madam Justice Prowse"

Reasons for Judgment of the Honourable Madam Justice Rowles:

I. Introduction

[84] This is an appeal from the order of Mr. Justice Low dated 6 April 2000, dismissing a petition brought by the appellant, the British Columbia Hydro and Power Authority, for judicial review of a decision of the Environmental Appeal Board ("EAB") dated 23 August 1999. The EAB decided that the appellant could be held liable for the pre-amalgamation actions of the British Columbia Electric Company ("B.C. Electric") and could be named as a "responsible person" under Part 4, the contaminated site remediation provisions, of the **Waste Management Act**, R.S.B.C. 1996, c. 482.

[85] The effect of the dismissal of the appellant's petition for judicial review was to uphold the order made by the EAB adding the appellant to a Remediation Order under the **Waste Management Act** on account of activities of B.C. Electric that pre-dated the amalgamation of the British Columbia Hydro and Power Authority, the British Columbia Power Commission, and B.C. Electric.

[86] I have had the advantage of reading the draft reasons for judgment of Madam Justice Newbury. With respect, I am unable

to agree with my colleague's analysis and conclusion that as a result of the 1965 Amalgamation Agreement and the statute ratifying the amalgamation, the appellant became subject only to those liabilities and obligations of B.C. Electric that existed "immediately before the amalgamation". Instead, I am of the view that under the Amalgamation Agreement, which was subsequently ratified by the *Power Measures Act, 1966*, S.B.C. 1966, c. 38, the appellant became fixed with the liabilities to which B.C. Electric would have been subject had it not amalgamated with the other entities.

II. Overview of the appellant's arguments

[87] In essence, the appellant argues that it was given special protection by statute from the actions of the three amalgamating companies. No convincing rationale for such immunity is offered, but it is said to be available because of the language of the Amalgamation Agreement and the subsequent Order-in-Council approving the amalgamation. The appellant posits that the language used dictates the result.

[88] The appellant seems to suggest in its factum that the government was seeking to minimize the potential risk of the newly amalgamated company encountering liability for the actions of the three amalgamating entities. In my view, a

plain reading of the Amalgamation Agreement and the enabling legislation does not support that suggestion. The language used in the Agreement and in the Order-in-Council which followed does not suggest an intention to restrict the liabilities of the newly amalgamated corporation; rather, the words are consistent with an intention that it would possess all of the assets and be subject to all the liabilities of the amalgamating entities, without exception or restriction.

[89] The appellant has not made reference to any historical circumstances that brought about the amalgamation, or anything else that would support its suggestion that there was a concern about the possibility of the Authority finding itself saddled with liabilities as yet unknown. If such an argument were to prevail, the result would be, in my respectful view, absurd and unjust: some liabilities would be recognized while others of the same kind that had not yet matured would be denied. Similarly, it would interfere with the rights of third parties, and it would fly in the face of the generally understood common law interpretation of the effect of amalgamation on the constituent entities.

[90] As my colleague, Madam Justice Newbury, has noted, the appellant correctly conceded that if B.C. Electric were still

in existence, it would be a "responsible person" under the **Waste Management Act** by reason of its pre-amalgamation activities at what has since been determined to be a contaminated site. In view of that concession, and the conclusion I have reached with respect to the effect of the amalgamation, I find it unnecessary to consider the question of whether the legislature intended the **Waste Management Act** to have true retroactive effect.

III. Analysis

[91] Mr. Justice Low was of the view that the decision of the Supreme Court of Canada in **R. v. Black and Decker Manufacturing Co.**, [1975] 1 S.C.R. 411, provided support for his conclusion that the words "immediately before the amalgamation" did not have the effect of limiting the appellant's legal responsibility for obligations that would have fallen on B.C. Electric under the **Waste Management Act** had it remained in existence. I agree with that opinion.

[92] **Black and Decker** is a useful place to begin. In that case, the Supreme Court considered the effect of an amalgamation under the **Canada Corporations Act**, R.S.C. 1970, c. C-32. Three companies had agreed to amalgamate under the name Black and Decker Manufacturing Company, Limited ("Black

and Decker"). Their agreement was dated 25 January 1971 and, on the same date, letters patent were issued confirming the agreement. On 5 April 1972, an Information was sworn charging Black and Decker with two counts of retail price maintenance offences contrary to the combines investigation legislation. The offences were alleged to have occurred between October 1966 and August 1970. Black and Decker moved to quash the Information or, alternatively, for dismissal on the ground that no criminal responsibility pre-dating the 1971 amalgamation could be transferred to it. The Ontario Court of Appeal prohibited further proceedings on the Information but that order was set aside on appeal to the Supreme Court of Canada.

[93] The Supreme Court held that upon an amalgamation under the **Canada Corporations Act**, no "new" company is created, and no "old" company is extinguished. Instead, the court held that the amalgamated companies "are amalgamated and are continued as one company". On this view, Dickson J., giving the judgment of the court, concluded that the amalgamating companies in their new identity as the amalgamated corporation remain liable to prosecution for offences committed pre-amalgamation.

[94] In this case, the British Columbia Hydro and Power Authority, the British Columbia Power Commission and B.C. Electric entered into an Amalgamation Agreement on 20 August 1965. The Amalgamation Agreement is annexed to my colleague's reasons and, consequently, there is no need to reproduce it here. As my colleague has stated, the Agreement provided that three corporations amalgamated in such a manner that:

- (a) they continue as one amalgamated corporation which is the British Columbia Hydro and Power Authority as established by the British Columbia Hydro and Power Authority Act, 1964,
- (b) the Company [B.C. Electric] and the Commission [B.C. Power Commission] cease to exist as separate corporations, and
- (c) the Authority [B.C. Hydro] shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise, and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise, of each of the Authority, the Company and the Commission immediately before the amalgamation.

[95] The specific words in the Amalgamation Agreement before us are that the amalgamating entities will "continue as one amalgamated corporation." Those words are very similar to the words under consideration in *Black and Decker*.

[96] In **Black and Decker**, the Ontario Court of Appeal had reasoned that since the "new" company was not even in existence during the period covered by the dates in the Information, it could not possibly be found guilty unless it were liable for acts or omissions of the old company. The Supreme Court rejected the proposition, which had been the implicit underpinning for the Court of Appeal's decision, that the amalgamated company was somehow a different, separate, or distinct entity from the "old" companies. In doing so, Dickson J., as he then was, said (at 417):

Whether an amalgamation creates or extinguishes a corporate entity will, of course, depend upon the terms of the applicable statute, but as I read the Act, in particular s. 137, and consider the purposes which an amalgamation is intended to serve, it would appear to me that upon an amalgamation under the *Canada Corporations Act* no "new" company is created and no "old" company is extinguished. The *Canada Corporations Act* does not in terms so state and the following considerations in my view serve to negate any such inference: (i) palpably the controlling word in s. 137 is "continue". That word means "to remain in existence or in its present condition": – *Shorter Oxford English Dictionary*. The companies "are amalgamated and are continued as one company" which is the very antithesis of the notion that the amalgamating companies are extinguished or that they continue in a truncated state;...

[97] In my view, the words used in the Amalgamation Agreement in this case are identical, in effect, to the words used in the **Canada Corporations Act**. The effect of an amalgamation

is, as Dickson J. described it (at 417), "that of blending and continuance as one and the selfsame company".

[98] Further, I note that the use of the term "possess" in the Amalgamation Agreement, when used in connection with the assets and undertaking of the constituent entities, is a term of continuance.

[99] The particular question before the Supreme Court in **Black and Decker** was whether the amalgamated company could be tried for the alleged criminal acts of one of its predecessors. The Court concluded that it could be tried. Mr. Justice Dickson determined (at 417-18) that:

...if Parliament had intended that a company by the simple expedient of amalgamating with another company could free itself of accountability for acts in contravention of the *Criminal Code* or the *Combines Investigation Act* or the *Income Tax Act*, I cannot but think that other and clearer language than that now found in the *Canada Corporations Act* would be necessary.

[100] In my opinion, those words apply with equal force here.

[101] In **Black and Decker**, Dickson J. noted that the word "amalgamation" is not a legal term and is not susceptible of exact definition but is derived from mercantile usage and

denotes "a legal means of achieving an economic end". He continued (at 420-21):

... The juridical nature of an amalgamation need not be determined by juridical criteria alone, to the exclusion of consideration of the purposes of amalgamation. Provision is made under the *Canada Corporations Act* and under the Acts of the various provinces whereby two or more companies incorporated under the governing Act may amalgamate and form one corporation. The purpose is economic: to build, to consolidate, perhaps to diversify, existing businesses; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and, above all, survival in that union. Also, one must recall that the amalgamating companies *physically* continue to exist in the sense that offices, warehouses, factories corporate records and correspondence and documents are still there, and business goes on. In a physical sense an amalgamating business or company does not disappear although it may become part of a greater enterprise.

There are various ways in which companies can be put together. The assets of one or more existing companies may be sold to another existing company or to a company newly-incorporated, in exchange for cash or shares or other consideration. The consideration received may then be distributed to the shareholders of the companies whose assets have been sold, and these companies wound up and their charters surrendered. In this type of transaction a new company may be incorporated or an old company may be wound up but the legal position is clear. There is no fusion of corporate entities. Another form of merger occurs when an existing company or a newly-incorporated company acquires the *shares* of one or more existing companies which latter companies may then be retained as subsidiaries or wound up after their assets have been passed up to

the parent company. Again there is no fusion. But in an amalgamation a different result is sought and different legal mechanics are adopted, usually for the express purpose of ensuring the continued existence of the constituent companies. The motivating factor may be the Income Tax Act or difficulties likely to arise in conveying assets if the merger were by asset or share purchase. But whatever the motive, the end result is to coalesce to create a homogeneous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.

[Underlining added.]

[102] The proposition advanced by the appellant in this case is that the combined entity is in some way immune from the responsibilities of its constituent parts. That seems to me to be the opposite of what is intended by an amalgamation.

[103] **Black and Decker** is useful on another point as well. In that case, the Supreme Court was faced with Black and Decker's argument that if an amalgamation had the effect contended for by the prosecution, then the words used in the **Canada Corporations Act** (which are similar to those contained in the Amalgamation Agreement here), would be mere surplusage. The words used in s. 137(13)(b) of the **Canada Corporations Act** were these:

(b) the amalgamated company possesses all the property, rights, assets, privileges and franchises,

and is subject to all the contracts, liabilities, debts and obligations of each of the amalgamating companies.

[104] In responding to that argument, Dickson J. observed (at 421-22) that those words (and the words of s. 137(14)) "spell out in broad language amplification of a general principle, a not uncommon practice of legislative draftsmen." He then went on to identify the very problem which, in my view, would be created by the interpretation of the Amalgamation Agreement for which the appellant contends in this case. Dickson J. said (at 422), if the words of the statute

... are to be read, however, as other than merely supportive of a general principle and other than all-embracing, then some corporate incidents, such as criminal responsibility, must be regarded as severed from the amalgamating companies and outside the amalgamated company. What happens to these vestigial remnants? Are they extinguished and if so, by what authority? Do they continue in a state of ethereal suspension? Such metaphysical abstractions are not, in my view, a necessary concomitant of the legislation. The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution.

[Underlining added.]

[105] Support for the conclusions reached by the EAB and Low J. as to the effect of the Amalgamation Agreement may be found in other cases as well. In **Agrifoods International Corp. v. Beatrice Foods Inc.** (1997), 34 B.L.R. (2d) 294, [1997] B.C.J. No. 393 (Q.L.) (B.C.S.C.) at para. 80, Spencer J. said the consequences of an amalgamation must be examined practically and, absent a juridical reason to the contrary, the amalgamation carries with it the property rights and liabilities enjoyed by the amalgamating entities.

[106] At common law, the nature of an amalgamation is such that the new corporation possesses all the property and rights of the companies the amalgamation has brought together: **Hoole v. Advani** (1996), 29 B.L.R. (2d) 150, [1996] B.C.J. No. 614 (Q.L.) (B.C.S.C.) at paras. 15-16, relying upon the decision of Shaw J. in **Rossi v. McDonald's Restaurants of Canada Ltd.** (1991), 1 B.L.R. (2d) 175, [1991] B.C.J. No. 429 (Q.L.) (B.C.S.C.). In the **Rossi** case, the language of the certificate of amalgamation, which was issued by the Minister under the Ontario **Business Corporations Act** to give effect to the amalgamation, was in identical terms to the relevant portions of the Amalgamation Agreement between the three entities in this case. The certificate provided that:

The Amalgamated Corporation shall possess all the property, rights, privileges, franchises and other assets, and shall be subject to all the liabilities, contracts and disabilities and debts, of the Amalgamating Corporations as such exist immediately before the amalgamation."

[Underlining added.]

[107] Contrary to the arguments of the appellant, there is nothing particularly unusual about the words "immediately before the amalgamation" used in the 1965 Amalgamation Agreement. The suggestion that those words must bear a special meaning limiting the liabilities assumed by the amalgamated entity because they are unique or unusual does not withstand scrutiny. It was the language used in the amalgamation certificate in *Rossi, supra*. It also appears in similar form in the statute books and in texts of corporate precedents.

[108] By way of example, the precedent form of amalgamation agreement in *O'Brien's Encyclopaedia of Forms*, 10th ed., vol. 6, (Agincourt: Canada Law Book, 1980) at 310, uses this language:

Each of the parties shall contribute to Amalco all its assets, subject to its liabilities, as of the date immediately before the date of the certificate of amalgamation.

Amalco shall possess all the property, rights, privileges, and franchises and shall be subject to

all the liabilities, contracts, disabilities and debts of each of the parties hereto as of the date immediately before the date of the certificate of amalgamation.

["Amalco" refers to the corporation continuing from the amalgamation of the three companies used in the example.]

[109] Almost identical language appears in the 1962 version of **Canadian Corporation Precedents**, vol. 2, (Toronto: Carswell, 1962), at p. 1321, and the 1976 version, 2nd ed., vol. 3, at pp. 12-22.

[110] The amalgamation provisions of the **Income Tax Act** in effect at the time of this amalgamation used similar language (see, for example, **Income Tax Act**, R.S.C. 1952, c. 148, s. 851, in *Stikeman Annotated Income Tax Act*, 1963-4).

[111] In view of the foregoing, I am far from persuaded that the words "immediately before the amalgamation" can take this case outside of the general rule that upon an amalgamation the appellant would have assumed the responsibilities of each of the three entities of which the appellant was then comprised.

[112] I am also of the view that the appellant can derive no support for its position from the rules of statutory construction. Clause 1(a) of the Amalgamation Agreement provides that the three entities amalgamate such that they

"continue" as one amalgamated corporation. Clause 1(b) provides that the individual amalgamating entities cease to exist "as separate corporations". Clause 1(c) can be broken down as follows:

- [i] the Authority
- [ii] shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise,
- [iii] and subject to the Power Measures Act, 1964, shall be liable for all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise,
- [iv] of each of the Authority, the Company and the Commission
- [v] immediately before the amalgamation.

[113] The appellant argues that the words "immediately before the amalgamation" are words which limit the liabilities assumed by it. I do not agree with that argument.

[114] Clause 1(c) can be understood as follows: "the Authority" in subparagraph [i] above identifies the amalgamated entity; the words quoted in [iv] above describe the entities whose obligations are referred to in [ii] and [iii]; and the words in [v], "immediately before the

amalgamation", which modify the words from both subparagraphs [ii] and [iii], describe the effective time of the assumption.

[115] The words "immediately before the amalgamation" in the Amalgamation Agreement have a similar effect to the word "thereafter" in s. 178(11) of the **Companies Act**, R.S.B.C. 1960, c. 67. They simply establish that from the time of the amalgamation, the new enterprise, for all purposes, replaces the old. Expressing that by saying that the new enterprise has the obligations of the old as they existed "immediately before the amalgamation", is no different in substance from saying that "thereafter" (meaning after amalgamation) the new enterprise has all the obligations of the old.

[116] The appellant's argument that the words "immediately before the amalgamation" are in some way words of limitation do not appear to me to be supportable. As previously noted, in an amalgamation responsibility for all the past acts of the former entities are generally assumed by and subsumed within the new entity (**Black and Decker, supra**). Thus, in future, if a liability arises out of something done by B.C. Electric in the past, the responsibility for the past acts of a now constituent part of the British Columbia Hydro and Power Authority would become that of the British Columbia Hydro and

Power Authority. As stated by Dickson J. in *Black and Decker* in relation to the construction of the statute under consideration there (at 422):

The effect of the statute, on a proper construction, is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be.

[117] As applied to this case, if B.C. Electric's pre-1965 activities would have made it an "operator" or a "producer", which for the purposes of Part 4 of the *Waste Management Act* is assumed on this appeal, then the appellant, as the combined or amalgamated company, which is the continuation of B.C. Electric, is a "responsible person" under the *Waste Management Act*.

[118] There is nothing in the Amalgamation Agreement that requires a different result. The effect of the amalgamation is to continue the three prior entities as one combined entity. The rights, duties and obligations of each of the parts of the new entity continue unextinguished as those of the combined organization. In my view, had a limit on future liability been intended, much clearer language would have been required.

[119] I should also mention that the appellant advanced the argument that limitation of liability is a valid legislative purpose, but that argument, standing alone, does not assist. Limiting liability may be a valid legislative purpose, but clear language is needed to do so.

[120] The Amalgamation Agreement uses broad and all encompassing language to confirm the scope of the amalgamated company's responsibility. The words used do not suggest that the parties to the Agreement intended to define a class of duties, liabilities and obligations for which the appellant would not be liable. For example, instead of just the "assets" of the constituent parts, the Agreement provides that the new enterprise "shall be seized of, possess and hold all the properties, assets, undertakings, contracts, powers, rights, privileges, immunities, concessions and franchises, whether conferred or imposed by statute or otherwise...."

[121] Nor does the language used suggest that the new enterprise was to assume only the debts owing at a particular point in time. Rather, the combined entity assumes "all duties, liabilities and obligations, whether conferred or imposed by statute or otherwise...." The use of such broad

words is consistent with an intention that the obligations being assumed were complete.

[122] Similarly, the Amalgamation Agreement makes clear that it does not matter how the right or obligation was created. Regardless of whether it was created "by statute or otherwise", the obligation becomes that of the new entity.

[123] Nor is there anything in the Amalgamation Agreement that suggests that there was any limitation upon the obligations assumed. There are several drafting techniques that could easily have been used, for example, the addition of the words "but not otherwise", or other words of limitation such as "shall *only* be liable for...", or "shall have no liability except as expressly set out herein".

[124] To suggest that an amalgamation agreement could unilaterally absolve the constituent parts of the enterprise of future obligations for their past actions seems to me to be a startling proposition. No case authority has been cited by the appellant to support such a proposition.

[125] I note, as well, that nothing in the language of the Amalgamation Agreement suggests an intention that the amalgamation would extinguish the rights of third parties, yet

that would be the inevitable effect of adopting the appellant's proposition as to the effect of the words "immediately before the amalgamation". Tort liability is an example. In tort cases, the cause of action only arises when the damage occurs, is discovered, or ought to have been discovered by the plaintiff. In other words, the cause of action may well arise after the amalgamation occurred, but be the result of events occurring prior to the amalgamation. In **Central Trust Co. v. Rafuse**, [1986] 2 S.C.R. 147 at 219, Le Dain J., for the court, held that the general rule is that a cause of action in tort "arose when damage occurred, according to the established rule", subject to the application of discoverability rule, which may further delay the accrual of the cause of action. (See also **City of Kamloops v. Nielsen**, [1984] 2 S.C.R. 2 at 38.)

[126] On the basis of the appellant's interpretation, the amalgamated company would be immune from liability for the consequences of an act occurring before amalgamation that did not manifest itself in damage until after the amalgamation. To destroy the rights of innocent third parties in the absence of any clear statutory warrant seems to me to be unsupportable.

IV. Conclusion

[127] For the reasons I have given, I am of the view that Mr. Justice Low was correct in dismissing the appellant's judicial review petition and, thus, sustaining the decision of the EAB.

[128] In the result, I would dismiss the appeal.

"The Honourable Madam Justice Rowles"

CORRECTION: October 2, 2003.

At page 56, the paragraph number "[58" is deleted.

TAB 4

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. Burseey 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 demand¹. The process results in the selection of that mix of resources which yields the preferred² 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 ratemaking³, 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 prudence 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 prudence 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.

TAB 5

Georges R. Brosseau Appellant

v.

**The Alberta Securities Commission
Respondent**INDEXED AS: BROSSEAU v. ALBERTA SECURITIES
COMMISSION

File No.: 19832.

1988: March 28; 1989: March 9.

Present: Dickson C.J. and Estey*, Lamer, Wilson,
Le Dain*, La Forest and L'Heureux-Dubé JJ.ON APPEAL FROM THE COURT OF APPEAL FOR
ALBERTA

Administrative law — Reasonable apprehension of bias — Commission conducting hearing with respect to trading in securities and/or the possible deprivation of certain statutory exemptions — Chairperson of Commission receiving report in his investigative capacity prior to hearing — Whether or not reasonable apprehension of bias.

Statutes — Interpretation — Retrospective effect — Statute imposing penalty related to a past event — Goal of penalty not to punish person in question but to protect the public — Whether or not statute attracting presumption against retrospective effect — Securities Act, S.A. 1981, c. S-6.1, ss. 28, 165, 166.

Appellant Brosseau, in his capacity as solicitor, prepared the prospectus of a company that later went into bankruptcy. The R.C.M.P. and the Alberta Securities Commission conducted separate investigations into the affairs of the company. The investigation initiated by the Securities Commission found no evidence of any violations of the *Securities Act*. The R.C.M.P. investigation, however, resulted in the laying of criminal charges against Brosseau and a colleague, Barry. The charges related to the making of false or misleading statements in the prospectus under the 'old' *Securities Act*, R.S.A. 1970, c. 333.

The Commission's investigation was reopened when the Assistant Deputy Minister of the Department of Consumer and Corporate Affairs informed the Chairman that litigation was pending concerning the collapse of the company, and that the Alberta Government was named as a party. There was a suggestion in some documents that the Alberta Government felt that any

* Estey and Le Dain JJ. took no part in the judgment.

Georges R. Brosseau Appelant

c.

The Alberta Securities Commission Intimée

a

RÉPERTORIÉ: BROSSEAU c. ALBERTA SECURITIES
COMMISSION

N° du greffe: 19832.

1988: 28 mars; 1989: 9 mars.

Présents: Le juge en chef Dickson et les juges Estey*,
Lamer, Wilson, Le Dain*, La Forest et

L'Heureux-Dubé.

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

Droit administratif — Crainte raisonnable de partialité — Commission tenant une audition concernant des opérations sur des valeurs mobilières ou l'inapplication possible de certaines exemptions prévues par la loi — Le président de la Commission, dans ses fonctions d'enquête, a reçu un rapport avant l'audition — Y a-t-il crainte raisonnable de partialité?

Législation — Interprétation — Rétroactivité — Loi imposant une peine liée à un événement passé — La peine n'a pas pour but de punir la personne visée mais de protéger le public — La loi fait-elle intervenir la présomption de non-rétroactivité? — Securities Act, S.A. 1981, chap. S-6.1, art. 28, 165, 166.

En sa qualité de procureur, l'appellant Brosseau a préparé le prospectus d'une société qui plus tard a fait faillite. La G.R.C. et l'Alberta Securities Commission (la Commission) ont mené des enquêtes distinctes sur les activités de la société. L'enquête de la Commission n'a abouti à aucune preuve d'infraction à la *Securities Act*. L'enquête de la G.R.C. a cependant mené au dépôt d'accusations criminelles contre Brosseau et un de ses collègues, Barry, relativement à des déclarations fausses ou trompeuses dans le prospectus, aux termes de «l'ancienne» *Securities Act*, R.S.A. 1970, chap. 333.

L'enquête de la Commission a été rouverte lorsque le sous-ministre adjoint du ministère de la Consommation et des Corporations avisa le président que des procédures étaient en cours à la suite de l'effondrement de Dial et que le gouvernement de l'Alberta y était nommé partie. Certains documents suggéraient que le gouvernement de l'Alberta estimait que toute responsabilité qui

* Les juges Estey et Le Dain n'ont pas pris part au jugement.

liability which attached to it would do so because of negligence on the part of the Commission. The Chairman forwarded the materials received from the Assistant Deputy Minister to the Deputy Director, Enforcement, of the Securities Commission. A review was conducted, and a copy of the Commission's staff report was given to the Chairman in March 1984.

The Alberta Securities Commission gave a notice of hearing to determine if Brosseau and Barry should be made subject to a cease trading order and/or possible deprivation of certain statutory exemptions. Brosseau and Barry, after their acquittal on the criminal charges in 1985, brought a preliminary application before the Alberta Securities Commission seeking an order and declaration that the Commission had no jurisdiction to hold a hearing against them. The Commission ruled it had jurisdiction pursuant to s. 26 of the "new" *Securities Act*, S.A. 1981, c. S-6.1, denied the application and directed that the hearing continue. An appeal to the Alberta Court of Appeal was dismissed. Barry discontinued his appeal before this Court and appellant Brosseau restricted his to two issues. The first was whether or not there was a reasonable apprehension of bias given the fact that the Commission Chairperson, in his investigative capacity, had received a report prior to the hearing from the Deputy Director of Enforcement. The second was whether or not the action taken by the Commission under the "new" *Securities Act* attracted the presumption against the retrospectivity of statutes. Before this Court, the appellant abandoned all argument based on s. 11 of the *Canadian Charter of Rights and Freedoms*.

Held: The appeal should be dismissed.

The facts of this case neither raise a reasonable apprehension of bias nor do they undermine public confidence in the impartiality of the Securities Commission.

The principle that no one should be a judge in his own action underlies the doctrine of "reasonable apprehension of bias". An exception occurs, however, where an overlap of functions is authorized by statute.

It was not necessary to decide to what extent the Chairman initiated the investigation because the Act contemplated his involvement at several stages of the proceedings.

The broad and formal investigatory powers granted the Commission by s. 28 of the *Securities Act* suggest that the Commission has the implied authority to conduct a more informal internal review. The Commission logically would first investigate the facts before ordering

lui serait imputée proviendrait d'une négligence de la part de la Commission. Le président a transmis les documents reçus du sous-ministre adjoint au directeur adjoint chargé de l'application de la loi pour la Commission. On procéda à un examen et une copie du rapport du personnel de la Commission fut communiquée au président en mars 1984.

La Commission a donné un avis d'audition en vue de déterminer si Brosseau et Barry pouvaient faire l'objet d'une ordonnance leur intimant de cesser des opérations sur des valeurs mobilières ou s'ils pouvaient être privés de certaines exemptions prévues par la loi. Après leur acquittement des accusations criminelles en 1985, Brosseau et Barry ont présenté à la Commission une demande préliminaire sollicitant une ordonnance et une déclaration portant que la Commission n'avait pas compétence pour tenir une audition contre eux. La Commission a conclu qu'elle avait compétence en vertu de l'art. 26 de la «nouvelle» *Securities Act*, S.A. 1981, chap. S-6.1, a rejeté la demande et a ordonné la poursuite de l'audition. La Cour d'appel de l'Alberta a rejeté l'appel de cette décision. L'appelant Barry s'est désisté de son pourvoi devant cette Cour et l'appelant Brosseau a limité le sien à deux points. Le premier est de savoir s'il y a crainte raisonnable de partialité étant donné que le président de la Commission, dans ses fonctions d'enquête, avait reçu avant l'audition un rapport du directeur adjoint, chargé de l'application de la loi. Le second est de savoir si les mesures prises par la Commission en vertu de la «nouvelle» *Securities Act* font intervenir la présomption de non-rétroactivité des lois. Devant cette Cour, l'appelant a abandonné toute argumentation fondée sur l'art. 11 de la *Charte canadienne des droits et libertés*.

Arrêt: Le pourvoi est rejeté.

Les faits de la présente affaire ne suscitent pas de crainte raisonnable de partialité et ne minent pas la confiance du public dans l'impartialité de la Commission.

Le principe que nul ne doit être juge dans sa propre cause sous-tend la doctrine de «la crainte raisonnable de partialité». Il y a cependant exception lorsque la loi autorise un chevauchement de fonctions.

Il n'est pas nécessaire de décider dans quelle mesure le président a déclenché l'enquête puisque la Loi prévoit sa participation à différentes étapes des procédures.

Les formalités qui accompagnent l'enquête en vertu de l'art. 28 de la *Securities Act*, et les vastes pouvoirs attribués, permettent de penser que la Commission a le pouvoir implicite de procéder à un examen interne plus informel. Logiquement, la Commission devrait enquêter

1989 CanLII 12 (SCC)

a s. 28 investigation. Only if irregularities were uncovered would the Commission proceed to either a more thorough s. 28 investigation or a hearing to probe more deeply into the matter.

Securities commissions, by their nature, undertake several different functions. The Commission's empowering legislation clearly indicates that the Commission was not meant to act like a court in conducting its internal reviews and certain activities, which might otherwise be considered "biased", form an integral part of its operations. A section 28 investigation is of a different nature from this type of proceeding.

A security commission's protective role, which gives it a special character, its structure and responsibilities, must be considered in assessing allegations of bias. A "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist if the Chairman did not act outside of his statutory authority and if there were no evidence to show involvement beyond the Chairman's fulfilling his statutory duties.

The Chairman, as Chief Executive Officer of the Commission, did not exceed the bounds of authority of his office. The report in question was also made available to the appellant.

There was no element of "improper purpose" in the Commission's conduct of the proceedings against the appellant. Any suspicion that the Commission's actions were motivated with a view to escaping its own potential liability in any pending litigation was not supported by the evidence.

The presumption against retrospectivity, that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act, applies only to "penal" statutes. It does not apply to statutes imposing a penalty related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public. The provisions here are designed to disqualify persons, whom the Commission found to have committed acts calling their business integrity into question, from trading in securities. The presumption against the retrospective effect of statutes is effectively rebutted because these provisions in question are designed to protect the public in keeping with the general regulatory role of the Commission.

sur les faits avant d'ordonner une enquête fondée sur l'art. 28. Ce n'est que si on découvrait des irrégularités que la Commission procéderait soit à une enquête plus complète fondée sur l'art. 28, soit à une audition pour examiner l'affaire plus à fond.

De par leur nature, les commissions des valeurs mobilières exécutent plusieurs fonctions différentes. Il ressort clairement de la loi habilitante de la Commission qu'elle n'est pas tenue d'agir comme une cour dans ses enquêtes internes et que certaines activités, qui pourraient par ailleurs être considérées comme «partiales», font partie intégrante de son fonctionnement. Une enquête fondée sur l'art. 28 est d'une nature différente.

Le rôle de protection d'une commission des valeurs mobilières, qui lui donne un caractère particulier, ainsi que sa structure et ses responsabilités doivent être examinés pour évaluer les allégations de partialité. Si le président n'a pas excédé les pouvoirs que lui confère la loi et si rien dans la preuve n'indique d'autre participation que le simple exercice des fonctions que lui impose la loi, on ne peut dire qu'il existe une «crainte raisonnable de partialité» qui touche la Commission dans son ensemble.

À titre d'administrateur principal de la Commission, le président n'a pas agi en dehors des limites des pouvoirs attachés à ce poste. L'appellant a également eu accès au rapport en question.

Il n'y a aucun élément d'«objet irrégulier» dans les procédures que la Commission a menées contre l'appellant. Tout soupçon que les actes de la Commission ont été accomplis en vue d'échapper à sa propre responsabilité éventuelle dans des poursuites en cours n'a pas de fondement dans la preuve.

La présomption de non-rétroactivité, selon laquelle les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation, ne s'applique qu'aux lois qui imposent une peine. Elle ne s'applique pas aux lois qui imposent une peine liée à un événement passé dans la mesure où le but de la peine n'est pas de punir la personne en question mais de protéger le public. Les dispositions en question sont destinées à empêcher les personnes que la Commission trouve coupables d'avoir accompli des actes qui mettent en doute leur intégrité commerciale, d'effectuer des opérations relatives à des valeurs mobilières. La présomption de non-rétroactivité de la loi est en fait repoussée parce que les dispositions en question sont destinées à protéger le public conformément au rôle général de réglementation de la Commission.

Cases Cited

Considered: *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, aff'd *sub nom. Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129; **distinguished:** *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256; **referred to:** *Committee for Justice and Liberty v. National Energy Board* (the Crowe case), [1978] 1 S.C.R. 369; *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584; *Nova, An Alberta Corporation v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; *R. v. Vine* (1875), 10 L.R. Q.B. 195; *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617.

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 Krauss, Michel. "Réflexions sur la rétroactivité des lois" (1983), 14 *R.G.D.* 287.

APPEAL from a judgment of the Alberta Court of Appeal (1986), 67 A.R. 222, 25 D.L.R. (4th) 730, dismissing an appeal from a judgment of the Alberta Securities Commission. Appeal dismissed.

Rostyk Sadownik, for the appellant.

P. J. McIntyre, for the respondent.

The judgment of the Court was delivered by

L'HEUREUX-DUBÉ J.—The facts of this case raise two main issues. The first concerns the existence of a reasonable apprehension of bias with respect to the activities of the Alberta Securities Commission (the Commission). The second deals with the retroactive application of the *Alberta Securities Act*, S.A. 1981, c. S-6.1, as amended.

Jurisprudence

Arrêts examinés: *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, conf. par *sub nom. Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129; **distinction d'avec l'arrêt:** *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256; **arrêts mentionnés:** *Committee for Justice and Liberty c. Office national de l'énergie* (l'arrêt Crowe), [1978] 1 R.C.S. 369; *Gregory & Co. v. Quebec Securities Commission*, [1961] R.C.S. 584; *Nova, An Alberta Corporation c. Amoco Canada Petroleum Co.*, [1981] 2 R.C.S. 437; *Gustavson Drilling (1964) Ltd. c. Le ministre du Revenu national*, [1977] 1 R.C.S. 271; *R. v. Vine* (1875), 10 L.R. Q.B. 195; *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 11(d), (h).
Securities Act, R.S.A. 1970, chap. 333, art. 136.
Securities Act, S.A. 1981, chap. S-6.1, art. 11, 28, 29, 65, 66, 107, 115, 116, 132, 133, 165, 166.

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 Krauss, Michel. «Réflexions sur la rétroactivité des lois» (1983), 14 *R.G.D.* 287.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1986), 67 A.R. 222, 25 D.L.R. (4th) 730, qui a rejeté un appel contre un jugement de l'Alberta Securities Commission. Pourvoi rejeté.

Rostyk Sadownik, pour l'appelant.

P. J. McIntyre, pour l'intimé.

Version française du jugement de la Cour rendu par

LE JUGE L'HEUREUX-DUBÉ—Les faits de cette affaire soulèvent deux questions en particulier. La première concerne l'existence d'une crainte raisonnable de partialité relativement aux activités de l'Alberta Securities Commission (la Commission). La seconde a trait à l'application rétroactive de la *Securities Act* de l'Alberta, S.A. 1981, chap. S-6.1, et modifications.

Facts

The appellant Brosseau was the solicitor for Dial Mortgage Co. Ltd. (Dial). In his capacity as solicitor, he prepared the company's prospectus, and filed it with the Commission in 1980.

In 1981, it became apparent that Dial was experiencing financial troubles. It was placed in receivership on February 2, 1981, and went into bankruptcy on April 16, 1981.

The Commission was concerned about the collapse of Dial. It ordered its staff to conduct a review of its files to determine if there had been any violation of the *Securities Act*, R.S.A. 1970, c. 333. On March 13, 1981 the staff reported that there was no evidence of any violations.

In March of 1982 the R.C.M.P. became involved in an investigation surrounding the affairs of Dial. They asked the Commission about its role in approving the Dial prospectus. The investigation was undertaken with a view to the laying of criminal charges. At the request of the R.C.M.P., the Commission provided them with documents from their files.

In early 1983, the Assistant Deputy Minister of the Department of Consumer and Corporate Affairs informed the Chairman of the Commission that litigation was pending which named the Alberta Government as a party to an action concerning the collapse of Dial. There is a suggestion in the documents in the case on appeal that the Alberta Government felt that any liability which attached to it would be as a result of negligence on the part of the Commission. Subsequently, the Chairman forwarded the materials received from the Assistant Deputy Minister to the Deputy Director, Enforcement, of the Commission. The Deputy Director directed the Commission staff to conduct an investigation into the matter. The investigation included a review of the Commission's files, as well as meetings with former employees of the Commission, in order to clarify matters relating to the prospectus filed by Dial. The investigators also reviewed seized documents at R.C.M.P. headquarters, and attended an R.C.M.P. interview of the appellant Brosseau.

Les faits

L'appelant Brosseau était le procureur de Dial Mortgage Co. Ltd. (Dial). En sa qualité de procureur, il a préparé le prospectus de la société et l'a déposé auprès de la Commission en 1980.

En 1981, il est devenu évident que Dial était en difficultés financières. Elle a été mise sous séquestre le 2 février 1981 et a fait cession de ses biens le 16 avril 1981.

La Commission s'est inquiétée de la déconfiture de Dial. Elle a ordonné à son personnel de procéder à un examen de ses dossiers pour déterminer s'il y avait eu infraction à la *Securities Act*, R.S.A. 1970, chap. 333. Dans son rapport du 13 mars 1981, le personnel a conclu qu'il n'y avait aucune preuve d'infraction.

En mars 1982, la G.R.C. a entrepris une enquête sur les affaires de Dial. La G.R.C. s'est informée du rôle de la Commission dans l'approbation du prospectus de Dial. L'enquête avait été entreprise dans le but de déposer des accusations criminelles. La Commission a fourni à la G.R.C., à sa demande, des documents provenant de ses dossiers.

Au début de 1983, le sous-ministre adjoint du ministère de la Consommation et des Corporations a avisé le président de la Commission que des procédures étaient en cours dans lesquelles le gouvernement de l'Alberta était nommé partie à une poursuite relative à la déconfiture de Dial. Les documents au dossier suggèrent que le gouvernement de l'Alberta était d'avis que toute responsabilité qui lui serait imputée proviendrait d'une négligence de la part de la Commission. Par la suite, le président a transmis les documents reçus du sous-ministre adjoint au directeur adjoint, chargé de l'application de la loi, pour la Commission. Le directeur adjoint a ordonné au personnel de la Commission d'enquêter sur l'affaire. L'enquête comportait un examen des dossiers de la Commission ainsi que des rencontres avec d'anciens employés de la Commission pour clarifier certains points concernant le prospectus déposé par Dial. Les enquêteurs ont également examiné aux quartiers généraux de la G.R.C. des documents saisis et ont assisté à une entrevue de la G.R.C. avec l'appelant Brosseau.

The Chairman was given a copy of the Commission staff's report on March 13, 1984. A notice of hearing was issued by the Commission on June 25, 1984.

Proceedings

I will turn now to a discussion of the proceedings which ensued as a result of the investigations by both the Commission and the R.C.M.P. The investigation involved two individuals, Georges Brosseau and Wayne Barry. The latter, who was originally a party to the appeal, withdrew.

The R.C.M.P. investigation led to the laying of charges against Brosseau and Barry. The charge stated that:

... between the 29th day of November, A.D. 1979, and the 2nd day of April, A.D. 1980, at or near the city of Edmonton and elsewhere in the Province of Alberta, did jointly and severally make statements in a prospectus dated the 29th day of August, A.D. 1979, required to be filed or furnished under The Securities Act, 1970 R.S.A. c. 333 or the Regulations enacted thereunder, which said statements at the time and in the light of the circumstances under which they were made, were false or misleading with respect to material facts, the particulars of the said statements appearing in the said prospectus include, but are not limited

On February 26, 1985, the Alberta Provincial Court held that it had no jurisdiction to proceed with the charges "because the limitation period had lapsed upon swearing of the Information". The accused were acquitted.

On June 25, 1984, pursuant to ss. 165 and 166 of the Alberta *Securities Act*, the Commission issued a notice of hearing in order to determine whether the Commission should make an order against either or both of them:

(a) under section 165 that trading cease in respect of any securities or that a person or company cease trading in securities or specified securities for a period of time as specified in the order

and to order, or alternatively may order, as against the Respondents, or each of them,

Le 13 mars 1984, le rapport du personnel de la Commission était communiqué au président. Le 25 juin 1984, la Commission donnait un avis d'audition.

Les procédures

Il y a lieu de discuter ici des procédures qui s'ensuivirent et qui résultèrent des enquêtes et de la Commission et de la G.R.C. L'enquête visait à l'origine deux personnes, Georges Brosseau et Wayne Barry. Ce dernier, qui était initialement partie au présent pourvoi, s'est ensuite désisté.

L'enquête de la G.R.C. a donné lieu au dépôt d'accusations contre Barry et l'appelant Brosseau. L'accusation énonce que:

[TRADUCTION] ... entre le 29 novembre 1979 et le 2 avril 1980, dans la ville d'Edmonton et ailleurs dans la province d'Alberta, ont conjointement et solidairement fait des déclarations dans un prospectus daté du 29 août 1979, qui devait être déposé ou fourni aux termes de la Securities Act, 1970 R.S.A. chap. 333 ou de ses règlements d'application, lesquelles déclarations, à l'époque et dans les circonstances où elles ont été faites, étaient fausses ou trompeuses en ce qui a trait à des faits importants, les détails desdites déclarations du prospectus comprenant notamment . . .

Le 26 février 1985, la Cour provinciale de l'Alberta a conclu qu'elle n'avait pas compétence pour entendre les accusations [TRADUCTION] «parce que le délai de prescription était expiré au moment de la signature de la dénonciation sous serment». Les accusés furent acquittés.

Le 25 juin 1984, en application des art. 165 et 166 de la *Securities Act*, la Commission a donné un avis d'audition pour déterminer si elle devait ordonner contre eux ou l'un d'eux:

[TRADUCTION]

a) aux termes de l'article 165, que cessent les opérations sur valeurs mobilières ou qu'une personne ou une société cesse d'effectuer des opérations sur des valeurs mobilières ou sur certaines valeurs mobilières données pendant une période précisée dans l'ordonnance.

et ordonner, ou subsidiairement ordonner, contre les intimés ou l'un d'eux,

(b) under section 166 that any or all of the exemptions contained in sections 65, 66, 107, 115, 116, 132 and 133, or in the Regulations do not apply to the person or company named in the order.

(One notes that the criminal charges based on substantially the same allegations were brought under the "old" *Securities Act*, R.S.A. 1970, c. 333, whereas the notice of hearing was based on the provisions of the "new" *Securities Act*, S.A. 1981, c. S-6.1.)

The hearing before the Commission was adjourned from time to time at the request of the parties in order to allow for the completion of the hearing of the charges in Provincial Court. Ultimately, the hearing before the Commission was never proceeded with, due to a preliminary application brought by Brosseau and Barry. After their acquittal from the criminal charges, they sought an order and declaration that the Commission did not have jurisdiction to hold a hearing against them pursuant to ss. 165 and 166 of the *Alberta Securities Act*, S.A. 1981, c. S-6.1.

The bases of the preliminary application before the Commission are set out as follows in the decision of the Commission dated September 11, 1985:

1. Double jeopardy—an infringement of the Respondents' rights as set out in section 11(h) of the Canadian Charter of Rights and Freedoms
2. Bias
3. Improper purpose
4. Expiry of limitation date for commencement of the proceedings
5. Other grounds

The Commission dismissed each of these arguments, ruled it had jurisdiction, denied the application and directed that the hearing continue. Brosseau and Barry appealed the decision to the Alberta Court of Appeal. Stevenson J.A., delivering the unanimous judgment of the Court of Appeal (1986), 67 A.R. 222, rejected their contentions and dismissed the appeal.

b) aux termes de l'article 166, que toutes les exemptions prévues aux articles 65, 66, 107, 115, 116, 132 et 133 ou dans le Règlement, ou certaines d'entre elles, ne s'appliquent pas à la personne ou à la société désignée dans l'ordonnance.

a (On notera que les accusations criminelles, fondées essentiellement sur les mêmes allégations, avaient été portées en vertu de «l'ancienne» *Securities Act*, R.S.A. 1970, chap. 333, alors que l'avis d'audition était fondé sur les dispositions de la «nouvelle» *Securities Act*, S.A. 1981, chap. S-6.1.)

c L'audition devant la Commission fut ajournée plusieurs fois à la demande des parties pour permettre la tenue du procès sur les accusations devant la Cour provinciale. En fin de compte, l'audition devant la Commission n'a jamais eu lieu en raison d'une requête préliminaire formée par d Brosseau et Barry. Ces derniers, après leur acquittement des accusations criminelles, ont en effet requis une ordonnance et une déclaration portant que la Commission n'avait pas compétence pour tenir une audition contre eux en application des e art. 165 et 166 de la *Securities Act* de l'Alberta, S.A. 1981, chap. S-6.1.

f Les moyens invoqués dans la demande préliminaire devant la Commission sont ainsi rédigés dans la décision de la Commission datée du 11 septembre 1985:

[TRADUCTION]

- g 1. Double péril—atteinte aux droits garantis aux intimés par l'alinéa 11h) de la Charte canadienne des droits et libertés
2. Partialité
3. Objet irrégulier
- h 4. Expiration du délai de prescription pour engager les procédures
5. Autres motifs

i La Commission a rejeté chacun de ces arguments, a conclu qu'elle avait compétence, a rejeté la demande et a ordonné la poursuite de l'audition. Brosseau et Barry ont interjeté appel de cette décision à la Cour d'appel de l'Alberta. Le juge Stevenson, qui a rendu l'arrêt unanime de la Cour d'appel (1986), 67 A.R. 222, a rejeté leurs arguments et les a déboutés de leur appel.

In their motion for leave to appeal to this Court, Brosseau and Barry raised constitutional issues which the Chief Justice stated as follows:

1. Does a hearing of the Alberta Securities Commission pursuant to ss. 165 and 166 of the *Securities Act*, S.A. 1981, c. S-6.1, to determine whether certain persons should be subject to a cease-trading order and deprived of certain exemptions provided by the said Act, infringe or deny the rights guaranteed by s. 11(h) of the *Canadian Charter of Rights and Freedoms* of persons who previously had been acquitted of an offence under s. 136 of the *Securities Act*, R.S.A. 1970, c. 333, in respect of the same factual allegations?

2. Does a hearing of the Alberta Securities Commission pursuant to ss. 165 and 166 of the *Securities Act*, S.A. 1981, c. S-6.1, infringe or deny the right to a fair and public hearing by an independent and impartial tribunal guaranteed by s. 11(d) of the *Canadian Charter of Rights and Freedoms* if the Alberta Securities Commission was involved in the investigation of allegations which are to be considered at the hearing?

3. If and to the extent that such a hearing of the Alberta Securities Commission would infringe or deny rights guaranteed by s. 11(d) or s. 11(h), is such a hearing justifiable under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit prescribed by law?

On March 1, 1988, before this case was to be heard, the appellant Brosseau informed the Court that he was abandoning any argument based on s. 11 of the *Canadian Charter of Rights and Freedoms* and would restrict his argument to the following two points:

1. Reasonable apprehension of bias, and
2. Statutory interpretation.

As a consequence, the Attorneys General of Canada, Alberta, Manitoba, Ontario, Quebec and New Brunswick, who had intervened in the case, gave notice of the withdrawal of their intervention.

Issues

After the *Charter* questions were dropped by the appellant, his two remaining arguments were as follows:

Dans leur requête en autorisation de pourvoi devant cette Cour, Brosseau et Barry ont soulevé des questions constitutionnelles que le Juge en chef a énoncées de la manière suivante:

^a 1. Une audition tenue par l'Alberta Securities Commission conformément aux art. 165 et 166 de la *Securities Act*, S.A. 1981, chap. S-6.1, pour déterminer si une ordonnance devrait être rendue pour interdire à certaines personnes d'effectuer des opérations sur valeurs et les priver de certaines dispenses prévues par la Loi, nie-t-elle ou viole-t-elle les droits garantis par l'al. 11h) de la *Charte canadienne des droits et libertés* à tout inculpé qui a été antérieurement acquitté à l'égard d'une infraction prévue à l'art. 136 de la *Securities Act*, R.S.A. 1970, chap. 333, concernant les mêmes allégations de fait?

^b 2. Une audition tenue par l'Alberta Securities Commission conformément aux art. 165 et 166 de la *Securities Act*, S.A. 1981, chap. S-6.1, nie-t-elle ou viole-t-elle le droit à un procès public et équitable garanti par l'al. 11d) de la *Charte canadienne des droits et libertés* si ladite commission a participé à l'enquête relative aux allégations qui doivent être examinées à l'audition?

^c 3. Si une telle audition de l'Alberta Securities Commission nie ou viole les droits garantis par l'al. 11d) ou l'al. 11h) et dans la mesure où ils le font, est-elle justifiable en vertu de l'article premier de la *Charte canadienne des droits et libertés* en tant que limite raisonnable fixée par une règle de droit?

Le 1^{er} mars 1988, avant l'audition du pourvoi, l'appellant Brosseau a informé la Cour qu'il abandonnait ses moyens fondés sur l'art. 11 de la *Charte canadienne des droits et libertés* et qu'il limiterait son argumentation aux deux points suivants:

1. Crainte raisonnable de partialité
2. Interprétation législative.

Par conséquent, les procureurs généraux du Canada, de l'Alberta, du Manitoba, de l'Ontario, du Québec et du Nouveau-Brunswick, qui étaient intervenus au dossier, ont donné avis du retrait de leur intervention.

Les questions en litige

Une fois abandonnées les questions relatives à la *Charte* restent les deux seuls arguments que l'appellant formule ainsi:

18. Whether the Court of Appeal erred in holding that, apart from the *Charter*, participation by the same members of the Commission in both investigative and adjudicatory functions did not raise a reasonable apprehension of bias precluding the Commission from holding the Hearing.

19. Whether the Court of Appeal erred in holding that the objects of Sections 165 and 166 of the New Act are protective, rather than punitive, and that therefore the presumption against retrospective application of statutes does not apply to prohibit the Commission from holding the Hearing to consider whether sanctions only provided for in the New Act should be imposed against the Appellants in respect of acts alleged to have been committed at a time when the Old Act governed the trading of securities in Alberta.

I will deal with these issues in the order in which they were argued.

Reasonable Apprehension of Bias

The appellant contends that a reasonable apprehension of bias arose from the fact that the Chairman, who had received the investigative report, was also designated to sit on the panel at the hearing of the matter. He objects to the Chairman's participation at both the investigatory and adjudicatory levels.

The maxim *nemo iudex in causa sua debet esse* underlies the doctrine of "reasonable apprehension of bias". It translates into the principle that no one ought to be a judge in his own cause. In this case, it is contended that the Chairman, in acting as both investigator and adjudicator in the same case, created a reasonable apprehension of bias. As a general principle, this is not permitted in law because the taint of bias would destroy the integrity of proceedings conducted in such a manner.

As with most principles, there are exceptions. One exception to the "*nemo iudex*" principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue. A case in point relied on by the respondents, *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, affirmed *sub nom. Re W.*

[TRANSLATION] 18. La Cour d'appel a commis une erreur quand elle a conclu que, indépendamment de la *Charte*, la participation des mêmes membres de la Commission à ses fonctions d'enquête et à ses décisions ne suscite pas de crainte raisonnable de partialité empêchant la Commission de tenir l'audition.

19. La Cour d'appel a commis une erreur quand elle a conclu que les articles 165 et 166 de la nouvelle loi visent la protection plutôt que l'imposition d'une peine, et que par conséquent la présomption de non-rétroactivité des lois ne s'applique pas pour interdire à la Commission de tenir l'audition pour déterminer si les sanctions prévues seulement dans la nouvelle loi devraient être imposées aux appelants relativement à des actes qu'on leur reproche d'avoir accomplis à un moment où l'ancienne loi régissait les opérations relatives aux valeurs mobilières en Alberta.

J'examinerai ces moyens dans l'ordre où ils ont été plaidés.

La crainte raisonnable de partialité

L'appellant prétend qu'il y avait crainte raisonnable de partialité parce que le président, qui avait reçu le rapport d'enquête, a également été désigné pour siéger comme membre du tribunal chargé d'entendre l'affaire. Il s'objecte à ce que le président participe à la fois à l'enquête et à la décision.

La maxime *nemo iudex in causa sua debet esse* sous-tend la doctrine de «la crainte raisonnable de partialité». Elle traduit le principe que nul ne doit être juge dans sa propre cause. On prétend en l'espèce que le président, en agissant à la fois comme enquêteur et comme arbitre dans la même affaire, a suscité une crainte raisonnable de partialité. Comme principe général, un tel procédé n'est pas autorisé en droit parce qu'il y aurait atteinte à l'intégrité des procédures conduites de cette façon par la crainte de partialité qu'elles susciteraient.

Comme la plupart des principes, celui-ci a ses exceptions. Il y a exception au principe «*nemo iudex*» lorsque le chevauchement de fonctions est autorisé par la loi, dans l'hypothèse où la constitutionnalité de la loi n'est pas attaquée. Un arrêt pertinent invoqué par les intimés, *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, confirmé par *sub nom.*

D. Latimer Co. and Bray (1974), 6 O.R. (2d) 129, addresses this particular issue with respect to the activities of a securities commission. In that case, as in this one, members of the panel assigned to hear proceedings had also been involved in the investigatory process. Dubin J.A. for the Court of Appeal found that the structure of the Act itself, whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias. He wrote at pp. 140-41:

Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.

In order to disqualify the Commission from hearing the matter in the present case, some act of the Commission going beyond its statutory duties must be found.

Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*. In this case, the appellant complains that the Chairman was both the investigator and adjudicator and that therefore, the hearing should be prevented from continuing on the grounds of reasonable apprehension of bias.

Re W. D. Latimer Co. and Bray (1974), 6 O.R. (2d) 129, porte précisément sur ce point, en relation avec les activités d'une commission des valeurs mobilières. Dans cette affaire, comme en l'espèce, certains membres d'un tribunal désigné pour l'audition d'une affaire avaient également joué un rôle dans le processus d'enquête. Le juge Dubin a conclu au nom de la Cour d'appel, que l'économie de la loi elle-même, qui prévoyait que les commissaires pouvaient participer à l'enquête et à la prise de décision, ne donnait pas en soi naissance à une crainte raisonnable de partialité. Il écrit, aux pp. 140 et 141:

[TRADUCTION] Lorsque la loi autorise le tribunal à exercer des fonctions tripartites, la récusation doit être fondée sur un certain acte du tribunal qui excède l'exécution des fonctions que lui attribue le texte législatif en vertu duquel les procédures sont engagées. De simples renseignements préalables quant à la nature de la plainte et quant aux motifs sur lesquels elle est fondée ne sont pas suffisants pour empêcher le tribunal d'accomplir sa tâche.

Pour disqualifier la Commission dans la présente affaire, il faut qu'il y ait quelque acte de la Commission qui aille au-delà des fonctions conférées par la loi.

Les tribunaux administratifs sont créés pour diverses raisons et pour répondre à divers besoins. Lorsqu'il établit ces tribunaux, le législateur est libre de choisir la structure de l'organisme administratif. Il déterminera, entre autres, sa composition et les degrés de formalité requis pour son fonctionnement. Dans certains cas, il estimera souhaitable, pour atteindre les objectifs de la loi, de permettre un chevauchement de fonctions qui, dans des procédures judiciaires normales, seraient séparées. Dans l'appréciation des activités de tribunaux administratifs, les cours doivent tenir compte de la nature de l'organisme créé par le législateur. Si la loi autorise un certain degré de chevauchement de fonctions, ce chevauchement, dans la mesure où il est autorisé, n'est généralement pas assujéti *per se* à la doctrine de la «crainte raisonnable de partialité». En l'espèce, l'appellant se plaint de ce que le président a pris part à la fois à l'enquête et à la décision et qu'en conséquence il y a lieu d'empêcher la poursuite de l'audition au motif de crainte raisonnable de partialité.

1989 CanLII 121 (SCC)

In the course of deciding this case, it became clear to this Court that the arguments presented by the parties in their factums and in oral argument before this Court were insufficient to properly address these questions. As a result, the parties were requested to provide written submissions in answer to the following questions:

- (1) pursuant to what statutory authority was the investigation directed?
- (2) was the investigation directed solely at the initiative of the Chairman?
- (3) was the investigation confined to documents on file with the Commission, i.e. was it a purely internal investigation or was it broader in scope?

In his written submissions, the appellant claimed that there was no authority for the investigation. He maintained that it was directed solely at the initiative of the Chairman, and was not confined to documents on file. Not surprisingly, the respondents disagreed. They argued that while not specifically authorized by statute, implicit authority for the investigation could be found in the general scheme of the *Securities Act*.

If the investigation was without statutory authority, and if it was also directed at the initiative of the Chairman, then it is clear that the Chairman was attempting to act in the role of both investigator and adjudicator in circumstances which would not permit an abrogation of the general rules against bias. The appellant claims that the investigation was initiated by the Chairman. The respondent contends that it was, in fact, the Director who ordered the investigation. In my view, the available evidence does not favour one position over the other. While it appears that the Chairman may have had some role in "initiating" the investigation, it is far from clear that he initiated it in the sense of directing what should be done, how, and by whom. However, I do not feel it necessary to decide this point since I believe that the Act contemplates the involvement of the Chairman at several stages of proceedings.

Section 28 of the *Securities Act* provides authority for the Commission to carry out a full scale investigation which includes a wide range of

Au cours du délibéré, il est devenu évident que les arguments présentés par les parties dans leurs mémoires et lors de l'audition étaient insuffisants pour traiter adéquatement de ces questions. La Cour a donc demandé aux parties de présenter des mémoires additionnels pour répondre aux questions suivantes:

- 1) En application de quelles dispositions législatives l'enquête a-t-elle été ordonnée?
- 2) L'enquête a-t-elle été ordonnée à la seule initiative du président?
- 3) L'enquête était-elle limitée à des documents faisant partie du dossier de la Commission, c.-à-d. s'agissait-il d'une enquête purement interne ou avait-elle une portée plus large?

Dans son mémoire, l'appelant a prétendu qu'aucun texte de loi n'autorisait l'enquête. Il a maintenu qu'elle avait été ordonnée à la seule initiative du président et qu'elle n'était pas limitée aux documents figurant au dossier. Comme il fallait s'y attendre, l'intimée ne fut pas d'accord. Elle a allégué que, bien qu'elle ne soit pas autorisée spécifiquement par un texte de loi, l'enquête était autorisée implicitement en vertu de l'économie générale de la *Securities Act*.

Si l'enquête n'est pas autorisée par un texte de loi et si elle a été ordonnée à l'initiative du président, il est clair que le président a tenté d'agir à la fois comme enquêteur et comme arbitre dans des circonstances qui ne permettent pas d'écarter les règles générales établies en matière de partialité. L'appelant soutient que l'enquête a été déclenchée par le président. L'intimée prétend qu'en fait elle a été lancée par le directeur. À mon avis, la preuve au dossier ne favorise pas plus l'un que l'autre. Bien qu'apparemment le président ait joué un certain rôle dans le « déclenchement » de l'enquête, il est loin d'être clair qu'il l'a déclenchée en ce sens qu'il aurait ordonné ce qu'il fallait faire, la manière de le faire et qui le ferait. Je n'estime cependant pas nécessaire de trancher ce point puisque, à mon avis, la Loi prévoit la participation du président à différentes étapes des procédures.

L'article 28 de la *Securities Act* autorise la Commission à mener une enquête complète ce qui comporte un large éventail de pouvoirs. La per-

powers. The person appointed to make the investigation under s. 28 has, by virtue of s. 29, "the same power as is vested in the Court of Queen's Bench for the trial of civil actions." Because of the extensive nature of the powers granted to an investigator under s. 28, such an investigation must be ordered by the Commission, and not by the Chairman alone.

There is no evidence in the present case that a s. 28 investigation was ordered by the Commission. In fact, the record and submissions suggest that this was not the route chosen by the Commission. The appellant contends that the only permissible route for an investigation is s. 28, and that therefore there was no statutory authorization for the action taken by the Chairman.

The respondent argues that the Act implies powers on a different level from the s. 28 formal investigative procedures. It contends that an informal "enforcement review" is the mechanism used by the Commission to bring to its attention those matters which warrant a more in depth investigation. Because of the formalities surrounding the s. 28 investigation, and because of the broad powers conferred, I am inclined to agree that the Commission must have the implied authority to conduct a more informal internal review. It would be unreasonable to say that a securities commission requires express statutory authority to review the documents it has on file, or to keep itself informed of the course of an R.C.M.P. investigation. To do so would be to make mandatory a resort to a s. 28 investigation for what are often simple administrative purposes. Such an approach might have the effect of paralysing the operations of the Commission. It would seem logical that before ordering a s. 28 investigation, the Commission would have first investigated the facts. If no wrongdoing is found, that would end the matter. If irregularities are uncovered, then the Commission could proceed either to a more thorough s. 28 investigation or to order a hearing, as in this case, to probe more deeply into the matter.

Section 11 of the *Securities Act* provides that the Chairman of the Commission is its Chief Executive Officer. As such, it appears to me that

sonne chargée de l'enquête en vertu de l'art. 28 a, en vertu de l'art. 29, [TRADUCTION] «des mêmes pouvoirs que ceux qui sont attribués à la Cour du Banc de la Reine pour l'audition de poursuites civiles.» À cause de l'étendue des pouvoirs accordés à l'enquêteur en vertu de l'art. 28, l'enquête doit être ordonnée par la Commission et non par le président seul.

Rien ne prouve en l'espèce que la Commission ait ordonné une enquête fondée sur l'art. 28. En fait, le dossier et les allégations permettent de croire que la Commission a choisi une voie différente. L'appelant prétend que le seul moyen permis pour initier une enquête est le recours à l'art. 28 et que la mesure prise par le président n'était donc pas autorisée par un texte de loi.

L'intimée allègue que la Loi présume l'existence de pouvoirs qui se situent à un niveau différent des procédures d'enquête formelles visées par l'art. 28. Elle prétend que la révision informelle est le mécanisme que la Commission utilise pour identifier les questions qui méritent une enquête plus approfondie. À cause des formalités qui accompagnent l'enquête fondée sur l'art. 28 et à cause des vastes pouvoirs y attribués, je suis d'avis que la Commission doit avoir le pouvoir implicite de procéder à un examen interne plus informel. Il serait déraisonnable de prétendre qu'une commission des valeurs mobilières requiert un pouvoir expressément prévu par la Loi pour examiner les documents qui se trouvent dans ses dossiers ou pour suivre l'évolution d'une enquête de la G.R.C. Ce serait là rendre obligatoire l'enquête fondée sur l'art. 28 pour de simples questions administratives. Une telle approche pourrait avoir l'effet de paralyser le fonctionnement de la Commission. Il semble logique que, avant d'ordonner une enquête fondée sur l'art. 28, la Commission enquête d'abord sur les faits. Si on ne trouve rien de répréhensible, l'affaire s'arrête là. Si on découvre des irrégularités, la Commission peut alors soit procéder à une enquête plus complète, fondée sur l'art. 28, soit ordonner une audition, comme en l'espèce, pour examiner l'affaire plus à fond.

L'article 11 de la *Securities Act* prévoit que le président de la Commission en est l'administrateur en chef. À ce titre, j'estime qu'il a nécessairement

he would necessarily have the authority to receive information from the Assistant Deputy Minister or from the R.C.M.P., pass this material along to the Director of the Commission, require that the Director verify the allegations and complaints, and receive a report of any review made by the Director. There is no evidence that his participation went beyond these bounds. It is also to be noted that the report in question was made available to the appellant.

Certain other factors should be taken into consideration along with the question of statutory authorization. For example, in a specialized body such as the Commission, it is more than likely that the same decision-makers will have repeated dealings with a given party on a number of occasions and for a variety of reasons. It is hardly surprising, given the fact that there is only one Alberta Securities Commission, that the Commission in this case was required to deal with many aspects of the failure of Dial over a period of years.

Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity. When a party is subjected to the enforcement proceedings contemplated by ss. 165 or 166 of the Act, that party is given an opportunity to present its case in a hearing before the Commission, as was done in this case. The Commission both orders the hearing and decides the matter. Given the circumstances, it is not enough for the appellant to merely claim bias because the Commission, in undertaking this preliminary internal review, did not act like a court. It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be con-

le pouvoir de recevoir des renseignements du sous-ministre adjoint ou de la G.R.C., de les transmettre au directeur de la Commission, de demander à celui-ci de vérifier les allégations et les plaintes, et de recevoir un rapport de tout examen fait par le directeur. Rien dans la preuve n'indique qu'il ait agi en dehors de ces limites. Il faut également noter que l'appelant a eu accès au rapport en question.

Outre la question de l'autorisation accordée par la loi, il y a aussi lieu de tenir compte d'autres facteurs. Par exemple, dans un organisme spécialisé comme la Commission, il est plus que probable que les mêmes instances décisionnelles auront des contacts répétés avec une partie donnée, à de nombreuses occasions et pour diverses raisons. Étant donné qu'il n'y a qu'une seule commission des valeurs mobilières en Alberta, il n'est guère surprenant qu'on ait demandé à la Commission en l'espèce d'examiner de nombreux aspects de la déconfiture de Dial, sur plusieurs années.

De par leur nature, les commissions de valeurs mobilières remplissent plusieurs fonctions différentes. Elles surveillent le dépôt de prospectus, réglementent les opérations relatives aux valeurs mobilières, inscrivent les personnes et les sociétés qui font des opérations relatives aux valeurs mobilières, mènent des enquêtes et appliquent les dispositions de la Loi. De par leur nature, elles sont amenées à avoir des contacts répétés avec les mêmes parties tant dans leur rôle administratif que dans leur rôle décisionnel. Dans le cas des procédures d'application de la loi envisagées aux art. 165 ou 166 de la Loi, la partie visée a la possibilité de faire des représentations à une audition tenue devant la Commission, comme cela a été fait en l'espèce. La Commission ordonne la tenue de l'audition et rend sa décision. Dans les circonstances, l'appelant ne peut, pour fonder son allégation de partialité, se contenter de dire que la Commission, lorsqu'elle a fait sa révision préliminaire interne, n'a pas agi comme une cour de justice. Il ressort clairement de sa loi habilitante que, dans de telles circonstances, la Commission n'est pas tenue d'agir comme une cour et que certaines activités, qui pourraient par ailleurs être

sidered "biased" form an integral part of its operations. A section 28 investigation is of a different nature from this type of proceeding.

Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

The special circumstances of the tribunal in this case are substantially the same as those in the case of *Re W. D. Latimer Co. and Attorney-General for Ontario*, *supra*. In the Supreme Court of Ontario, Wright J. made the following observation at p. 404:

What fair play is in particular circumstances, and whether and how the power of the Courts to enforce it should be exercised are what the Court must decide. It must on the one hand see that the citizen is not unfairly dealt with or put in a position of potential unjustified peril at the hands of some person or body exercising jurisdiction. It must on the other hand see that such persons or bodies seeking to perform their public duty are not unduly hampered in their work and that the purpose of the Legislature, if it be the source of their jurisdiction, is respected and realized as it has been expressed.

The particular structure and responsibilities of the Commission must be considered in assessing allegations of bias. Upon the appeal of *Latimer* to the Ontario Court of Appeal, Dubin J.A., for a

considérées comme «partiales», font partie intégrante de son fonctionnement. Une enquête fondée sur l'art. 28 est d'une nature différente de celle dont il est ici question.

^a D'une manière générale, on peut dire que les lois sur les valeurs mobilières visent à réglementer le marché et à protéger le public. Cette Cour a reconnu ce rôle dans l'arrêt *Gregory & Co. v. Quebec Securities Commission*, [1961] R.C.S. 584, dans lequel le juge Fauteux a fait remarquer à la p. 588:

[TRADUCTION] L'objet prépondérant de la loi est d'assurer que les personnes qui, dans la province, exercent le commerce des valeurs mobilières ou qui agissent comme conseillers en placement, sont honnêtes et de bonne réputation et, ainsi, de protéger le public, dans la province ou ailleurs, contre toute fraude consécutive à certaines activités amorcées dans la province par des personnes qui y exercent ce commerce.

Ce rôle protecteur, qui est commun à toutes les commissions des valeurs mobilières, donne à ces organismes un caractère particulier qui doit être reconnu lorsqu'on examine la manière dont leurs fonctions sont exercées aux termes des lois qui leur sont applicables.

La situation particulière du tribunal en l'espèce est essentiellement la même que celle dans l'affaire *Re W. D. Latimer Co. and Attorney-General for Ontario*, précitée. Le juge Wright de la Cour suprême de l'Ontario y faisait les remarques suivantes à la p. 404:

^b [TRADUCTION] La Cour doit décider ce qui est franc-jeu dans des circonstances particulières, et dans quelle mesure et de quelle manière le pouvoir des tribunaux de l'appliquer devrait être exercé. D'une part, elle doit veiller à ce que le citoyen ne soit pas traité injustement ou placé dans une situation où il pourrait subir un péril injustifié aux mains d'une personne ou d'un organisme qui exerce la compétence. D'autre part, elle doit veiller à ce que ces personnes ou ces organismes qui cherchent à exécuter leurs obligations publiques ne soient pas gênés indûment dans leur travail et à ce que le but visé par l'assemblée législative, si c'est la source de leur compétence, soit respecté et réalisé tel qu'il a été exprimé.

La structure particulière et les responsabilités de la Commission doivent être examinées pour évaluer les allégations de partialité. Dans l'affaire *Latimer*, le juge Dubin, au nom de la Cour d'appel

unanimous Court, dismissed the complaint of bias. He acknowledged that the Commission had a responsibility both to the public and to its registrants. He wrote at p. 135:

... I view the obligation of the Commission towards its registrants as analogous to a professional body dealing in disciplinary matters with its members. The duty imposed upon the Commission of protecting members of the public from the misconduct of its registrants is, of course, a principal object of the statute, but the obligation of the Commission to deal fairly with those whose livelihood is in its hands is also by statute clearly placed upon it, and nothing is to be gained, in my opinion, by placing a priority upon one of its functions over the other.

Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.

I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

Improper Purpose

Although not argued before this Court, I have also considered the question of whether there may have been some element of "improper purpose" in the conduct of the proceedings against the appellant. For example, if the Commission conducted a review of Dial and ordered a hearing with a view to escaping its own potential liability in any pending litigation against the Commission, then otherwise legitimate proceedings could be tainted with bias. However, after a careful review of the file I am satisfied that any such "suspicion" of the motives of the Chairman, or of the Commission, is completely unfounded. While there seems, at one point, to have been pending litigation, there is no evidence as to the actual existence of claims against the Commission. More importantly, there is no evidence of the nature of such claims, or of

de l'Ontario, a rejeté la plainte de partialité. Il a reconnu, à la p. 135, que la Commission avait une responsabilité envers le public et les personnes inscrites:

^a [TRADUCTION] Je suis d'avis que l'obligation de la Commission envers les personnes inscrites est semblable à celle d'un organisme professionnel traitant de questions relatives à la discipline de ses membres. L'obligation qui incombe à la Commission de protéger les membres du public contre la mauvaise conduite des personnes inscrites est, évidemment, un des buts principaux de la loi, mais la loi lui impose également l'obligation de traiter équitablement ceux dont le gagne-pain est placé entre ses mains et, à mon avis, il n'y a aucun avantage à faire prévaloir l'une de ses fonctions sur l'autre.

^d Le juge Dubin a conclu que l'économie de la Loi, qui permettait aux commissaires d'avoir à la fois des fonctions d'enquête et des fonctions décisionnelles ne pouvait, en elle-même, susciter de crainte raisonnable de partialité.

^e Je suis d'accord avec cette opinion. Dans la mesure où le président n'a pas excédé les pouvoirs que lui confère la Loi et dans la mesure où rien dans la preuve n'indique d'autre participation que le simple fait d'avoir exercé les fonctions que lui impose la loi, on ne peut dire qu'il existe une ^f «crainte raisonnable de partialité» qui affecterait la Commission dans son ensemble.

L'objet irrégulier

^g Bien qu'elle n'ait pas été plaidée devant cette Cour, j'ai également examiné la possibilité de l'«objet irrégulier» des procédures engagées contre l'appelant. Par exemple, si la Commission avait examiné la situation de Dial et ordonné une audition en vue d'échapper à sa propre responsabilité éventuelle dans des poursuites dirigées contre elle, alors, des procédures par ailleurs légitimes pourraient être entachées de partialité. Après un examen attentif du dossier, je suis cependant convaincue que tout «soupçon» de ce genre, en ce qui a trait au but visé par le président ou la Commission, est sans aucun fondement. Bien qu'il semble y avoir eu à un certain moment un litige, il n'y a aucune preuve de l'existence de réclamations contre la Commission. Plus important encore, aucune preuve n'a été produite quant à la nature

the possible defences available to the Commission. In short, any argument of bias founded on such scanty information would hardly be a reasonable suspicion. It would be more easily categorized as sheer conjecture.

Of course, had there been any evidence of a possible conflict between the interest of the Commission in the outcome of the hearing, and their duty to give a fair hearing to the appellant, it would be a different matter, and might raise a reasonable apprehension of bias. However, in my view, this is not the case here.

Conclusion

In *Committee for Justice and Liberty v. National Energy Board* (the *Crowe* case), [1978] 1 S.C.R. 369, Chief Justice Laskin stated the principle behind the test of reasonable apprehension of bias. He wrote, at p. 391:

This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies

In my view, the facts of this case do not raise a reasonable apprehension of bias, nor can they undermine public confidence in the impartiality of the Commission. I would therefore dismiss this first ground of appeal.

Retroactivity

The appellant claims that ss. 165 and 166 of the new Act (1981) cannot be applied retrospectively to him. The appellant maintains that these provisions of the new Act broaden the powers of the Commission. He submits that the Court of Appeal erred "in relying upon the case of *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617, as authority for the proposition that where the objectives of a statute are 'protective', rather than 'penal', then the presumption against retrospective operation of statutes does not apply." The appellant contends that under ss. 165 and 166 of the new Act (1981), sanctions are penal and consequently the Act should not be applied retrospectively.

de ces réclamations ou aux moyens de défense que la Commission pouvait invoquer. Bref, une allégation de partialité fondée sur d'aussi maigres renseignements serait loin d'équivaloir à un soupçon raisonnable. Ce serait plus aisément taxé de pure conjecture.

Il en irait autrement s'il y avait eu preuve d'un conflit possible entre l'intérêt de la Commission dans l'issue de l'audition et son obligation d'accorder une audition équitable à l'appelant. Ceci serait de nature à susciter une crainte raisonnable de partialité. À mon avis cependant, tel n'est pas le cas ici.

Conclusion

Dans l'arrêt *Committee for Justice and Liberty v. Office national de l'énergie* (l'arrêt *Crowe*), [1978] 1 R.C.S. 369, le juge en chef Laskin a formulé le principe qui sous-tend le critère de la crainte raisonnable de partialité. Il écrit à la p. 391:

Ce critère se fonde sur la préoccupation constante qu'il ne faut pas que le public puisse douter de l'impartialité des organismes ayant un pouvoir décisionnel

À mon avis, les faits de la présente affaire ne suscitent pas de crainte raisonnable de partialité et ils ne peuvent miner la confiance du public dans l'impartialité de la Commission. Je suis donc d'avis de rejeter le premier moyen d'appel.

La rétroactivité

L'appelant allègue que les art. 165 et 166 de la nouvelle loi (1981) ne peuvent lui être appliqués rétroactivement. L'appelant soutient que ces dispositions de la nouvelle loi élargissent les pouvoirs de la Commission. Il prétend que la Cour d'appel a commis une erreur [TRADUCTION] «en se fondant sur l'arrêt *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617, pour affirmer que, lorsque les objectifs d'une loi sont la «protection» plutôt que «l'imposition d'une peine», la présomption contre l'application rétroactive des lois ne s'applique pas.» L'appelant est d'avis qu'aux termes des art. 165 et 166 de la nouvelle loi (1981), les sanctions sont pénales et que, par conséquent, la loi ne devrait pas être appliquée rétroactivement.

1989 CanLII 121 (SCC)

The relevant legislation consists of s. 136 of the *Securities Act*, R.S.A. 1970, c. 333, and ss. 165 and 166 of the current *Securities Act*, S.A. 1981, c. S-6.1:

136. (1) Every person or company who

(b) makes a statement in any application, report, prospectus ... required to be filed or furnished ... that ... is false or misleading is ... guilty of an offence.

165(1) The Commission may order that

(a) trading cease in respect of any security for a period of time as is specified in the order, or

(b) that a person or company cease trading in securities or specified securities for a period of time as is specified in the order.

(2) The Commission shall not make an order under subsection (1) without conducting a hearing.

166(1) The Commission may order that any or all of the exemptions contained in sections 65, 66, 107, 115, 116, 132 and 133 or in the regulations do not apply to the person or company named in the order.

(2) The Commission shall not make an order under subsection (1) without conducting a hearing.

The basic rule of statutory interpretation, that laws should not be construed so as to have retrospective effect, was reiterated in the recent decision of this Court in *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256. That case, however, dealt with the question of the retrospective effect of procedural versus substantive provisions. The present case presents a different facet of the problem of retrospectivity.

While the presumption against retrospective effect is clear, there seems to be a great deal of confusion among the authorities and case law as to what constitutes such an effect. Michel Krauss in "Réflexions sur la rétroactivité des lois" (1983), 14 *R.G.D.* 287, observes at p. 291:

[TRANSLATION] ... there is unanimity when it comes to recognizing that the "non-retrospectivity rule" is now applicable. However, the content of this presumption has still to be determined in order to apply it consistent-

Les dispositions pertinentes sont l'art. 136 de la *Securities Act*, R.S.A. 1970, chap. 333 et les art. 165 et 166 de l'actuelle *Securities Act*, S.A. 1981, chap. S-61:

^a [TRADUCTION] **136.** (1) Est coupable d'une infraction, quiconque

^b fait une déclaration [...] fausse ou trompeuse [...] dans une demande, dans un rapport, dans un prospectus [...] qui doit être produit ou fourni ...

165(1) La Commission peut ordonner

^c a) que cessent toutes opérations relatives à des valeurs mobilières pendant la période précisée dans l'ordonnance, ou

^d b) qu'une personne ou une société cesse d'effectuer des opérations relatives à des valeurs mobilières ou à des valeurs mobilières désignées pendant la période précisée dans l'ordonnance.

(2) La Commission ne doit pas prendre d'ordonnance aux termes du paragraphe (1) sans audition.

166(1) La Commission peut ordonner que l'une ou l'autre des exemptions prévues aux articles 65, 66, 107, 115, 116, 132 et 133 ou dans le Règlement ne s'applique pas à la personne ou à la société désignée dans l'ordonnance.

(2) La Commission ne doit pas rendre d'ordonnance aux termes du paragraphe (1) sans tenir d'audition.

^f La règle fondamentale d'interprétation des lois selon laquelle les lois ne devraient pas être interprétées de manière à avoir un effet rétroactif, a été réitérée dans l'arrêt récent de cette Cour *Angus c. Sun Alliance Compagnie d'assurance*, [1988] 2 R.C.S. 256. Cet arrêt portait toutefois sur l'effet rétroactif de dispositions de nature procédurale par opposition à des dispositions de fond. La présente affaire soulève un aspect différent du problème de la rétroactivité.

Bien que la présomption de non-rétroactivité soit claire, il semble y avoir beaucoup de confusion dans la doctrine et la jurisprudence sur ce que constitue un effet rétroactif. Michel Krauss dans «Réflexions sur la rétroactivité des lois» (1983), 14 *R.G.D.* 287 fait remarquer à la p. 291:

ⁱ ... il y a unanimité lorsqu'il s'agit de reconnaître la vigueur actuelle de la «règle de non-rétroactivité». Toutefois, pour pouvoir appliquer précisément et avec constance cette présomption, encore faut-il en cerner le

ly and precisely. In our opinion, this concept is not precisely defined in our law.

Pierre-André Côté (*The Interpretation of Legislation in Canada* (1984)) wrote on the subject of the application of the rule against retroactive application of laws at p. 91:

Examination of the case law reveals a great number of judgments based on general principles. It is difficult to discern a logical thread in this panoply of decisions that are difficult to reconcile.

This Court has had the opportunity to consider the matter of the retrospective application of laws. In *Nova, An Alberta Corporation v. Amoco Canada Petroleum Co.*, [1981] 2 S.C.R. 437, Estey J. dealt with the issue of retrospectivity by scrutinizing the intent behind the particular piece of legislation. He stated at p. 448 that "each statute must, for the purpose of its interpretation, stand on its own and be examined according to its terminology and the general legislative pattern it establishes". In *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, Dickson J. (as he then was) stated the general principle with respect to retrospectivity of enactments at p. 279:

The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively.

The so-called presumption against retrospectivity applies only to prejudicial statutes. It does not apply to those which confer a benefit. As Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), explains at p. 198:

... there are three kinds of statutes that can properly be said to be retrospective, but there is only one that attracts the presumption. First, there are the statutes that attach benevolent consequences to a prior event; they do not attract the presumption. Second, there are those that attach prejudicial consequences to a prior

contenu. Nous croyons justement que ce concept n'est pas précis en notre droit.

Pierre-André Côté (*Interprétation des lois* (1982)) a écrit ceci au sujet de l'application de la règle de non-rétroactivité des lois à la p. 100:

L'examen de la jurisprudence en matière d'effet de la loi dans le temps fait voir une multitude de décisions rendues sur le fondement de quelques principes très généraux et dont chacune paraît un cas d'espèce. Les décisions particulières sont souvent difficiles à réconcilier sur un plan logique ...

Cette Cour a eu l'occasion d'examiner la question de l'application rétroactive des lois. Dans l'arrêt *Nova, An Alberta Corporation c. Amoco Canada Petroleum Co.*, [1981] 2 R.C.S. 437, le juge Estey a analysé la question de la rétroactivité en examinant l'intention qui sous-tend la disposition législative visée. Il a dit à la p. 448 que «chaque loi doit être complète en elle-même et se lire en fonction de sa terminologie propre et du plan législatif général qu'elle met en place». Dans l'arrêt *Gustavson Drilling (1964) Ltd. c. Le ministre du Revenu national*, [1977] 1 R.C.S. 271, le juge Dickson (maintenant Juge en chef) a énoncé le principe général relatif à la rétroactivité des textes législatifs à la p. 279:

Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif.

Ce qu'on appelle la présomption de non-rétroactivité ne s'applique qu'aux lois qui ont un effet préjudiciable. Elle ne s'applique pas à celles qui confèrent un avantage. Elmer Driedger, explique dans *Construction of Statutes* (2nd ed. 1983), à la p. 198:

[TRADUCTION] Il y a trois sortes de lois que l'on peut, à proprement parler, qualifier de rétroactives, mais il n'y en a qu'une qui donne lieu à la présomption. Premièrement, il y a les lois qui rattachent des conséquences bienfaisantes à un événement antérieur; elles ne donnent pas lieu à la présomption. Deuxièmement, il y a celles

event; they attract the presumption. Third, there are those that impose a penalty on a person who is described by reference to a prior event, but the penalty is not intended as further punishment for the event; these do not attract the presumption.

A sub-category of the third type of statute described by Driedger is enactments which may impose a penalty on a person related to a past event, so long as the goal of the penalty is not to punish the person in question, but to protect the public. This distinction was elaborated in the early case of *R. v. Vine* (1875), 10 L.R. Q.B. 195, where Cockburn C.J. wrote at p. 199:

If one could see some reason for thinking that the intention of this enactment was merely to aggravate the punishment for felony by imposing this disqualification in addition, I should feel the force of Mr. Poland's argument, founded on the rule which has obtained in putting a construction upon statutes—that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective. But here the object of the enactment is not to punish offenders, but to protect the public against public-houses in which spirits are retailed being kept by persons of doubtful character . . . the legislature has categorically drawn a hard and fast line, obviously with a view to protect the public, in order that places of public resort may be kept by persons of good character; and it matters not for this purpose whether a person was convicted before or after the Act passed, one is equally bad as the other and ought not to be intrusted with a licence.

In *Re A Solicitor's Clerk*, *supra*, a statute concerning the practice of law by solicitors was amended so as to enable an order disqualifying a person from acting as a solicitor's clerk if such person had been convicted of larceny, embezzlement or fraudulent conversion of property. A clerk who had been convicted of one of those offenses before the coming into effect of the new law, contested his disqualification on the basis that the law was being given a retrospective effect. The Court of Queen's Bench dismissed these arguments. Lord Goddard C.J. found that there was no

qui rattachent des conséquences préjudiciables à un événement antérieur; elles donnent lieu à la présomption. Troisièmement, il y a celles qui imposent une peine à une personne qui est décrite par rapport à un événement antérieur, mais la peine n'est pas destinée à constituer une autre punition pour l'événement; elles ne donnent pas lieu à la présomption.

Une sous-catégorie du troisième type de lois décrit par Driedger est composée des textes législatifs qui peuvent imposer à une personne une peine liée à un événement passé en autant que le but de la peine n'est pas de punir la personne en question mais de protéger le public. Cette distinction a été élaborée dans un arrêt ancien, *R. v. Vine* (1875), 10 L.R. Q.B. 195, dans lequel le juge en chef Cockburn a écrit à la p. 199:

[TRADUCTION] Si on pouvait trouver une raison pour penser que l'intention de ce texte législatif était simplement d'augmenter la peine à l'égard d'une infraction majeure en y ajoutant cette interdiction, je serais sensible à la force de l'argument de M. Poland, qui est fondé sur la règle d'interprétation des lois selon laquelle, lorsqu'elles sont de nature pénale, elles ne peuvent être interprétées rétroactivement, si le texte peut avoir un effet pour l'avenir et n'est pas nécessairement rétroactif. Toutefois, en l'espèce, le but du texte législatif n'est pas de punir les contrevenants, mais de protéger le public contre la possibilité que des débits d'alcool soient tenus par des personnes de mœurs douteuses [...] le Parlement a de façon catégorique adopté une position ferme, de toute évidence pour protéger le public, afin que les endroits publics puissent être tenus par des personnes de bonnes mœurs, et il n'est pas important à cette fin de savoir si une personne a été déclarée coupable avant ou après l'adoption de la loi, car elle est tout aussi mauvaise dans un cas comme dans l'autre et ne devrait pas recevoir de permis.

Dans l'arrêt *Re A Solicitor's Clerk*, précité, une loi concernant l'exercice de la profession d'avocat avait été modifiée de manière à autoriser une ordonnance empêchant une personne d'agir à titre de clerk d'avocat si cette personne avait été déclarée coupable de vol, d'abus de confiance ou de détournement de biens. Un clerk, qui avait été déclaré coupable de l'une de ces infractions avant l'entrée en vigueur de la nouvelle loi, avait contesté son exclusion parce que l'on donnait à la loi un effet rétroactif. La Court of Queen's Bench a rejeté ces arguments. Le juge en chef, Lord

retrospective effect since the real aim of the law was prospective and aimed at protecting the public. He wrote at p. 619:

In my opinion, however, this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order; but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

Elmer Driedger summarizes the point in "Statutes: Retroactive, Retrospective Reflections" (1978), 56 *Can. Bar Rev.* 264, at p. 275:

In the end, resort must be had to the object of the statute. If the intent is to punish or penalize a person for having done what he did, the presumption applies, because a new consequence is attached to a prior event. But if the new punishment or penalty is intended to protect the public, the presumption does not apply.

Stevenson J.A. of the Court of Appeal likened the situation in the present appeal to that in the *Re A Solicitor's Clerk* case at p. 229:

In my view the principle in the **Solicitor's Clerk** case is indistinguishable. An additional power is given to the Commission—based on previous conduct. A new punishment cannot be added but that is not the nature of the office of ss. 166 and 167. It is the same office that the **Solicitor's Clerk** case deals with, namely to provide a disqualification based on past conduct which may show unfitness for the exemption.

The present case involves the imposition of a remedy, the application of which is based upon conduct of the appellant before the enactment of ss. 165 and 166. Nonetheless, the remedy is not designed as a punishment for that conduct. Rather, it serves to protect members of the public.

The fact that the relief is not really punitive in nature is supported by the conclusion of Stevenson J.A. that the imposition of the new remedy did not

Goddard, a conclu qu'il n'y avait pas d'effet rétroactif, étant donné que le but réel de la loi était prospectif et visait la protection du public. Il écrit à la p. 619:

^a [TRADUCTION] À mon avis, cette loi n'est pas véritablement rétroactive. Elle permet de rendre une ordonnance empêchant une personne d'agir à titre de clerk d'avocat dans l'avenir et ce qui s'est produit dans le passé constitue la cause ou la raison de l'ordonnance; mais l'ordonnance n'a pas d'effet rétroactif. Elle serait rétroactive si la loi déclarait nulle ou annulable une chose faite avant l'entrée en vigueur de la loi ou avant l'ordonnance ou imposait une peine pour avoir agi à tel titre avant que l'entrée en vigueur de la loi ou avant l'ordonnance. La loi permet simplement l'exclusion pour l'avenir, ce qui n'a aucun d'effet sur ce que l'appelant a fait dans le passé.

^a Elmer Driedger résume la question dans «Statutes: Retroactive, Retrospective Reflections» (1978), 56 *R. du B. can.* 264, à la p. 275:

^e [TRADUCTION] Finalement, il faut se tourner vers l'objet de la loi. Si l'intention est de punir ou de pénaliser une personne pour ce qu'elle a fait, la présomption joue, parce qu'une nouvelle conséquence se rattache à un événement antérieur. Toutefois, si la nouvelle punition ou peine est destinée à protéger le public, la présomption ne joue pas.

^f Le juge Stevenson de la Cour d'appel a comparé la situation de la présente affaire à celle de l'affaire *Re A Solicitor's Clerk* à la p. 229:

^g [TRADUCTION] À mon avis, on ne peut établir de distinction avec le principe énoncé dans l'arrêt **Solicitor's Clerk**. Un pouvoir additionnel est accordé à la Commission, fondé sur la conduite antérieure. Une nouvelle peine ne peut être ajoutée mais ce n'est pas le rôle des art. 166 et 167. L'arrêt **Solicitor's Clerk** portait sur le même rôle, c'est-à-dire prévoir une exclusion fondée sur la conduite passée qui peut démontrer l'incapacité en ce qui a trait à l'exemption.

ⁱ La présente affaire concerne un redressement dont l'application est fondée sur la conduite de l'appelant avant l'adoption des art. 165 et 166. Néanmoins, le redressement n'est pas conçu comme une peine liée à cette conduite. Il vise plutôt à protéger le public.

^j Le fait que ce redressement ne soit pas véritablement de nature punitive est appuyé par la conclusion du juge Stevenson selon laquelle l'imposi-

lie at the root of the appellant's concern in this matter at p. 229:

In essence, the appellants fear the stigma arising from a finding that they did, or failed to do, what is alleged in the hearing notice. That root concern was well illustrated by the suggestion made in argument that neither would be particularly aggrieved by the remedy being imposed against them, indeed they could accept the remedies, but were concerned about the finding of wrong doing.

The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

In the result, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Wheatley, Sadownik, Edmonton.

Solicitors for the respondent: Burnet, Duckworth & Palmer, Calgary.

tion du nouveau redressement n'était pas la préoccupation fondamentale de l'appelant en l'espèce à la p. 229:

[TRADUCTION] Essentiellement, les appelants craignent d'être marqués par une décision indiquant qu'ils ont fait ou omis de faire ce qui est allégué dans l'avis d'audition. Cette préoccupation fondamentale est bien illustrée par la déclaration faite dans l'argumentation, selon laquelle ils se souciaient moins du redressement imposé contre eux, car ils pouvaient accepter le redressement, que de la possibilité d'une conclusion sur l'illégalité.

Les dispositions en question sont destinées à empêcher les personnes que la Commission trouve coupables d'avoir accompli des actes qui mettent en doute leur intégrité commerciale, d'effectuer des opérations relatives à des valeurs mobilières. Il s'agit d'une mesure destinée à protéger le public et elle est conforme au rôle général de réglementation de la Commission. Étant donné que la modification contestée en l'espèce est destinée à protéger le public, la présomption de non-rétroactivité de la loi est en fait repoussée.

Je suis en conséquence d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs de l'appelant: Wheatley, Sadownik, Edmonton.

Procureurs de l'intimée: Burnet, Duckworth & Palmer, Calgary.

TAB 6

The Attorney General of Canada *Appellant*

v.

CanadianOxy Chemicals Ltd., CanadianOxy Industrial Chemicals Limited Partnership and Canadian Occidental Petroleum Ltd. *Respondents*

and

The Attorney General for Ontario *Intervener*

INDEXED AS: CANADIANOXY CHEMICALS LTD. v. CANADA (ATTORNEY GENERAL)

File No.: 25944.

Hearing and judgment: December 10, 1998.

Reasons delivered: April 23, 1999.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major and Binnie JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Search and seizure — Search warrants — Criminal Code authorizing issuance of warrants to search for “evidence with respect to the commission of an offence” — Whether provision authorizes granting of warrants to search for and seize evidence of negligence going to defence of due diligence — Criminal Code, R.S.C., 1985, c. C-46, s. 487(1)(b).

A plant operated by the respondents discharged a quantity of chlorine into the adjacent waters, killing a number of fish. This incident occurred during a power outage at the plant, which resulted from a power line being struck by a tree. The respondents reported the discharge to the authorities and an investigation followed. Five months after the discharge, a fishery officer swore an information and obtained a warrant to search the plant for a range of documents. He later obtained an order for a new warrant to re-seize several items which had been returned and which were relevant to the investigation. The respondents were charged with offences under the *Fisheries Act* and the *Waste Management Act*.

Le procureur général du Canada *Appelant*

c.

CanadianOxy Chemicals Ltd., CanadianOxy Industrial Chemicals Limited Partnership et Canadian Occidental Petroleum Ltd. *Intimées*

et

Le procureur général de l'Ontario *Intervenant*

RÉPERTORIÉ: CANADIANOXY CHEMICALS LTD. c. CANADA (PROCUREUR GÉNÉRAL)

N° du greffe: 25944.

Audition et jugement: 10 décembre 1998.

Motifs déposés: 23 avril 1999.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major et Binnie.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit criminel — Fouilles, perquisitions et saisies — Mandats de perquisition — Délivrance des mandats de perquisition autorisée par le Code criminel en vue de rechercher des éléments de «preuve touchant la commission d'une infraction» — La disposition législative autorise-t-elle la délivrance des mandats de perquisition pour rechercher en vue de les saisir des preuves de négligence se rapportant à la défense de diligence raisonnable? — Code criminel, L.R.C. (1985), ch. C-46, art. 487(1)(b).

Une usine exploitée par les intimées a rejeté du chlore dans un cours d'eau adjacent, ce qui a provoqué la mort d'un certain nombre de poissons. L'incident s'est produit pendant une panne d'électricité à l'usine causée par un arbre qui a heurté une ligne d'alimentation en électricité. Les intimées ont signalé le rejet aux autorités et une enquête a été ouverte. Cinq mois après le rejet, un agent des pêches a fait une dénonciation sous serment et a obtenu un mandat pour faire une perquisition à l'usine afin d'y rechercher différents documents. Il a obtenu par la suite un nouveau mandat pour saisir à nouveau plusieurs pièces qui avaient été remises et qui étaient pertinentes relativement à l'enquête. Les intimées ont été

They subsequently brought a motion to quash the warrants, alleging that s. 487(1) of the *Criminal Code*, which provides for the issuance of search warrants pertaining to “evidence with respect to the commission of an offence”, had been exceeded. The chambers judge ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants. The Court of Appeal, in a majority decision, upheld the ruling.

Held: The appeal should be allowed.

Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur. On a plain reading, the phrase “evidence with respect to the commission of an offence” is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. Anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant. It can be assumed that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown’s *prima facie* case. To conclude otherwise would effectively delete the phrase “with respect to” from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants. Although s. 487(1) is part of the *Criminal Code*, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that all relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the *Criminal Code* and the demands of a fair and expeditious administration of justice. Furthermore, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. While the broad powers contained in s. 487(1) do not authorize investigative fishing expeditions, nor do they diminish the proper privacy interests of individuals or corporations, in this case the specific terms of the warrant were not at issue, as the respondents challenged only the underlying authority to grant warrants for the purpose of investigating the presence of negligence. Both a plain reading of the relevant section and consideration of the role and obligations of state investi-

accusées d’infractions à la *Loi sur les pêches* et à la *Waste Management Act*. Elles ont par la suite présenté une requête en annulation des mandats en faisant valoir que l’on avait outrepassé les limites du par. 487(1) du *Code criminel*, qui prévoit la délivrance de mandats de perquisition relativement à des éléments de «preuve touchant la commission d’une infraction». Le juge en chambre a statué que les documents saisis relativement à la question de la diligence raisonnable n’étaient pas des documents touchant la commission de l’infraction reprochée et il a annulé les deux mandats. Les juges majoritaires de la Cour d’appel ont maintenu la décision.

Arrêt: Le pourvoi est accueilli.

Les dispositions législatives doivent être interprétées de manière à donner aux mots leur sens ordinaire le plus évident qui s’harmonise avec le contexte et l’objet visé par la loi dans laquelle ils sont employés. D’après son sens ordinaire, l’expression «preuve touchant la commission d’une infraction» est compréhensive et englobe tous les éléments qui pourraient jeter la lumière sur les circonstances d’un événement qui paraît constituer une infraction. Est visé par le mandat tout ce qui a trait ou se rapporte logiquement à l’incident faisant l’objet de l’enquête, aux parties en cause et à leur culpabilité éventuelle. Nous pouvons présumer que le législateur a décidé de ne pas limiter le par. 487(1) à la preuve établissant un élément faisant partie de la preuve *prima facie* du ministère public. Parvenir à une autre conclusion reviendrait en réalité à retrancher le mot «touchant» de la disposition. Même amputé de ce mot, le par. 487(1) est suffisamment large pour autoriser la perquisition dont il est question, mais son insertion dans la disposition appuie manifestement la validité de ces mandats. Bien que le par. 487(1) fasse partie du *Code criminel* et puisse occasionner des atteintes importantes à la vie privée, l’intérêt public commande qu’une enquête prompte et approfondie soit menée s’il y a possibilité d’infraction. C’est par rapport à cet intérêt que tous les renseignements et éléments de preuve pertinents doivent être trouvés et conservés le plus rapidement possible. Cette interprétation est compatible avec les objets qui sous-tendent le *Code criminel* et les exigences d’une administration de la justice prompte et équitable. De plus, refuser d’admettre que le ministère public peut rassembler des éléments de preuve en prévision de la présentation d’un moyen de défense aurait des conséquences graves sur le fonctionnement de notre système de justice. Bien que les pouvoirs étendus qui sont visés au par. 487(1) n’autorisent pas les recherches à l’aveuglette dans le cadre d’une enquête et ne diminuent pas le droit légitime à la vie privée des personnes physiques ou

gators support the conclusion that s. 487(1) authorized the granting of the warrants in question.

morales, dans la présente affaire, les modalités précises du mandat n'étaient pas en jeu, puisque les intimées ont uniquement contesté le pouvoir fondamental de décerner des mandats en vue de faire enquête sur l'existence d'une négligence. Le sens ordinaire de la disposition pertinente et la prise en compte du rôle et des obligations des enquêteurs de l'État appuient la conclusion que le par. 487(1) autorisait la délivrance des mandats en cause.

Cases Cited

Referred to: *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *R. v. McIntosh*, [1995] 1 S.C.R. 686; *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449; *R. v. Storrey*, [1990] 1 S.C.R. 241; *Nelles v. Ontario*, [1989] 2 S.C.R. 170; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *Baron v. Canada*, [1993] 1 S.C.R. 416.

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Criminal Code, R.S.C., 1985, c. C-46, s. 487(1)(b) [am. c. 27 (1st Supp.)], s. 68; am. 1994, c. 44, s. 36].
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Interpretation Act, R.S.C., 1985, c. I-21, s. 12.
Waste Management Act, S.B.C. 1982, c. 41, ss. 3(1.1) [ad. 1985, c. 52, s. 96], 34(3).

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Jurisprudence

Arrêts mentionnés: *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *R. c. McIntosh*, [1995] 1 R.C.S. 686; *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449; *R. c. Storrey*, [1990] 1 R.C.S. 241; *Nelles c. Ontario*, [1989] 2 R.C.S. 170; *R. c. Levogianis*, [1993] 4 R.C.S. 475; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425; *Baron c. Canada*, [1993] 1 R.C.S. 416.

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Code criminel, L.R.C. (1985), ch. C-46, art. 487(1)(b) [mod. ch. 27 (1^{er} suppl.), art. 68; mod. 1994, ch. 44, art. 36].
Loi d'interprétation, L.R.C. (1985), ch. I-21, art. 12.
Loi sur les pêches, L.R.C. (1985), ch. F-14, art. 36(3), 40(2).
Waste Management Act, S.B.C. 1982, ch. 41, art. 3(1.1) [aj. 1985, ch. 52, art. 96], 34(3).

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S. David Frankel, Q.C., and Kenneth Yule, for the appellant.

Gary A. Letcher, Jonathan S. McLean and Eric B. Miller, for the respondents.

Michal Fairburn, for the intervener

The judgment of the Court was delivered by

S. David Frankel, c.r., et Kenneth Yule, pour l'appellant.

Gary A. Letcher, Jonathan S. McLean et Eric B. Miller, pour les intimées.

Michal Fairburn, pour l'intervenant.

Version française du jugement de la Cour rendu par

1 MAJOR J. — This appeal raises the question of whether search warrants issued under s. 487(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46, authorize investigators to search for and seize evidence of negligence in the investigation of strict liability offences. At the conclusion of argument the question was answered in the affirmative and the appeal was allowed with reasons to follow.

I. Facts

2 On October 13, 1994 a chlor-alkali plant operated by the respondents (collectively referred to as “CanadianOxy”) in North Vancouver, British Columbia discharged a quantity of chlorine into the waters of Burrard Inlet, killing a number of fish. This incident occurred during a three and a half hour power outage at the plant, as a result of one of two B.C. Hydro 60 kV power lines servicing the plant being struck by a tree.

3 The company reported the discharge to the authorities and an investigation by the Department of Fisheries and Oceans followed. Fishery Officer Robert Tompkins went to the plant that night, spoke with the Plant Chemist, and seized a number of documents. He also seized samples of dead fish recovered in the vicinity of the plant by the Harbour Master’s patrol vessel. He advised the Plant Manager that he had reasonable grounds to believe that an offence had been committed under the *Fisheries Act*, R.S.C., 1985, c. F-14.

LE JUGE MAJOR — Le présent pourvoi soulève la question de savoir si les mandats de perquisition décernés en vertu de l’al. 487(1)b) du *Code criminel*, L.R.C. (1985), ch. C-46, autorisent les enquêteurs à rechercher en vue de les saisir des preuves de négligence dans le cadre d’une enquête sur des infractions de responsabilité stricte. À la clôture des débats, il a été répondu à cette question par l’affirmative et le pourvoi a été accueilli, avec motifs à suivre.

I. Les faits

Le 13 octobre 1994, une usine de fabrication de chlore et de soude caustique exploitée par les intimées (collectivement appelées «CanadianOxy») à North Vancouver (Colombie-Britannique) a rejeté du chlore dans les eaux du bras de mer Burrard, ce qui a provoqué la mort de nombreux poissons. L’incident s’est produit pendant une panne d’électricité de trois heures et demie à l’usine, causée par un arbre qui a heurté l’une des deux lignes d’alimentation en électricité de 60 kV de B.C. Hydro desservant l’usine.

L’entreprise a signalé le rejet aux autorités et une enquête a été ouverte par le ministère des Pêches et des Océans. S’étant rendu à l’usine le soir même, l’agent des pêches Robert Tompkins a parlé avec le chimiste de l’usine et il a saisi un certain nombre de documents. Il a également saisi des échantillons de poissons morts que le patrouilleur du directeur de port avait trouvés à proximité de l’usine. Il a informé le directeur de l’usine qu’il avait des motifs raisonnables de croire qu’une infraction à la *Loi sur les pêches*, L.R.C. (1985), ch. F-14, avait été commise.

Over a short time Tompkins made three further visits to the plant, formally interviewed the Plant Chemist, was shown the valve which the company had identified as the cause of the discharge and was provided with certain documents. His request to interview additional employees was refused.

Tompkins subsequently made a written request to CanadianOxy's counsel for additional technical information believed relevant for Environment Canada's Pollution Abatement Division to assess whether the discharge had been preventable. Only a few of these questions were answered.

On March 16, 1995, five months after the discharge, Tompkins swore an information and obtained a warrant to search the respondents' plant for a range of documents relating to process records, plant maintenance, employee training, discipline, and general plant operations. In the information, Tompkins described the reasons for seeking this information:

The business records . . . are required to establish and prove that CanadianOxy Chemicals Ltd. . . . operate a chlor-alkali plant that discharges effluent to the waters of Burrard Inlet near North Vancouver, B.C., that the release of effluent with a chlorine concentration exceeding 10 ppm, which I know would be acutely lethal to fish, occurred on October 13, 1994, and that the company could have taken additional reasonable measures to prevent the release of a deleterious substance into water frequented by fish

. . . I have reasonable grounds to believe that correspondence had been generated by company personnel in January 1994, and that maintenance was performed in March 1994, and again in October 1994, and that the company conducted their own investigation, prepared reports, and provided information regarding the incident until February 1995. . . .

It is necessary to examine effluent discharge records, effluent water quality sampling and analysis records, mechanical and instrument maintenance records, environmental control records, instrument calibration records and flow rate calculation records covering an extended period of time before and after October 13,

Sur une courte période, Tompkins s'est rendu à l'usine à trois autres reprises. Il a interrogé officiellement le chimiste de l'usine, il s'est fait montrer la valve que l'entreprise considérait comme la cause du rejet, et il s'est fait remettre certains documents. Il a demandé à rencontrer d'autres employés, ce qui lui a été refusé.

Tompkins a par la suite demandé par écrit à l'avocat de CanadianOxy d'autres renseignements techniques jugés utiles par la Direction de la dépollution d'Environnement Canada pour évaluer si le rejet aurait pu être évité. Seulement quelques questions ont fait l'objet d'une réponse.

Le 16 mars 1995, cinq mois après le rejet, Tompkins a fait une dénonciation sous serment et a obtenu un mandat pour faire une perquisition à l'usine des intimées afin d'y rechercher différents documents concernant les dossiers de fabrication, l'entretien de l'usine, la formation des employés, la discipline et les opérations générales de l'usine. Dans la dénonciation, Tompkins exposait les motifs de sa recherche de renseignements:

[TRADUCTION] Les dossiers de l'entreprise [. . .] sont nécessaires pour prouver que CanadianOxy Chemicals Ltd. [. . .] exploite une usine de fabrication de chlore et de soude caustique qui rejette des effluents dans les eaux du bras de mer Burrard près de North Vancouver (C.-B.), qu'un rejet d'effluents ayant une concentration de chlore supérieure à 10 ppm, que je sais être extrêmement mortelle pour les poissons, s'est produit le 13 octobre 1994 et que l'entreprise aurait pu prendre des mesures raisonnables supplémentaires pour empêcher le rejet d'une substance nocive dans des eaux où vivent des poissons

. . . J'ai des motifs raisonnables de croire que des lettres ont été envoyées par des employés de l'entreprise en janvier 1994 et que des travaux d'entretien ont été effectués en mars 1994, et à nouveau en octobre 1994, et que l'entreprise a mené sa propre enquête, a rédigé des rapports et a fourni des renseignements concernant l'incident jusqu'en février 1995

Il est nécessaire d'examiner les registres de rejet d'effluents, les registres d'échantillonnage et d'analyse de la qualité des effluents, les registres d'entretien des instruments et d'entretien mécanique, les registres de contrôle de l'environnement, les registres de calibrage des instruments et les registres de calcul du débit sur une période

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1994. This will . . . permit analysis of the maintenance programs undertaken by CanadianOxy Chemicals Ltd.

It is necessary to examine company personnel records covering the period between January 1, 1994 and February 28, 1995 . . . to determine if any company employees have been disciplined in any manner as a result of this incident. . . .

7 The warrant was executed on March 17, 1995. In total 139 items were seized pursuant to the warrant, and 73 additional items were seized under the investigators' understanding of the "plain view" doctrine. Following the search, Tompkins learned by coincidence of an adverse ruling by a British Columbia Provincial Court judge on the validity of a similar seizure in an unrelated case. As a result, he sought legal advice with respect to a number of the items taken.

8 On April 26, 1995, Tompkins made two applications to a Justice of the Peace, one for an order to return the documents which had been improperly seized under the first warrant, and the second for a new warrant to re-seize 13 of the items returned which were relevant to the investigation. These orders were granted and executed the same day.

9 On June 15, 1995 the respondents were charged with:

- (a) depositing, or permitting the deposit, of a deleterious substance in waters frequented by fish, contrary to ss. 36(3) and 40(2) of the *Fisheries Act*; and
- (b) introducing, or causing or allowing the introduction of waste into the environment, contrary to ss. 3(1.1) and 34(3) of the *Waste Management Act*, S.B.C. 1982, c. 41 (now R.S.B.C. 1996, c. 482).

10 The respondents subsequently brought a motion to quash the warrants alleging that s. 487(1) of the *Criminal Code* had been exceeded. The warrants

prolongée avant et après le 13 octobre 1994. Cet examen [...] permettra d'analyser les programmes d'entretien de CanadianOxy Chemicals Ltd.

Il est nécessaire d'examiner les dossiers du personnel de l'entreprise concernant la période allant du 1^{er} janvier 1994 au 28 février 1995 [...] pour décider si des employés de l'entreprise ont fait l'objet de mesures disciplinaires à la suite de cet incident. . . .

Le mandat a été exécuté le 17 mars 1995. Au total, les enquêteurs ont saisi 139 pièces en application du mandat et 73 autres en s'appuyant sur leur interprétation de la théorie des «objets bien en vue». Après la perquisition, Tompkins a appris par hasard qu'un juge de la Cour provinciale de la Colombie-Britannique avait déclaré invalide une saisie similaire dans une autre affaire. Il a donc consulté un avocat relativement à un certain nombre des pièces saisies.

Le 26 avril 1995, Tompkins a présenté deux demandes à un juge de paix, l'une en vue d'obtenir une ordonnance enjoignant de remettre les documents qui avaient été saisis irrégulièrement en vertu du premier mandat et l'autre en vue d'obtenir un nouveau mandat pour saisir à nouveau 13 des pièces remises qui étaient pertinentes relativement à l'enquête. Ces ordonnances ont été prononcées et exécutées le même jour.

Le 15 juin 1995, les intimées ont été accusées:

- a) d'avoir immergé ou rejeté une substance nocive — ou d'en avoir permis l'immersion ou le rejet — dans des eaux où vivent des poissons, en contravention des par. 36(3) et 40(2) de la *Loi sur les pêches*;
- b) d'avoir introduit des déchets dans l'environnement — ou d'en avoir causé ou permis l'introduction —, en contravention des par. 3(1.1) et 34(3) de la *Waste Management Act*, S.B.C. 1982, ch. 41 (maintenant R.S.B.C. 1996, ch. 482).

Les intimées ont par la suite présenté une requête en annulation des mandats en faisant valoir que les limites du par. 487(1) du *Code criminel*

were broad enough to authorize a search for evidence of negligence which if found would negate a defence of due diligence.

II. Judicial History

- A. *British Columbia Supreme Court* (1996), 138 D.L.R. (4th) 104

Sigurdson J. felt bound by *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106 (B.C.S.C.), which held that a s. 487 warrant could not be used to search for and seize evidence of negligence going to the defence of due diligence. As a result, he ruled that the documents seized pertaining to the issue of due diligence were not documents with respect to the commission of this particular offence and quashed both warrants.

- B. *British Columbia Court of Appeal* (1997), 145 D.L.R. (4th) 427

In dismissing the appeal, Goldie J.A. (Carrothers J.A. concurring) held that the appellant had failed to demonstrate on any reasonable construction that s. 487(1)(b) authorizes the issuance of a warrant that includes a search for evidence with respect to due diligence in a regulatory offence. In dissent, Southin J.A. concluded that a warrant can issue upon proper evidence to search for and seize things relating to the question of due diligence.

III. Analysis

At issue is whether search warrants issued pursuant to s. 487(1) of the *Criminal Code* are limited only to evidence relevant to an element of the offence which is part of the Crown's *prima facie* case, or whether such warrants encompass evidence that may relate to potential defences, such as due diligence, which may or may not be raised at

avaient été outrepassées. La portée des mandats était assez large pour autoriser une perquisition pour rechercher des preuves de négligence qui, si elles étaient trouvées, feraient échouer une défense fondée sur la diligence raisonnable.

II. L'historique judiciaire

- A. *La Cour suprême de la Colombie-Britannique* (1996), 138 D.L.R. (4th) 104

Le juge Sigurdson a estimé qu'il était lié par l'arrêt *Re Domtar Inc.* (1995), 18 C.E.L.R. (N.S.) 106 (C.S.C.-B.), statuant qu'un mandat décerné en vertu de l'art. 487 ne pouvait pas être utilisé pour effectuer une perquisition en vue de saisir des preuves de négligence se rapportant à la défense fondée sur la diligence raisonnable. Il a donc statué que les documents saisis relativement à la question de la diligence raisonnable n'étaient pas des documents touchant la commission de l'infraction reprochée, et il a annulé les deux mandats.

- B. *Cour d'appel de la Colombie-Britannique* (1997), 145 D.L.R. (4th) 427

Pour rejeter l'appel, le juge Goldie de la Cour d'appel (avec l'appui du juge Carrothers) a statué que l'appelant n'avait pas établi, selon une interprétation raisonnable, que l'al. 487(1)(b) autorisait la délivrance d'un mandat permettant notamment d'effectuer une perquisition pour rechercher des éléments de preuve touchant la diligence raisonnable dans le contexte d'une infraction réglementaire. Dans ses motifs dissidents, le juge Southin a conclu qu'un mandat pouvait, sur la foi d'éléments de preuve suffisants, être décerné pour effectuer une perquisition et saisir des choses se rapportant à la question de la diligence raisonnable.

III. Analyse

La question litigieuse est de savoir si les mandats de perquisition décernés en vertu du par. 487(1) du *Code criminel* se limitent uniquement à la preuve se rapportant à un élément de l'infraction faisant partie de la preuve *prima facie* du ministère public, ou s'ils visent la preuve pouvant se rapporter à des moyens de défense

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the trial. The relevant section of the *Code* provides:

487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

. . . .

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

. . . .

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer

(d) to search the building, receptacle or place for any such thing and to seize it . . . [Emphasis added.]

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Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22. It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids. In our opinion there is no such ambiguity in s. 487(1).

A. *The Ordinary Meaning of the Words*

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On a plain reading, the phrase “evidence with respect to the commission of an offence” is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their

possibles, telle la diligence raisonnable, qui peuvent être invoqués au procès ou non. La disposition pertinente du *Code* est ainsi conçue:

487. (1) Un juge de paix qui est convaincu, à la suite d’une dénonciation faite sous serment selon la formule 1, qu’il existe des motifs raisonnables de croire que, dans un bâtiment, contenant ou lieu, se trouve, selon le cas:

. . . .

b) une chose dont on a des motifs raisonnables de croire qu’elle fournira une preuve touchant la commission d’une infraction ou révélera l’endroit où se trouve la personne qui est présumée avoir commis une infraction à la présente loi, ou à toute autre loi fédérale;

. . . .

peut à tout moment décerner un mandat sous son seing, autorisant une personne qui y est nommée ou un agent de la paix:

d) d’une part, à faire une perquisition dans ce bâtiment, contenant ou lieu, pour rechercher cette chose et la saisir;

Les dispositions législatives doivent être interprétées de manière à donner aux mots leur sens ordinaire le plus évident qui s’harmonise avec le contexte et l’objet visé par la loi dans laquelle ils sont employés; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, aux par. 21 et 22. C’est uniquement lorsque deux ou plusieurs interprétations plausibles, qui s’harmonisent chacune également avec l’intention du législateur, créent une ambiguïté véritable que les tribunaux doivent recourir à des moyens d’interprétation externes. Selon nous, le par. 487(1) ne contient pas semblable ambiguïté.

A. *Le sens ordinaire des mots*

D’après son sens ordinaire, l’expression «preuve touchant la commission d’une infraction» est compréhensive et englobe tous les éléments qui pourraient jeter la lumière sur les circonstances d’un événement qui paraît constituer une infraction. Selon le sens naturel et ordinaire de cette expression, est visé par le mandat tout ce qui a trait ou se rapporte logiquement à l’incident faisant

potential culpability falls within the scope of the warrant.

This reading is supported by Dickson J.'s interpretation of almost identical language in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39:

The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters. [Emphasis added.]

We can assume that Parliament chose not to limit s. 487(1) to evidence establishing an element of the Crown's *prima facie* case. To conclude otherwise would effectively delete the phrase "with respect to" from the section. While s. 487(1) is broad enough to authorize the search in question even absent this phrase, the inclusion of these words plainly supports the validity of these warrants.

The respondents urged that s. 487(1) be given a restrictive reading in accordance with the principle that an ambiguous penal statute should be interpreted in a manner most favourable to an accused: see *R. v. McIntosh*, [1995] 1 S.C.R. 686, at para. 39. That argument was rejected as, in our opinion, this section is neither ambiguous, nor the type of penal provisions to which the rule should apply. Instead, s. 487 should be given a liberal and purposive interpretation; *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12.

While s. 487(1) is part of the *Criminal Code*, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that all relevant information and evidence should be located and preserved as soon as possible. This interpretation accords with the purposes underlying the *Criminal Code* and the

l'objet de l'enquête, aux parties en cause et à leur culpabilité éventuelle.

Cette interprétation s'appuie sur le sens donné par le juge Dickson à une expression pratiquement identique dans l'arrêt *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29, à la p. 39:

À mon avis, les mots «quant à» ont la portée la plus large possible. Ils signifient, entre autres, «concernant», «relativement à» ou «par rapport à». Parmi toutes les expressions qui servent à exprimer un lien quelconque entre deux sujets connexes, c'est probablement l'expression «quant à» qui est la plus large. [Je souligne.]

Nous pouvons présumer que le législateur a décidé de ne pas limiter le par. 487(1) à la preuve établissant un élément faisant partie de la preuve *prima facie* du ministère public. Parvenir à une autre conclusion reviendrait en réalité à retrancher le mot «touchant» de la disposition. Même amputé de ce mot, le par. 487(1) est suffisamment large pour autoriser la perquisition dont il est question, mais son insertion dans la disposition appuie manifestement la validité de ces mandats.

Les intimées soutiennent avec insistance que le par. 487(1) doit recevoir une interprétation restrictive conformément au principe voulant qu'une disposition pénale ambiguë soit interprétée de la façon qui favorisera le plus l'accusé: voir *R. c. McIntosh*, [1995] 1 R.C.S. 686, au par. 39. Nous avons rejeté cet argument parce que, selon nous, cette disposition n'est pas ambiguë et qu'il ne s'agit pas du type de dispositions pénales auquel ce principe doit s'appliquer. Il convient plutôt de donner à l'art. 487 une interprétation large et fondée sur l'objet visé; *Loi d'interprétation*, L.R.C. (1985), ch. I-21, art. 12.

Bien que le par. 487(1) fasse partie du *Code criminel* et puisse occasionner des atteintes importantes à la vie privée, l'intérêt public commande qu'une enquête prompte et approfondie soit menée s'il y a possibilité d'infraction. C'est par rapport à cet intérêt que tous les renseignements et éléments de preuve pertinents doivent être trouvés et conservés le plus rapidement possible. Cette interpré-

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demands of a fair and expeditious administration of justice.

B. Purpose of the Search Warrant Provisions of the Criminal Code

20 A primary, though not exclusive, purpose of the *Criminal Code*, and penal statutes in general, is to promote a safe, peaceful and honest society. This is achieved by providing guidelines prohibiting unacceptable conduct, and providing for the just prosecution and punishment of those who transgress these norms. The prompt and comprehensive investigation of potential offences is essential to fulfilling that purpose. The point of the investigative phase is to gather all the relevant evidence in order to allow a responsible and informed decision to be made as to whether charges should be laid.

21 At the investigative stage the authorities are charged with determining the following: What happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing their issuance must be interpreted in that light.

22 The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out — that decision is the role of the courts. The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities. To that end an unnecessary and restrictive interpretation of s. 487(1) defeats its purpose. See *Re Church of Scientology*

tation est compatible avec les objets qui sous-tendent le *Code criminel* et les exigences d'une administration de la justice prompte et équitable.

B. Objet des dispositions relatives au mandat de perquisition du Code criminel

Le *Code criminel*, et les dispositions pénales en général, visent principalement, mais non exclusivement, à favoriser une société pacifique et intègre qui soit sûre. En vue de réaliser cet objectif, des lignes directrices interdisent les agissements inacceptables et prescrivent la poursuite et le châtiement justes de ceux qui transgressent ces normes. S'il y a possibilité d'infraction, une enquête prompte et approfondie est essentielle pour atteindre ce but. L'enquête vise à rassembler tous les éléments de preuve pertinents de manière à permettre une prise de décision judicieuse et éclairée sur l'opportunité de porter des accusations.

Au stade de l'enquête, il incombe aux autorités de trancher les points suivants: Que s'est-il passé? Qui est responsable? La conduite reprochée est-elle un comportement susceptible d'engager la responsabilité criminelle? Le mandat de perquisition est un instrument d'enquête de base qui permet de répondre à ces questions, et la disposition qui en autorise la délivrance doit être interprétée sous cet angle.

Le paragraphe 487(1) vise à permettre aux enquêteurs de découvrir et de conserver le plus d'éléments de preuve pertinents possible. Pour être en mesure d'exercer convenablement les fonctions qui leur ont été confiées, les autorités doivent pouvoir découvrir, examiner et conserver tous les éléments de preuve se rapportant à des événements susceptibles de donner lieu à une responsabilité criminelle. Il n'appartient pas aux policiers de mener une enquête pour décider si les éléments essentiels d'une infraction sont établis — cette décision relève des tribunaux. Le rôle des policiers et autres agents de la paix consiste à enquêter sur des incidents qui pourraient être criminels, à prendre une décision consciencieuse et éclairée sur l'opportunité de porter des accusations, puis à soumettre l'ensemble des faits sans les dénaturer aux autorités chargées des poursuites. À cette fin, une

and the Queen (No. 6) (1987), 31 C.C.C. (3d) 449, at p. 475:

Police work should not be frustrated by the meticulous examination of facts and law that is appropriate to a trial process. . . . There may be serious questions of law as to whether what is asserted amounts to a criminal offence. . . . However, these issues can hardly be determined before the Crown has marshalled its evidence and is in a position to proceed with the prosecution.

Moreover, extrinsic factors such as the accused's motive or the failure to exercise due diligence are often relevant to determining whether the event which triggered the investigation in the first place is criminally culpable. Everyone, including accused persons, who lacks the means of obtaining and preserving evidence prior to trial has an interest in seeing that these facts are brought to light. It would be undesirable if a narrow reading of s. 487(1) resulted in either inculpatory or exculpatory evidence being lost because of the investigators' inability to secure it. See *R. v. Storrey*, [1990] 1 S.C.R. 241, per Cory J., at p. 254:

The essential role of the police is to investigate crimes. That role and function can and should continue after they have made a lawful arrest. The continued investigation will benefit society as a whole and not infrequently the arrested person. It is in the interest of the innocent arrested person that the investigation continue so that he or she may be cleared of the charges as quickly as possible.

It is important that an investigation unearth as much evidence as possible. It is antithetical to our system of justice to proceed on the basis that the police, and other authorities, should only search for evidence which incriminates their chosen suspect. Such prosecutorial "tunnel vision" would not be appropriate: see *The Commission on Proceedings Involving Guy Paul Morin: Report*, vol. 1 (1998), per the Honourable F. Kaufman at pp. 479-82.

interprétation du par. 487(1) qui est restrictive et qui ne s'impose pas va à l'encontre du but recherché. Voir *Re Church of Scientology and the Queen (No. 6)* (1987), 31 C.C.C. (3d) 449, à la p. 475:

[TRADUCTION] Le travail des policiers ne devrait pas être gêné par l'examen minutieux des faits et du droit, exercice qui est pertinent dans le cadre d'un procès [. . .] La question de savoir si les faits déclarés constituent une infraction criminelle peut soulever d'importantes questions de droit [. . .] Toutefois, ces questions ne peuvent guère être tranchées tant que le ministère public n'a pas rassemblé ses éléments de preuve et qu'il n'est pas en mesure d'engager des poursuites.

De plus, des facteurs extrinsèques tel le mobile de l'accusé ou le défaut de faire preuve de diligence raisonnable sont souvent pertinents quant à la question de savoir si l'événement qui a déclenché l'enquête en premier lieu est de nature à engager la responsabilité criminelle. Toute personne, y compris le prévenu, qui est privée des moyens de recueillir et de conserver des éléments de preuve avant un procès a intérêt à ce que ces faits soient connus. Il ne serait pas souhaitable qu'une interprétation étroite du par. 487(1) entraîne la perte d'éléments de preuve inculpatatoires ou disculpatoires parce que les enquêteurs ne peuvent les obtenir. Voir *R. c. Storrey*, [1990] 1 R.C.S. 241, motifs du juge Cory, à la p. 254:

Le rôle de la police consiste essentiellement à faire enquête sur les crimes. C'est là une fonction qu'elle peut et devrait continuer à exercer après avoir effectué une arrestation légale. La continuation de l'enquête profitera à la société dans son ensemble et souvent aussi à la personne arrêtée. En effet, il est dans l'intérêt de la personne innocente arrêtée que l'enquête se poursuive afin que son innocence à l'égard des accusations puisse être établie dans les plus brefs délais.

Il est important que les enquêteurs découvrent le plus d'éléments de preuve possible. Admettre que les policiers, et d'autres autorités, ne doivent rechercher que les seuls éléments de preuve qui incriminent le suspect visé est incompatible avec notre système de justice. Un tel «manque d'objectivité» de la part du poursuivant serait inapproprié: voir *Commission sur les poursuites contre Guy Paul Morin: Rapport*, t. 1 (1998), le commissaire F. Kaufman, aux pp. 559 à 562.

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25 In *Nelles v. Ontario*, [1989] 2 S.C.R. 170, Lamer J. (later C.J.C.) stated for the majority, at pp. 191-92, that:

Traditionally the Crown Attorney has been described as a “minister of justice” and “ought to regard himself as part of the Court rather than as an advocate”. (Morris Manning, “Abuse of Power by Crown Attorneys”, [1979] *L.S.U.C. Lectures* 571, at p. 580, quoting Henry Bull, Q.C.) As regards the proper role of the Crown Attorney, perhaps no more often quoted statement is that of Rand J. in *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.

26 The majority of the British Columbia Court of Appeal found that the word “commission” in s. 487(1) restricted its application to evidence that the accused had done those acts, or allowed those omissions, which constitute the elements of the offence. The criminal justice system is not solely concerned with whether a *prima facie* case can be made out against an accused, but whether he or she is ultimately guilty. The dissenting reasons of Southin J.A. are persuasive on both the purpose and meaning of s. 487(1). At para. 63 she stated:

... I would translate the words in issue to mean “touching upon whether a breach of the law involving a penal sanction has occurred”. Whether or not there can be said to have been such a breach depends upon whether there

Dans l’arrêt *Nelles c. Ontario*, [1989] 2 R.C.S. 170, le juge Lamer (maintenant Juge en chef) a déclaré au nom des juges majoritaires aux pp. 191 et 192:

Le procureur de la Couronne a traditionnellement été décrit comme un [TRADUCTION] «représentant de la justice» qui «devrait se considérer plus comme un fonctionnaire de la cour que comme un avocat». (Morris Manning, «Abuse of Power by Crown Attorneys», [1979] *L.S.U.C. Lectures* 571, à la p. 580, citant Henry Bull, c.r.) Sur le rôle qui est propre au procureur de la Couronne, il n’y a probablement aucun passage qui soit aussi souvent cité que cet extrait des motifs du juge Rand dans l’affaire *Boucher v. The Queen*, [1955] R.C.S. 16, aux pp. 23 et 24:

[TRADUCTION] On ne saurait trop répéter que les poursuites criminelles n’ont pas pour but d’obtenir une condamnation, mais de présenter au jury ce que la Couronne considère comme une preuve digne de foi relativement à ce que l’on allègue être un crime. Les avocats sont tenus de voir à ce que tous les éléments de preuve légaux disponibles soient présentés: ils doivent le faire avec fermeté et en insistant sur la valeur légitime de cette preuve, mais ils doivent également le faire d’une façon juste. Le rôle du poursuivant exclut toute notion de gain ou de perte de cause; il s’acquitte d’un devoir public, et dans la vie civile, aucun autre rôle ne comporte une plus grande responsabilité personnelle.

Les juges majoritaires de la Cour d’appel de la Colombie-Britannique ont conclu que l’emploi du mot «commission» au par. 487(1) limitait son application aux éléments de preuve établissant que l’accusé avait commis les actes ou avait permis les omissions qui constituent les éléments de l’infraction. Le système de justice pénale ne se préoccupe pas uniquement de la question de savoir si une preuve *prima facie* peut être établie contre un accusé, il s’intéresse aussi à la question de savoir si l’accusé est coupable en définitive. Les motifs dissidents du juge Southin sont convaincants en ce qui concerne tant l’objet que le sens du par. 487(1). Au paragraphe 63, elle dit:

[TRADUCTION] ... je dirais que les mots en cause veulent dire «touchant la question de savoir si une violation de la loi entraînant une sanction pénale a été commise». La question de savoir si l’on peut affirmer ou non qu’une

can be a penal sanction and there can be no sanction without a conviction.

In addition, as pointed out by the intervener Attorney General for Ontario, denying the Crown the ability to gather evidence in anticipation of a defence would have serious consequences on the functioning of our justice system. In order to be fair, the criminal process must “enable the trier of fact to ‘get at the truth and properly and fairly dispose of the case’ while at the same time providing the accused with the opportunity to make a full defence”; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 486. This reciprocal fairness demands that the Crown be able to fairly seek and obtain evidence rebutting the accused’s defences. If the respondents’ submission on the interpretation of s. 487(1) were accepted, a search warrant would never be available for this purpose. This narrow interpretation would frustrate the basic imperative of trial fairness and the search for truth in the criminal process.

C. Privacy Concerns

There is no doubt that search warrants are highly intrusive, and that an investigation bearing on the issue of due diligence could, as Shaw J. pointed out in *Re Domtar, supra*, at p. 119, “entail a detailed inquiry into the affairs of a corporation over a period of several years”. This Court has endorsed the importance of privacy and the need to constrain search powers within reasonable limits: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 889; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 520-22; *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 436-37.

The broad powers contained in s. 487(1) do not authorize investigative fishing expeditions, nor do

telle violation a été commise dépend de la question de savoir s’il peut y avoir une sanction pénale, et il ne saurait y avoir de sanction sans déclaration de culpabilité.

De plus, comme l’a souligné l’intervenant, le procureur général de l’Ontario, refuser d’admettre que le ministère public peut rassembler des éléments de preuve en prévision de la présentation d’un moyen de défense aurait des conséquences graves sur le fonctionnement de notre système de justice. Pour être équitable, le processus pénal doit «permettre au juge des faits “de découvrir la vérité et de rendre une décision équitable” tout en accordant à l’accusé la possibilité de présenter une pleine défense»; *R. c. Levogiannis*, [1993] 4 R.C.S. 475, à la p. 486. Cette équité réciproque commande que le ministère public soit en mesure de rechercher et d’obtenir régulièrement des éléments de preuve pour réfuter les moyens de défense invoqués par l’accusé. Si la thèse des intimées concernant l’interprétation du par. 487(1) était acceptée, il serait impossible d’obtenir un mandat de perquisition à cette fin. Cette interprétation étroite ferait échec à l’impératif fondamental de l’équité du procès et à la recherche de la vérité dans le processus pénal.

C. Questions touchant le droit à la vie privée

Il est certain que le mandat de perquisition est très envahissant, et une enquête portant sur la question de la diligence raisonnable pourrait, ainsi que le juge Shaw l’a fait remarquer dans l’arrêt *Re Domtar*, précité, à la p. 119, [TRADUCTION] «comporter un examen approfondi des affaires d’une société sur une période de plusieurs années». Notre Cour a reconnu l’importance du droit à la vie privée et la nécessité de restreindre les pouvoirs de perquisition dans des limites raisonnables: *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, à la p. 889; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, aux pp. 520 à 522; *Baron c. Canada*, [1993] 1 R.C.S. 416, aux pp. 436 et 437.

Les pouvoirs étendus qui sont visés au par. 487(1) n’autorisent pas les recherches à

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they diminish the proper privacy interests of individuals or corporations. This is particularly true with respect to personnel records which may contain a great deal of highly personal information unrelated to the investigation at hand. Judges and magistrates should continue to apply the standards and safeguards which protect privacy from unjustified searches and seizures.

30 In this case, however, the specific terms of the warrant were not at issue, as the respondents challenged only the underlying authority to grant warrants for the purpose of investigating the presence of negligence. In our opinion both a plain reading of the relevant section and consideration of the role and obligations of state investigators support the conclusion that s. 487(1) authorized the granting of the warrants at issue.

IV. Disposition

31 The appeal is allowed, without costs, as agreed by counsel.

Appeal allowed.

Solicitor for the appellant: The Attorney General of Canada, Vancouver.

Solicitors for the respondents: Edwards, Kenny & Bray, Vancouver.

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

l'aveuglette dans le cadre d'une enquête et ne diminuent pas le droit légitime à la vie privée des personnes physiques ou morales. C'est particulièrement vrai dans le cas des dossiers des employés, qui peuvent contenir une foule de renseignements très personnels n'ayant aucun rapport avec l'enquête qui est menée. Les juges et les magistrats doivent continuer d'appliquer les normes et garanties qui protègent la vie privée contre les perquisitions, les fouilles et les saisies abusives.

En l'espèce, toutefois, les modalités précises du mandat n'étaient pas en jeu, puisque les intimées ont uniquement contesté le pouvoir fondamental de décerner des mandats en vue de faire enquête sur l'existence d'une négligence. À notre avis, le sens ordinaire de la disposition pertinente et la prise en compte du rôle et des obligations des enquêteurs de l'État appuient la conclusion que le par. 487(1) autorisait la délivrance des mandats litigieux en l'espèce.

IV. Dispositif

Le pourvoi est accueilli sans dépens, ainsi que les avocats en ont convenu.

Pourvoi accueilli.

Procureur de l'appelant: Le procureur général du Canada, Vancouver.

Procureurs des intimées: Edwards, Kenny & Bray, Vancouver.

Procureur de l'intervenant: Le procureur général de l'Ontario, Toronto.

TAB 7

CITATION: *Chesterman Farm Equipment Inc. v. CNH Canada Ltd.*, 2016 ONSC 698
DIVISIONAL COURT FILE NO.: 14-0033-00
DATE: 20160307

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
MOLLOY, HACKLAND and HAMBLY JJ.

BETWEEN:)
)
CHESTERMAN FARM EQUIPMENT) *Eric Gillespie, John May and Ian Flett, for*
INC.) *the Applicant/Respondent on Appeal*
)
Applicant /Respondent on Appeal))
)
– and –)
)
CNH CANADA LTD.) *Stuart R. MacKay, for the*
) *Respondent/Appellant*
)
Respondent/Appellant)
)
)
) **HEARD:** October 20, 2015 in Brampton,
) and in writing in November, 2015

REASONS FOR JUDGMENT

TABLE OF CONTENTS

HAMBLY J. AND HACKLAND J.:

Overview (paras 1-2)
Analysis (paras 3-21)
Conclusion and Order (paras. 22-24)

MOLLOY J. (dissenting in part):

A. INTRODUCTION (paras. 25-33)

- B. JURISDICTION and STANDARD OF REVIEW (paras. 34-50)
- C. THE RELEVANT PROVISIONS OF THE DEALER AGREEMENT (paras. 51-56)
- D. THE RELEVANT PROVISIONS OF THE ACT AND REGULATION 123/06 (paras.57-60)
- E. FACTUAL BACKGROUND – THE PURPORTED NOTICE OF TERMINATION (paras.61-64)
- F. THE PROCEDURAL HISTORY OF THIS CASE (paras. 65-70)
- G. THE REASONS OF THE TRIBUNAL ON DAMAGES (paras. 71-93)
 - (i) Applicability of Regulation 123 (paras. 71-75)
 - (ii) Incorporating Regulation 123 into this Dealer Agreement (paras. 76-82)
 - (iii) Invalidity of the Non-Renewal Notice by CNH (paras. 83-84)
 - (iv) Opportunity to Address Concerns (para. 85)
 - (v) Unreasonableness (paras. 86-87)
 - (vi) Finding of Breach (para. 88)
 - (vii) Damages for Loss of Profits (paras. 89-90)
 - (viii) Damages for Obsolete Assets (para. 91)
 - (ix) Other Heads of Damages (para. 92)
 - (x) Pre-Judgment Interest (para. 93)
- H. ANALYSIS: DAMAGES DECISION (paras. 94-176)
 - (i) Does Regulation 123 Apply to the Dealer Agreement? (para.96)
 - The presumption against retrospectivity* (paras. 97-105)
 - No express language requiring retrospective interpretation* (paras. 106-110)

Retrospective application as a necessary implication (paras. 111-127)

- (ii) Incorporating Regulation 123 into the CNH/Chesterman Agreement (paras. 128-133)
- (iii) Validity of Non-Renewal by CNH (paras. 134-150)

Reliance on contractual provision that “does not exist” (para. 137-143)

Reasons for non-renewal (paras. 144-147)

Opportunity to address concerns (paras. 148-150)

- (iv) Reasonableness of Refusing to Renew (paras. 151-160)
- (v) Breach of Contract and Damages (para. 161-176)

Damages for Obsolete Items (paras. 162-167)

Cross-Appeal: Loss of Profits (paras. 168-170)

Interest (paras. 171-176)

I. ANALYSIS: COSTS DECISION (paras. 177-193)

HAMBLY J. AND HACKLAND J.:

Overview

[1] Our colleague Justice Molloy has set out a comprehensive summary of the history of this proceeding and of the legal and factual issues arising in this appeal. For that reason, we will only refer to the matters necessary to explain our decision, which is based on the jurisdictional limitations of this Court in dealing with this appeal. We agree with Justice Molloy and indeed with the Agriculture, Food and Rural Affairs Appeals Tribunal (“the Tribunal”), that Ontario Regulation 123/06 made under the Farm Implements Act, R.S.O. 1990, c F4 (“the Act”) came into force on April 25, 2006, with retrospective effect, so as to apply to the Dealer Agreement between the parties Chesterman Farm Equipment Inc. (“Chesterman”) a farm equipment dealer and CNH Canada Ltd. (“CNH”), a manufacturer and distributor of farm equipment.

[2] The Tribunal, after a lengthy hearing in which extensive evidence was called, held that CNH had improperly terminated the Dealer Agreement between the parties and awarded damages to Chesterman in the sum of \$60,000 for lost profit, \$80,000 for obsolete assets and

\$60,000 in pre-judgment interest. Costs were also awarded to Chesterman in the amount of \$376,338.05. CNH appeals that decision and Chesterman cross-appeals for an increase in the damages awarded.

Analysis

[3] Pursuant to s. 5(7)-(9) of the Act an appeal lies to this court, but solely on a question of law. This important jurisdictional limitation must be respected. It means that this court is precluded from reviewing the reasoning and findings of facts of the Tribunal to the extent that the matters in issue are either purely factual or are mixed questions of fact and law. In this case, CNH refused to renew its Dealer Agreement with Chesterman upon its expiry on December 31, 2006. The Tribunal had the statutory mandate under Regulation 123/06 to inquire into and determine whether the distributor's (CNH) approval for renewal was "unreasonably withheld". The Tribunal analyzed the Dealer Agreement and the relevant dealings between the parties and concluded CNH had unreasonably withheld its approval to renew. That decision was within the Tribunal's specific mandate and the considerations were fact and credibility based for the most part. Accordingly, we are of the opinion that this Court lacks the jurisdiction to hear an appeal from the Tribunal's finding as to the reasonableness of CNH's decision.

[4] It is common ground that for the purposes of Regulation 123/06, Chesterman is a "dealer" and CNH is a "distributor". This regulation imposed mandatory terms into dealer agreements. The Regulation provides:

Mandatory terms

1. (1) The terms set out in sections 2 and 3 are prescribed as the mandatory terms that must be included in any dealership agreement under subsection 3(4) of the Act.

(2) The mandatory terms set out in sections 2 and 3 are deemed to form part of any dealership agreement even if the agreement fails to include them as required.

(3) A provision in a dealership agreement that limits, varies or attempts to waive a term set out in sections 2 and 3 is void.

[5] For purposes of this appeal, the relevant terms imposed by the Regulation, under s. 3 provide:

3. (1) The dealer has the right, and the agreement shall not be interpreted as interfering with the right of the dealer to,

b) renew or transfer the dealership agreement;

(3) A dealer who wishes to renew or transfer a dealership agreement under clause (1)(b) shall notify the distributor in writing of that fact.

(4) A renewal or transfer of a dealership agreement under clause (1)(b) is subject to the approval of the distributor, which approval shall not be unreasonably withheld.

(6) If the distributor intends to refuse the transfer or renewal of the dealership agreement, the following rules apply:

1. The distributor shall notify the dealer in writing of the reasons for the refusal, within 45 days of receiving the request for approval.
2. If the distributor fails to notify the dealer within the 45-day period, the transfer or renewal is deemed to be approved.
3. The dealer shall be allowed 15 days from receipt of the notice to address the concerns underlying the refusal.
4. After the 15-day period has passed, the distributor may, subject to subsection (3), refuse the transfer or renewal.

(7) The distributor has the right to set sales targets that are fair and reasonable.
(emphasis added)

[6] As noted, we agree with Justice Molloy's analysis and her conclusion that the Tribunal was correct in holding that this regulation applied retrospectively to this Dealer Agreement and others throughout the province. The retrospectivity issue is a pure question of law involving issues of statutory interpretation and is not dependent on the factual matrix between the parties in this case.

[7] However, having found that Regulation 123/06 applied to the Dealer Agreement between the parties, it was necessary for the Tribunal to modify the existing notice and renewal provisions to comply with the Regulation. In doing so, the Tribunal held the right not to renew in paragraph 22 of the Dealer Agreement was void and was therefore removed and based on agreement of counsel, the automatic renewal clause was deemed to constitute the notice of intent to renew contemplated by the Regulation.

[8] We agree with Justice Molloy's holding that the manner in which the Tribunal applied Regulation 123 to the Dealer Agreement in this case is a mixed question of fact and law and is not subject to review by this Court.

[9] The Tribunal went on to find the September 30, 2006 notice of non-renewal was void as it breached the Regulation because; (1) it was based on the void automatic renewal provision, (2) it did not give Chesterman the required period to address the concerns raised and (3) it did not adequately set out the reasons for the non-renewal. The Regulation provided that if the

distributor intends to refuse the renewal, it must give 45 days notice to the dealer stating the reasons for the refusal. The dealer then has 15 days to address the identified concerns.

[10] The Tribunal was not satisfied that CNH's letter of September 20, 2006 complied with the requirement of the Regulation that the distributor provide written reasons for the refusal to renew so that the dealer could then address the concerns within the allowable 15 days. We are of the view that the nature and adequacy of the reasons for non-renewal provided by CNH are matters of fact arising from the dealings between the parties and clearly do not engage questions of law. They are likewise not subject to review by this Court.

[11] The Tribunal in its reasons under the heading "11. Liability for Ending the Relationship" summarized the reasons for its conclusion that CNH had not met its burden to prove on the balance of probabilities that it did not unreasonably withhold renewal approval. The Tribunal stated (referring to Chesterman as "CFEI") at pages 32-33:

CNH breached the Regulation and the Dealer Agreement (as amended by the Regulation) by failing to follow the regulated renewal process.

Subsection 3(4) introduced "unreasonableness" as a control over a distributor's ability to refuse to approve renewing a dealer agreement. The distributor cannot unreasonably withhold renewal approval.

What is unreasonable is determined from the factual context (see *1193430 Ontario Inc. v. Boa-Franc Inc.* [2005] O.J. No. 4671 (C.A.) at para 45) that includes the following, all of which are findings of fact:

- The parties had a 19 year business relationship.
- The Dealer Agreement was drafted by CNH with no input from CFEI.
- CFEI premises were subject to inspections and grading by CNH.
- CFEI's business performance was tracked and graded by CNH.
- CFEI received CNH's President's Prestige Award commending CFEI's business premises standards for 2004-05 and 2005-06.
- CFEI had a substantial investment dedicated to selling and servicing CNH's products.
- Between 2000-2006, CNH sales and service accounted for the majority of CFEI's business.
- CNH's Market Representation Manager who recommended non-renewal did so without ever visiting CFEI.

- No other senior CNH representative visited CFEI before the non-renewal decision.
- CNH did not issue CFEI any written warnings its dealership status was in jeopardy.
- CNH did not tell CFEI its complete reasons for non-renewal.
- CNH did not give CFEI any opportunity to develop a plan for curative measures to address CNH's concerns.
- As illustrated on the Market Rep Action Form, CNH's processes provide for curative action plans for dealers subject to termination under paragraph 23 of the Dealership Agreement but not for dealers subject to non-renewal.
- Between September 30th, 2006 and December 31st, 2006, CFEI had to repay almost \$1 million in credit financing extended by CNH's credit arm.
- While the repayment time was eventually extended by CNH, repaying the debt forced CFEI into a distress situation where it had to discount its new and used equipment inventory to generate sales to create cash flow to fund the debt repayment.
- The Minister, under powers granted under the Act, enacted a Regulation removing CNH's right not to renew the Dealer Agreement and requiring CNH not to unreasonably withhold renewal approval.

(...)

The Regulation recognizes it is unreasonable to withhold renewal approval without giving a dealer written notice of the distributor's non-renewal reasons and a chance to address the distributor's concerns.

Therefore, if the Tribunal notionally considered the September 30th, 2006 letter as CNH's required written notice under the Regulation, we find that CNH failed to fully explain its non-renewal decision, and it also failed to give CFEI an opportunity to address its concerns. In this hypothetical and the circumstances, we would therefore find CNH to have unreasonably withheld renewal approval and to have breached the Regulation.

[12] The Tribunal stated in the section of its reasons quoted above that “what is reasonable is determined from the factual context” and further observed that the numerous considerations listed are “findings of fact”. We agree with the Tribunal. The considerations leading the Tribunal to its decision are not, in any event, questions of law, and therefore, this Court has no jurisdiction to intervene.

[13] This Court must follow the governing jurisprudence from the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 and the Supreme Court’s more recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633, 2014 SCC 53, both of which discuss the distinction between questions of law and questions of mixed law and fact.

[14] *Sattva* dealt with the right of appeal from the decision of an arbitrator engaged in the interpretation of a commercial contract. The applicable legislation provided, as in the present case, for a right of appeal only on a question of law. The issue in *Sattva* was the meaning of “market price” in the contract, as that would in turn determine *Sattva*’s share entitlement by way of a finder’s fee provided for in the agreement. The Court held that this was a question of mixed fact and law and confirmed that, in future, contractual interpretation would normally be viewed as a question of mixed fact and law. The Court disapproved the historical approach which was to view issues of contractual interpretation as questions of law.

[15] In *Sattva*, the Court outlined the policy basis for the important distinction between questions of law and questions of mixed fact and law:

51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or “precedential value”) as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

- a) If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be

drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

[16] The Court also advised that the concept of extricable questions of law would have extremely limited application:

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the AA, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

- a) Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact".

Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" [para. 36]

[17] We find no extricable questions of law in the Tribunal's ruling as to the unreasonableness of CNH's decision not to renew. The Tribunal's decision was based on a consideration of the historical relationship of the parties and the events and communications surrounding the decision not to renew. This specialized Tribunal's assessment of reasonableness in all the circumstances is entitled to deference. In any event, there is no right of appeal on these matters as they are not questions of law.

[18] We agree with Justice Molloy's opinion that the Tribunal erred in law in awarding damages in the sum of approximately \$80,000 for the value of special tools and materials Chesterman had purchased from CNH. Neither the Regulation nor the terms of the Dealer Agreement imposed any such repurchase obligation on CNH. The fact that this loss was "reasonably foreseeable" in the Tribunal's view, does not provide a legal basis for this award in the context of the contractual relationship between the parties. There was no legal basis for this award and it must be set aside.

[19] Similarly, the issue of the Tribunal's power to award prejudgment interest is a question of law and we would share Justice Molloy's opinion that the Tribunal had such power for the reasons she has provided. We also agree that this Court ought not to interfere with the Tribunal's exercise of discretion in determining the applicable rate of interest.

[20] We further agree that the Tribunal's disposition of costs reflects errors of law in several respects as discussed comprehensively in Justice Molloy's reasons, and must be remitted to the Tribunal for reconsideration in accordance with this Court's ruling.

[21] Chesterman's cross-appeal relates to the quantum of damages awarded and does not engage any question of law. Accordingly, the cross-appeal is dismissed.

Conclusion and Order

[22] For the Reasons set out above, the decision of the Tribunal dated March 24, 2014 is upheld except with respect to the award for obsolete assets, which is set aside. The appeal by CNH is otherwise dismissed and the cross-appeals by Chesterman are dismissed.

[23] The costs decision of the Tribunal dated June 9, 2014 is quashed. The issue of costs is remitted to the Tribunal to be reconsidered in light of this Court's rulings as to the jurisdiction for awarding costs and the relevant factors to be taken into account, as well as the Tribunal's Rules and s. 17.1 of the *SPPA*.

[24] The costs of the appeals to this Court shall be dealt with in writing. The submissions of CNH, supported by dockets or docket summaries, shall be forwarded to the Court within 30 days of the release of these Reasons. Chesterman shall deliver its responding submissions, including its own dockets or docket summaries, within 15 days of the delivery of the CNH submissions.

CNH shall then have a brief write of reply, if it sees fit, to be delivered within 7 days of the Chesterman submissions.

HAMBLY J.

HACKLAND J.

MOLLOY J. (dissenting in part):

A. INTRODUCTION

[25] This is an appeal from decisions of the Agriculture, Food and Rural Affairs Appeals Tribunal (“the Tribunal”). In a decision dated March 24, 2014, the Tribunal held that CNH Canada Ltd. (“CNH”) had improperly terminated a dealer agreement with Chesterman Farm Equipment Inc. (“Chesterman”) and awarded \$200,516.61 in damages to Chesterman (being approximately \$60,000 for lost profit, \$80,000 for obsolete assets, and \$60,000 in pre-judgment interest). For Reasons dated June 9, 2014, the Tribunal awarded partial indemnity costs to Chesterman in the amount of \$376,338.05.

[26] CNH appeals from both the damages and costs decisions. Chesterman cross-appeals from the damages award for lost profits, submitting that this head of damages was wrongly calculated and should be higher.

[27] Chesterman is a family-owned and run business, located in Tilsonburg, Ontario, and sells farm equipment and implements. CNH manufactures and then distributes farm implements throughout Canada. CNH (and its predecessor company, New Holland) supplied farm implements to CNH, which CNH then resold to the public. The relationship between Chesterman and CNH was governed by a Dealer Agreement executed in December 1999 and to take effect on January 1, 2000. The agreement provided for a two-year initial term with automatic one-year extensions thereafter unless, at least 90 days prior to the expiry of the term, one party gave the other notice of its intent not to extend.

[28] On September 30, 2006, CNH gave written notice that it would not be extending the agreement for the 2007 year. There is an issue as to whether that notice was effective to terminate the agreement.

[29] Meanwhile, on April 25, 2006, Ontario Regulation 123/06, made under the *Farm Implements Act*¹ came into force. The Regulation prescribed certain mandatory terms that must be included in any farm implement dealership agreement, including terms dealing with the renewal of such agreements. There is an issue as to whether, and in what manner, the Regulation applied to the ongoing agreement between CNH and Chesterman.

[30] The Tribunal held that the Regulation should be given retrospective effect and applies to the agreement between CNH and Chesterman. My two colleagues and I agree, although not for the same reasons as expressed by the Tribunal. We also agree that the manner in which the Tribunal incorporated Regulation 123 into the agreement between CNH and Chesterman is a question of mixed fact and law and not reviewable by this Court.

[31] The Tribunal further held that the September 30 notice delivered by CNH under the Dealer Agreement was invalid and constituted a breach of contract. The Tribunal also found that the September 30 notice failed to give Chesterman an opportunity to address the concerns raised and that this termination was unreasonable. My colleagues are of the view that these are questions of mixed fact and law and are not reviewable by this Court. On these issues, we disagree. For the reasons that follow, I believe that the Tribunal erred in law when it held that the September 30 notice was invalid and also erred in law in finding that it failed to give CNH an opportunity to respond. I would therefore have set aside the Tribunal's finding of breach of contract, and its award of damages and costs. My colleagues, however, uphold the breach of contract finding.

[32] The parties raised three issues with respect to the Tribunal's award. CNH challenges the basis for the Tribunal's award based on obsolete items (such as tool and manuals purchased by Chesterman over the years that were of no use to Chesterman once the dealership agreement was at an end. My colleagues and I agree that the Tribunal erred in law in making this award and that it must therefore be quashed.

[33] On the remaining issues, the Panel is unanimous. We find the Tribunal does have jurisdiction to include interest in any damages award it makes. The manner of calculating that interest is not a question of law and we would not interfere. The cross-appeal by Chesterman (with respect to the quantum of the award for loss of profits) is dismissed as it does not raise a question of law, but rather a question of mixed fact and law. Finally, we are all of the view that the Tribunal erred in law with respect to the basis upon which it awarded costs. In the result, the Tribunal's decision dated March 24, 2014 is upheld in its entirety. The Tribunal decision dated June 9, 2014 is set aside and the issue of costs is remitted to the Tribunal for its reconsideration based on the directions set out herein.

¹ *Farm Implements Act*, R.S.O. 1990, c. F4

B. JURISDICTION and STANDARD OF REVIEW

[34] An appeal lies to this Court from decisions of the Tribunal pursuant to s. 5(7)-(9) of the *Farm Implements Act* (the “Act”), but solely on a question of law. This Court is empowered to make “any order that it considers proper” or may refer the matter back to the Tribunal with directions.

[35] The parties agree that a standard of correctness applies to the legal questions raised on this appeal.

[36] The result in this appeal hinges on the distinction between what can be characterized as a question of law, as opposed to a question of mixed fact and law. It is not an easy issue to resolve. It is on this point, and only on this point, that I disagree with my two colleagues.

[37] The Supreme Court of Canada dealt with this vexing issue in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*², (“*Southam*”) stating as follows (at para. 35):

. . . Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what “negligence” means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

[38] In *Southam*, the Supreme Court also reiterated (at para. 37) the governing principle that “as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed fact and law.” Iacobucci J. (writing for the unanimous Court) then stated:

Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

² *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1977] 1 S.C.R. 748

[39] In elaborating on this principle, the Court in *Southam* referred to its earlier decision in *Pezim v. British Columbia (Superintendent of Brokers)*³ and made a point that is particularly apt for the case now before this Court – there is a distinction between applying a legal test to the words of a contract (which is a question of mixed fact and law) and applying the same legal test to the same words but where those words are contained in a statutory provision (which is a question of law). Iacobucci held (at para. 36):

For example, the majority of the British Columbia Court of Appeal in *Pezim, supra*, concluded that it was an error of law to regard newly acquired information on the value of assets as a “material change” in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely -- that newly acquired information about the value of assets can constitute a material change -- was a matter of law, because it had the potential to apply widely to many cases. [emphasis added]

[40] The Supreme Court in *Southam* also noted another example of a question that might look like a question of mixed fact and law, but is actually a question of law. It is not enough for the Tribunal to accurately state the applicable law. It must actually apply that law by considering all of the relevant factors required by the applicable law. Iacobucci J. provided the following helpful example of this principle (at para. 39):

. . . After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

And further, (at para. 41):

³ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557

. . . If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact.

[41] Another important case dealing with the distinction between a question of law and a question of mixed fact and law is the Supreme Court of Canada's more recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*,⁴ which involved an appeal from a commercial arbitration award as to the quantum of a finder's fee payable to Sattva by Creston under a private agreement between the two companies. The parties agreed that Sattva was entitled to a finder's fee of US\$1.5 million and was entitled to be paid this fee in shares of Creston, cash or a combination thereof. However, they disagreed on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled. The arbitrator's decision turned on the interpretation of the term "market price" as defined in the contract between the parties.

[42] The applicable legislation provided a limited right of appeal from the arbitration decision, but only on a question of law, with leave. In the first instance a judge of the British Columbia Supreme Court denied leave on the basis that the issue raised was one of mixed fact and law and not subject to appeal. The British Columbia Court of Appeal reversed the lower court, finding the issue to be a question of law, and granted leave.

[43] The Supreme Court of Canada ruled that leave to appeal should not have been granted because the issue raised was a question of mixed law and fact. In coming to that conclusion, the Supreme Court referred to the historical approach to issues of contract interpretation, which was to treat such issues as questions of law, and then specifically decided to abandon that approach in light of two developments in the law.

[44] The first legal development cited by Rothstein J. (for the unanimous Court) is the more modern approach to contract interpretation, which is to take into account the factual matrix, considering all of the surrounding circumstances, with a view to determining the intention of the parties to the contract. This, the Court noted, is not driven by the absolute meaning of the words used, but by what the parties intended. Rothstein J. held:⁵

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

⁴ *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53

⁵ *Sattva, supra*, at para. 48, citing with approval the decision of Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 at p. 115(H.L.)

[45] The second legal development cited by the Court in *Sattva* is derived from more recent Supreme Court of Canada decisions as to the nature of a question of law, which, Rothstein J. noted, do not fit well with the historical approach to contract interpretation. In particular, Rothstein J. referred to the decision in *Southam* (to which I referred above) and to the Court's landmark decision on standards of appellate review in *Housen v. Nikolaisen*⁶ [2002] 2 SCR 235, 2002 SCC 33.

[46] In discussing *Southam*, the Court emphasized the underlying rule that the more particular an issue is to the parties, the more it will be characterized as a question of mixed fact and law. On the other hand, issues that have a broad general application are more likely to be treated as questions of pure law. He stated as follows (at para. 51):

The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or “precedential value”) as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal. [emphasis added]

[47] The Court in *Sattva*, applying *Housen*, referred to the importance of deference to fact-finders as “promot[ing] the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings” and held that, for the same reasons, it is important to accord deference to fact-finders determinations of contractual interpretation. In coming to that conclusion, the Court reasoned that, “The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties.”⁷

[48] The Court in *Sattva* also endorsed its previous ruling in *Housen* that where a court is engaged in determining a question of mixed fact and law, pure questions of fact may nevertheless be extricable. It is only where the legal principles and findings of fact are inextricably interwoven that the issue will be regarded as a question of fact and law from which there is no appeal.

[49] Rothstein J. held (at para. 53):

⁶*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33

⁷ *Sattva*, *supra*, Note 4, at para. 52, citing *Housen* *supra* Note 6 at paras 16-17.

Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor” (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[50] Thus, where a legal issue can be extricated from the facts, it is subject to appeal. Further, in the course of contract interpretation, legal errors can be made, including: applying an incorrect principle; considering a factor that is not legally relevant; failing to consider a relevant factor; and failing to consider an aspect of the correct legal test. All such errors, are subject to appeal. Finally, a distinction must be made between questions of broad application, including statute interpretation (which are questions of law), and questions of contract interpretation that affect only the particular parties involved (which are questions of mixed fact and law).

C. THE RELEVANT PROVISIONS OF THE DEALER AGREEMENT

[51] The Dealer Agreement was executed by the parties on December 3, 1999. It took effect on January 1, 2000 and was stipulated to continue to December 31, 2002, unless terminated by either party earlier.

[52] Under the Dealer Agreement, Chesterman could sell farm implements anywhere, but its primary area of responsibility (“PMR”) was stipulated to be Elgin, Oxford and Haldimand-Norfolk Counties. Chesterman agreed under Clause 4 of the Agreement that it would “promote vigorously and aggressively” the retail sales of CNH’s products and agreed to obtain a reasonable share of the market in its PMR for CNH products. Further, in the same Clause, the parties agreed that a reasonable market share would be 90% of the average market share that CNH products achieve in Ontario or in a regional sales area, it being the sole discretion of CNH whether such performance would be based on sales in the regional sales area or the province as a whole.

[53] Under the Dealer Agreement, Chesterman was required to perform warranty and policy service and was obligated to keep in inventory all special tools, equipment and machinery needed to service CNH’s products.

[54] The Dealer Agreement provided various grounds upon which CNH can terminate it for cause without notice, none of which apply here. In addition, paragraph 23(c) provided that in the event “that a party has failed to fulfill any of that party’s responsibilities” under the Agreement, the other party may terminate by giving 30 days written notice.

[55] The Agreement specifically provided for automatic one-year extensions after December 31, 2002 “unless at least ninety (90) days prior to the expiration date of the original term or any extension term either party notifies the other of its intention not to extend.” The Agreement further stated that, upon such notification, the Agreement would expire on December 31, 2002 or at the end of any such extension period. This is set out in paragraph 22 of the Dealer Agreement, which is a pivotal provision in this appeal. It states:

22. DURATION

Unless terminated earlier in accordance with the terms hereof, this Agreement shall continue from the date first set forth above until December 31, 2002. The Agreement shall be extended for successive one-year terms unless at least ninety (90) days prior to the expiration date of the original term or any extension term either party notifies the other of its intention not to extend. Upon such notification, this Agreement shall expire on December 31, 2002 or at the end of any such extension period. The Dealer understands that this Agreement is of a limited duration and agrees that it has not relied on any representation regarding the continuation of the Agreement or its benefits beyond the initial term or any subsequent term. [emphasis added]

[56] The Dealer Agreement was automatically renewed for the years 2003, 2004, 2005 and 2006. The 2006 term would expire on December 31, 2006 unless, at least 90 days before that, written notification was given by one of the parties that it did not intend to renew. The notice by CNH given on September 30, 2006 was more than 90 days prior to the expiry of the term. If otherwise effective, the Agreement would expire at the end of its term on December 31, 2006.

D. THE RELEVANT PROVISIONS OF THE ACT AND REGULATION 123/06

[57] The *Farm Implements Act* regulates aspects of the relationships between manufacturers, distributors, dealers and buyers of farm implements. The Act stipulates in s. 33 that the rights, duties and remedies provided are “in addition to the rights, duties and remedies under any other *Act* and the common law.” The Act first came in force in 1988 and has been amended from time to time. There were significant amendments in 2005, including ** and imposing minimum buy-back provisions. Also, prior to 2005, the power delegated to make regulations was limited to “prescribing information to be included in agreements referred to in subsection 3(4). This was amended to include the power to “set out legal rights and obligations for parties to the agreement.”

[58] Regulation 123 under the Act was enacted pursuant to the expanded regulation-making power and came into force on April 25, 2006. The Regulation provided for certain mandatory terms that must be included in dealer agreements. Within the wording of the Regulation, Chesterman was a “dealer” and CNH was a “distributor.” Section 1 provides that the terms are mandatory. It states as follows:

Mandatory terms

1. (1) The terms set out in sections 2 and 3 are prescribed as the mandatory terms that must be included in any dealership agreement under subsection 3 (4) of the Act.

(2) The mandatory terms set out in sections 2 and 3 are deemed to form part of any dealership agreement even if the agreement fails to include them as required.

(3) A provision in a dealership agreement that limits, varies or attempts to waive a term set out in sections 2 and 3 is void.

[59] For purposes of this appeal, the relevant terms imposed by the Regulation under s. 3 provide:

3. (1) The dealer has the right, and the agreement shall not be interpreted as interfering with the right of the dealer to,

(b) renew or transfer the dealership agreement;

(3) A dealer who wishes to renew or transfer a dealership agreement under clause (1) (b) shall notify the distributor in writing of that fact.

(4) A renewal or transfer of a dealership agreement under clause (1) (b) is subject to the approval of the distributor, which approval shall not be unreasonably withheld.

(6) If the distributor intends to refuse the transfer or renewal of the dealership agreement, the following rules apply:

1. The distributor shall notify the dealer in writing of the reasons for the refusal, within 45 days of receiving the request for approval.

2. If the distributor fails to notify the dealer within the 45-day period, the transfer or renewal is deemed to be approved.

3. The dealer shall be allowed 15 days from receipt of the notice to address the concerns underlying the refusal.

4. After the 15-day period has passed, the distributor may, subject to subsection (3), refuse the transfer or renewal.

(7) The distributor has the right to set sales targets that are fair and reasonable.

[60] Upon termination or expiration of an agreement, sections 23 to 30 of the Act impose a number of provisions with respect to the distributor's obligation to buy-back certain products from the dealer and the prices at which that is to be done. The Act specifies (at s. 23(2)) that these provisions "apply to a dealership agreement that is in effect on or after January 1, 1990."

E. FACTUAL BACKGROUND – THE PURPORTED NOTICE OF TERMINATION

[61] In May 2006, CNH hired a new Market Representation Manager, Mr. Mackow. As part of his responsibilities, Mr. Mackow conducted a review of dealer performance. Chesterman came up on his radar as a poor performer. More detailed reports were compiled, reviewing sales figures and market share for the current year, as well as for the three prior years. For those four years, Chesterman was significantly failing to meet its required sales level of 90% of the average market share for CNH products in Ontario. A review of the figures in July 2006 showed further poor performance. As a result, CNH decided not to extend the Dealer Agreement beyond December 31, 2006.

[62] On September 30, 2006, CNH gave written notice to Chesterman that it would not be extending the Dealer Agreement beyond its expiration date of December 31, 2006. The notice stated that the decision not to renew was based on "serious breaches" of s. 4(a) of the Dealer Agreement by failing to meet a reasonable market share as required under the Agreement. The notice specified that the sales levels were "severely deficient" during the period of the past four years and provided a chart demonstrating the persistent failure of Chesterman to achieve the required market share.

[63] The Tribunal found that there was no basis to reject the data set out in CNH's notice. Chesterman's sales figures were significantly below its required market share target and were declining year after year from 2003 to 2006.

[64] During the 92 days from the notice of non-renewal and December 31, 2006, Chesterman did not propose any plan to CNH as to how it could address its sales performance. Mr. Chesterman testified before the Tribunal that he asked his dealer representative if CNH would change its mind and was told "no", and also testified that he received no response from CNH when he proposed a merger with another CNH dealer.

F. THE PROCEDURAL HISTORY OF THIS CASE

[65] The proceedings were initiated with a complaint by Chesterman against CNH for improperly ending the Dealer Agreement. Mediation was not successful and the matter proceeded before the Tribunal. There were initially three issues: (1) a warrant issue; (2) liability for breach of contract; and (3) damages. The Tribunal decided to hear the case in two phases: Phase 1 would deal with the warranty and breach of contract issues; and Phase 2 would deal with damages. The Phase 1 hearing proceeded before the Tribunal for seven days commencing

October 18, 2010. The Tribunal's written decision on these issues was delivered on March 17, 2011.

[66] The warranty issue, which involved a number of intervenors, was dismissed.

[67] The Tribunal found in Chesterman's favour on the breach of contract issue. Its Reasons were brief. The Tribunal held that:

- (a) Regulation 123 applied to the Dealer Agreement with the result that the right to not renew in paragraph 22 was removed and was void.
- (b) Based on the agreement of counsel, the automatic renewal clause was deemed to be the notice of intent to renew under the Regulation.
- (c) The September 30, 2006 notice by CNH was based on paragraph 22, which was void, and therefore breached the Regulation.
- (d) Even if the September 30, 2006 letter was treated as CNH's refusal to approve Chesterman's requested renewal, it did not comply with the regulations because it did not give Chesterman the required period to address the concerns raised.
- (e) Therefore, CNH breached the contract.

[68] CNH appealed to the Divisional Court from the March 17, 2011 decision. CNH sought to adduce fresh evidence before the Divisional Court to the effect that its counsel either did not, or did not intend, to concede before the Tribunal that the automatic renewal clause satisfied the requirement to give notice of intent to renew.

[69] The Divisional Court remitted the matter to the Tribunal with directions. The Court gave oral reasons in which Aston J. stated that one of the reasons for remitting the matter to the Tribunal was the inability of the Court to determine what was agreed to by counsel at the initial hearing. In addition, the Court stated that the Tribunal should have the opportunity to deal with issues not expressly addressed in its Reasons, including: (1) whether Regulation 123 has retroactive or retrospective effect; (2) notwithstanding the agreement of counsel, whether the interplay between the Regulation and paragraph 22 needed to be interpreted consistently, rather than finding paragraph 22 valid as notice of intent to renew for Chesterman but void and unenforceable for the non-renewal by CNH; (3) whether the Regulation required CNH to give written notice it was withholding approval of renewal and an opportunity to cure any defect or address the concerns raised; (4) whether the opportunity to cure was rendered academic by Chesterman's inability to address the concerns or by some other reason; and (5) whether CNH's actions could be said to be unreasonable although not unconscionable or in bad faith.

[70] The hearing then proceeded again before the Tribunal,⁸ between February and November, 2013, for ten days of evidence and submissions on the issues remitted by the Divisional Court and the issues of damages. The Tribunal's decision on these issues was released on March 24, 2014, and is the subject of this appeal. Subsequently, the Tribunal received written submissions as to costs and released its written decision on costs on June 9, 2014, which is also the subject of this appeal.

G. THE REASONS OF THE TRIBUNAL ON DAMAGES

(i) Applicability of Regulation 123

[71] The Tribunal held that Regulation 123 applied retrospectively to the Dealer Agreement in this case, notwithstanding that the Agreement was four months into the 2006 term when the Regulation came into force. The Tribunal identified the starting point of its analysis as being the language used in s. 1 of the Regulation, and in particular that both ss. 1(1) and 1(2) provide that the mandatory terms apply to “any” dealer agreement. The Tribunal stated (at p. 19):

“Any” in this context is an expansive and all-encompassing word that infers dealer agreements in the existence (past) and dealer agreements yet to be made (future).

There is no temporal limitation in the *Regulation* suggesting applying the *Regulation* begins with dealer agreements made after the enactment date of April 25, 2006.

[72] The Tribunal contrasted the word “any” in the Regulation with various sections of the Act (ss. 3(2), 8(9) and 23(2)) that use temporal reference mechanisms and concluded that the absence of such language in the Regulation meant that the Legislature did not intend to limit its application temporally.

[73] The Tribunal rejected the applicability of the reasoning of the Supreme Court of Canada in *Upper Canada v. Smith*⁹ in which the Court considered the words “shall be in writing” in amendments to the *Statute of Frauds* as being prospective and therefore not operating to affect pre-existing oral agreements to pay commission on the sale of land. The Tribunal reasoned that the Supreme Court was not suggesting that every time the words “shall be in writing” are used, a statute must be given a prospective interpretation and also noted that this decision was made in

⁸ By February 2013, one of the original three members of the Panel had been appointed as a Justice of the Peace and resigned from the Tribunal. The hearing proceeded before the remaining two members, which is provided for in the legislation and not the subject of any dispute.

⁹ *Upper Canada v. Smith*, [1920] 61 S.C.R. 413

1920, prior to the more modern approach to statute interpretation subsequently taken by the Supreme Court in cases such as *Rizzo Shoes*.¹⁰

[74] The Tribunal held (at p. 24) as follows:

As previously noted, the Tribunal determined that the Legislature, by the express words “any dealership” in the *Regulation*, communicated an intention of retrospective application of the *Regulation*. Therefore, in our view, there is no ambiguity in the *Act* or *Regulation* that requires resolution by applying the principle against interfering with vested rights. Here, the Legislature understood it was interfering with vested rights by giving the Minister the authority to prescribe “legal rights and obligations.” None of the stakeholder parties could have been surprised by the legislative amendments incorporating some regulatory control over contract terms. The issues of dealer purity and dealer termination had been the matter of legislative debate and stakeholder discussions between at least 2001 and 2005. During that four year period, the [CNH-Chesterman] Dealer Agreement, as an illustration, renewed at least four times. The Tribunal finds it difficult to accept that in that context, dealers, manufacturers and distributors would not understand the contractual landscape was evolving and that “vested rights” might be affected at the moment of any legislative change.

[75] In the result, the Tribunal found that Regulation 123 applied retrospectively and that the mandatory terms must be read into the CNH/Chesterman Dealer Agreement.

(ii) Incorporating Regulation 123 into this Dealer Agreement

[76] The Dealer Agreement in this case already gave greater renewal rights to the dealer than were required, in some respects, under the new Regulation. Under paragraph 22 of the Dealer Agreement, the Agreement renewed automatically unless one of the parties gave 90 days’ notice of its intention not to renew it. Under the Regulation, a dealer is required to give written notice that it wishes to renew a dealer agreement. Such a renewal is subject to the approval of the distributor, but s. 3(4) provides that approval shall not be unreasonably withheld. If the distributor intends to refuse the renewal, the distributor must give 45 days’ notice to the dealer stating the reasons for the refusal. The dealer then has 15 days to address the concerns underlying the refusal.

[77] The Dealer Agreement in this case contemplated the possibility of its terms being contrary to legislation and provided as follows in Clause 31:

¹⁰ *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 [“*Rizzo Shoes*”]

If performance or enforcement of this Agreement is unlawful under a valid law of any jurisdiction where that performance or enforcement is to take place, the performance or enforcement will be modified to the minimum extent necessary to comply with such law.

[78] One option for the Tribunal would have been to apply s. 1(3) of the Regulation which states that any provision in a dealership agreement that limits or varies a term set out in s. 3 is void. Section 3 contains the mandatory renewal terms. Applying s. 1(3) of the Regulation, the renewal term in the Dealer Agreement (which “varies” the terms of the mandatory provisions) would be void and would be replaced by the mandatory terms in the Regulation. Therefore, the process would be started by written notice from Chesterman that it intended to renew the Dealer Agreement. Chesterman did not give such a notice. Therefore, the Agreement would simply expire on December 31, 2006.

[79] The Tribunal did not take that approach. Instead, it held that it was appropriate to “read down” the language in the Agreement, or apply “notional severance.” Therefore, the Tribunal rewrote paragraph 22 of the Dealer Agreement as follows:

22. DURATION

Unless terminated earlier under the terms hereof, this Agreement shall continue from the date first set forth above until December 31, 2002.

The Agreement shall renew for successive one-year terms unless the Dealer or the Company gives notice.

For the Dealer, written notice to the Company prior to the end of the original term or any extension term that the Dealer will not renew.

For the Company, written notice to the Dealer at least forty-five (45) days prior to the end of the original term or any extension term setting out the Company’s non-renewal reasons.

Upon receipt of such non-renewal notice from the Company, the Dealer shall have fifteen (15) days from receipt of the Company’s notice to address the concerns underlying the Company’s non-renewal notice.

Upon expiry of the fifteen (15) days, the Company may not renew the Agreement; however, the Company’s decision not to renew must not be unreasonable in the circumstances.

[80] The Tribunal found that this would meet the purpose and policy of the amendments (increasing fairness, competition and choice in the industry) and was in accordance with the “spirit” of paragraph 31 of the Dealer Agreement. Further, the Tribunal stated that such an approach “recognizes the historical reality about renewals as between CNH and [Chesterman]

and reflects the reality in the market.” The historical reality between CNH and Chesterman was that their Agreement was renewed automatically every year without Chesterman needing to do anything. The “reality in the market” referred to by the Tribunal was based on the evidence of Barbara Leavitt, the President and CEO of the Canada East Equipment Dealers Association (“CEEDA”), a trade association representing farm equipment dealers such as Chesterman in liaison with industry and government. Ms. Leavitt testified that she polled approximately 300 equipment dealers in Ontario that comprise CEEDA’s membership and the majority of them reported that their dealer agreements auto-renewed, unless terminated by one of the parties. Further, the members reported that none of them had given notice of an intent to renew prior to 2005 and only a handful had given such a renewal notice after 2005, and only then when she advised them to do so.

[81] With respect to the requirement under the Regulation that Chesterman provide notice of its intent to renew, the Tribunal held that the auto-renewal clause in the Dealer Agreement constituted written notice by the dealer of its intent to renew, as required under the Regulation. The Tribunal relied on the concession of CNH’s counsel in the 2010 hearing that the auto-renew clause constituted notice of intent to renew. The Tribunal did not deal with when such a notice would be deemed to have been given, so as to trigger the distributor’s right to refuse.

[82] The Tribunal also held (at p. 27) that in the particular circumstances of this case, the September 30, 2006 letter sent by CNH to Chesterman (indicating its intention not to renew) pre-empted Chesterman from giving its written renewal notice, made any renewal notice requirement from Chesterman “academic” and “relieved Chesterman of any requirement to give written notice.”

(iii) Invalidity of the Non-Renewal Notice by CNH

[83] The Tribunal held that Regulation 123 required CNH to give Chesterman written notice that it was withholding renewal approval and an opportunity to address the concerns raised. However, the Tribunal found that the September 30, 2006 notice was not a written refusal to approve Chesterman’s deemed notice of renewal, but rather an attempt to exercise a right under paragraph 22 of the Dealer Agreement that no longer existed in its original format. The Tribunal provided no explanation for that conclusion. It also did not address the specific concern raised by the Divisional Court in October 2011 as to the inconsistency in finding paragraph 22 valid for purposes of being notice of renewal, but void in respect of notice of non-renewal.

[84] The Tribunal went on to hold that even if it treated the CNH September 30 letter as the written notice of refusal required under s. 3(6) of the Regulation, it failed to comply with the Regulation. The Tribunal noted that the letter stipulated that the reason for non-renewal was the failure to achieve market share over a four-year period in breach of the Agreement. The Tribunal held that the actual decision not to renew this Agreement was made by Mr. Mackow, although it had been approved at senior levels and was signed by The Regional Sales Director, Real Prefontaine. Mr. Mackow testified at the hearing and in the course of his evidence stated four reasons behind CNH’s decision not to renew: (1) poor “high power” tractor sales

performance; (2) lack of trained salespeople; (3) declining total revenue; and (4) poor hay and forage equipment sales performance. The Tribunal therefore concluded that because these four reasons were not specified in the September 30, 2006 letter, the notice did not comply with the Regulation which requires a refusal to renew to specify the reasons for that decision. The Tribunal stated (at p. 45), “In our view, it would not be fair of a distributor to decide not to renew and then only communicate some of the reasons behind the decision to the dealer.”

(iv) Opportunity to Address Concerns

[85] The Tribunal also found CNH’s notice to be invalid because it failed to provide Chesterman with the required 15 days to address CNH’s underlying concerns. The Tribunal pointed out that no warning was given to Chesterman prior to the September 2006 letter. Further, the Tribunal found that CNH had already made up its mind that there was no “cure” possible for Chesterman’s poor performance. The Tribunal held (at p. 31):

There was no evidence about what [Chesterman] could have done to address CNH’s underlying concerns, within a 15-day period.

What Chesterman could have done is academic given CNH’s determination made during the summer of 2006 that no opportunity to “cure” or address its concerns would have been effective. It was not open to CNH to overlook an entitlement to cure afforded by the *Regulation* because it believed the cure would be ineffective.

(v) Unreasonableness

[86] The Tribunal reiterated its previous conclusions from 2011 that it had found CNH’s decision not to renew the Dealer Agreement was not unconscionable, unreasonable or in bad faith, within their contractual relationship. However, the Tribunal clarified that this did not mean that CNH’s conduct was reasonable within the terms of the Regulation, which provided that the distributor’s refusal to consent to a renewal request by the dealer could not be unreasonably withheld.

[87] Further, for many of the same reasons given for finding CNH’s notice ineffective, the Tribunal found its conduct to be unreasonable under the Regulation; *e.g.* purporting to exercise a non-renewal right that no longer existed; failure to set out all of the reasons for non-renewal; and failure to provide Chesterman with an opportunity to address the concerns raised. In coming to that conclusion, the Tribunal acknowledged that there is no requirement under the Regulations for CNH to advise Chesterman that it had 15 days to address the concerns raised. However, again, the Tribunal ruled (at p. 33) that “CNH foreclosed any opportunity by their pre-determination that such an opportunity would not be effective.” The Tribunal also referred to a number of other factors such as: the 19-year business relationship; the fact that it was a standard-form agreement drafted by CNH with no input from Chesterman; and the absence of any prior written warnings to Chesterman that its dealership was in jeopardy.

(vi) Finding of Breach

[88] Accordingly, the Tribunal held that CNH had breached the Regulation by not renewing the Dealer Agreement in accordance with the terms of the Regulation.

(vii) Damages for Loss of Profits

[89] Chesterman presented expert evidence on loss of profits based on a business valuation approach. The Tribunal rejected that evidence because the expert overlooked a key factor and because it failed to take into account that the Dealer Agreement was terminable on reasonable notice. As such, the business value approach, which looks at an income stream indefinitely, was found to be inappropriate.

[90] The Tribunal concluded that in all of the circumstances, including the long-standing business relationship between the companies spanning almost two decades, a two-year notice period was appropriate. Based largely on the expert witness called by CNH and the two-year notice period, the Tribunal awarded damages of \$59,536.00 for loss of profits.

(viii) Damages for Obsolete Assets

[91] The Dealer Agreement required Chesterman to purchase special tools and manuals specific to CNH products. CNH tendered no evidence that these tools and manuals had any usefulness to Chesterman following termination as a CNH dealer. Chesterman claimed damages of \$80,310 for these obsolete assets, based on estimates derived from 2006 pricing or internet information. The Tribunal held that it was reasonably foreseeable that Chesterman would suffer a loss in respect of these tools upon termination of the agreement. The Tribunal noted that CNH had disputed the valuation put on these items by Chesterman as being based on current prices, but that CNH presented no alternate value for the obsolete assets. The Tribunal awarded damages as claimed for the obsolete assets, in the amount of \$80,310.

(ix) Other Heads of Damages

[92] The Tribunal dismissed Chesterman's claims for damages based on restocking fees, parts that were determined by CNH to be non-returnable, and losses caused as a result of the requirement to liquidate inventory. No appeal is taken from those rulings.

(x) Pre-judgment Interest

[93] The Tribunal held that it was set up as a dispute resolution process that was an alternative to the courts. Accordingly, it concluded that it had jurisdiction to award interest on the damages and that it would be appropriate to apply *Courts of Justice Act* pre-judgment interest rates for that purpose. Based on the *Courts of Justice Act* rate in December 2006 when Chesterman first sent notice of its claim, the Tribunal awarded interest at 6% per year from January 1, 2007 to March 24, 2014, for a total interest award of \$60,670.61.

H. ANALYSIS : DAMAGES DECISION

[94] In my view, the Tribunals' conclusion that CNH breached the Dealer Agreement cannot stand. For the detailed reasons that follow, I would find as follows:

- (i) The Tribunal erred in law in its analysis of whether Regulation 123 applied to the Dealer Agreement, in particular by failing to apply a presumption against retrospective application and by finding that the Regulation expressly applied retrospectively. However, even applying the presumption against retrospective effect, such an interpretation arises by necessary implication given the nature and intent of the legislation and the effect of applying the provisions only prospectively. Therefore, the Tribunal reached the correct conclusion that Regulation 123 applied.
- (ii) The manner in which the Tribunal applied Regulation 123 to the contract in this case is a mixed question of law and fact and is not subject to review by this Court. Alternatively, if it is a question of law, I find no legal error.
- (iii) Assuming the auto-renewal clause constituted notice of intent to renew by the dealer, the notice of September 30, 2006 by the distributor can only reasonably be interpreted as a rejection of that deemed notice of intent to renew. The Tribunal erred in law by finding that CNH could not refuse to renew because paragraph 22 of the Agreement was no longer in existence.
- (iv) The September 30, 2006 letter from CNH set out the grounds for the non-renewal. There is no legal requirement that every possible ground for refusing a renewal be listed and the Tribunal erred in law in so finding. The Tribunal further erred in law by finding that Chesterman was not given an opportunity to respond to the concerns raised.
- (v) The onus was on Chesterman to respond in some way to the concerns stated by CNH and its failure to do so was fatal to its claim that CNH had breached the Regulation. The Tribunal erred in law by finding to the contrary.
- (vi) There is no need for an inquiry as to the reasonableness of CNH's refusal in light of Chesterman's failure to even attempt to address the concerns raised. However, on their face the grounds stated by Chesterman are reasonable given that they demonstrate a fundamental breach of a key term of the agreement going back four years – the failure to meet the market share requirement. The Tribunal erred in law in considering reasonableness at all. Further, in its consideration of reasonableness, the Tribunal erred in law by: (a) failing to take into account relevant factors (such as the longstanding breach of the market share terms of the agreement and the absence of any evidence that Chesterman did, or even could have, done anything to address those concerns); and (b) taking into account irrelevant and legally invalid factors (such as the failure of CNH to comply with the Regulation, CNH's reliance on a non-renewal clause that was void, the failure

of the notice to set out all the grounds for non-renewal, and the failure to give Chesterman an opportunity to respond).

[95] I would, therefore, have set aside the March 24, 2014 decision of the Tribunal and determined that CNH was not in breach of its contract with Chesterman.

(i) Does Regulation 123 Apply to the Dealer Agreement?

[96] Although I agree with the conclusion of the Tribunal that Regulation 123 applied to the Dealer Agreement in this case, the Tribunal made a number of legal errors in its analysis that need to be addressed. The Tribunal accepted that its interpretation of the Regulation resulted in its having retrospective effect. It did not, however, apply the presumption against that interpretation, which ought to have been its starting point. The Tribunal erroneously found that the language of the Regulation constituted an express direction, in clear and unambiguous language, that it be given retrospective effect. I do not agree. I find the language of the Regulation to be ambiguous as to whether it would apply to contracts already in existence. However, the Tribunal then went on to look at the legislative history and intent of the Regulation. Based on that analysis, and the impact of applying a rigid prospective interpretation of the Regulation, I am of the view that a retrospective application of the Regulation arises by necessary implication and that the Regulation does apply to the circumstances before the Tribunal.

The presumption against retrospectivity

[97] First, I agree with the submissions of the appellant CNH that the Tribunal erred in starting its analysis of the retrospectivity issue from the wrong perspective. The Tribunal should have started its analysis by considering whether applying Regulation 123 to this Dealer Agreement in the fall of 2006 would interfere with vested rights of the parties. If so, the Tribunal should then have started from the presumption that the Regulation did not apply and then considered whether that presumption had been rebutted.

[98] The Tribunal did not take that approach. The Tribunal started its analysis by stating that the Regulation had retrospective effect. Even if that statement is taken as a pre-statement of its conclusion, with the analysis to follow, the Tribunal failed to consider the presumption against retrospectivity. Rather, the Tribunal merely examined the language used in the Regulation to determine the intention of the Legislature. That is an incorrect legal approach and a fundamental error of law.

[99] It is well-established that a statute with retrospective effect is one that takes away or changes tangible rights that have vested in a party. In *Épiciers Unis Métro-Richelieu Inc.*,

division "Éconogros" v. Collin,¹¹ the Supreme Court of Canada adopted the following explanation by Professor Driedger as to what retrospectivity entails:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event. [Emphasis in original.]

[100] In *Épiciers*, Lebel J. stated (at para. 48) that “the signing of a contract usually creates rights and obligations, which are considered vested rights and which, generally speaking, remain subject to the former legislation.” He concluded (at para. 47) that the legislation at issue in that case had retrospective effect because “[i]t applies to an event that has already happened, namely the signing of the suretyship contract, but governs only the future effects of the contract.”

[101] Those principles apply in this case. Chesterman and CNH were parties to a contract entered into in 1999. The current term of the contract was for one year commencing January 1, 2006. Each of the parties had vested rights under it. One of the vested rights enjoyed by Chesterman was that the contract would renew automatically for successive one-year periods unless terminated or unless one party gave 90-day written notice of an intention to not renew it. The ability to give such a notice so as to prevent the renewal of the contract was also a vested right, in this case one which was particularly important to CNH. It is apparent that, but for Regulation 123 which came into force in April 2006, CNH could have ended the Dealer Agreement by delivering the notice it did in September 2006. Thus, applying the reasoning of the Supreme Court in *Épiciers*: (a) the parties had vested rights and obligations under the Agreement; and (b) the Regulation would have retrospective effect if it applied to the event that had already happened (whether it be the renewal of the Dealer Agreement for 2006 or the initial signing of the Agreement in 1999), and governed its future effects (in this case, how and under what terms it could be renewed or not renewed after the Regulation came into force).

¹¹ *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] 3 S.C.R. 257, 2004 SCC 59 at para. 46, citing E. A. Driedger, “Statutes: Retroactive Retrospective Reflections” (1978), 56 *Can. Bar Rev.* 264, at pp. 268-69

[102] It is also well-established that there is a presumption that a statute or regulation must “not be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.”¹²

[103] Further, the presumption against retrospectivity is even stronger for delegated powers (such as regulations). Ruth Simpson in *Sullivan on the Construction of Statutes*¹³ describes it this way:

It is presumed that the legislature does not intend to delegate a power to legislate retroactively, retrospectively or to interfere with vested rights. As Southin J.A. put it in *Casamiro Resource Corp. v. British Columbia (Attorney General)*, such a delegation would be out of keeping with Canadian notions of decent legislative behaviour.

In practice, this means two things: (1) regulations and other forms of delegated legislation are presumed only to apply prospectively and not to interfere with vested rights; and (2) delegated legislation that claims to have retroactive application or to interfere with vested rights is presumed to be invalid. Both presumptions are rebuttable.

[104] As stated by the Supreme Court of Canada in *British Columbia (Attorney General) v. Parklane Private Hospital Ltd.*¹⁴ (at para. 16):

If *intra vires*, Order in Council 4400 would serve to extinguish retrospectively the entire claim of Parklane, but in my view it fails to have that effect. The Lieutenant Governor in Council is empowered to enact regulations for the purposes of carrying into effect the provisions of the Act, but nothing expressly or by necessary implication contained in the Act authorizes the retrospective impairment by regulation of existing rights and obligations.

[105] These general principles were also applied by the Federal Court of Appeal in *Apotex Inc. v. Merck Frosst Canada & Co.*,¹⁵ in which Stratas J.A. held (at paras. 30-31):

Merck is correct that the making of retroactive or retrospective regulations or regulations that interfere with vested rights on substantive matters must be authorized by the regulations’ enabling provisions: R. Sullivan, *Sullivan on the*

¹² *Gustavson Drilling (1964) Limited v. Minister of National Revenue*, [1977] 1 S.C.R. 271, 66 D.L.R. (3d) 449 at para. 11

¹³ Sullivan, Ruth: *Sullivan on the Construction of Statutes* (6th Edition), Lexis Nexis Canada Inc. 2014, September 2014 at pp. 834-835 (citations omitted)

¹⁴ *British Columbia (Attorney General) v. Parklane Private Hospital Ltd.*, [1975] 2 S.C.R. 47

¹⁵ *Apotex Inc. v. Merck Frosst Canada & Co.*, 2011 FCA 329

Construction of Statutes, 5th ed. (Markham, Ont.: LexisNexis, 2008) at pages 670 and 727; *Attorney General for British Columbia v. Parkland Private Hospital Ltd.*, [1975] 2 S.C.R. 47 at page 60; *Ass'n Internationale des commis du détail v. Commission des Relations de Travail du Québec et al.*, [1971] S.C.R. 1043 at page 1048.

Merck is also correct that subsection 55.2(4) of the *Patent Act* does not authorize the making of such regulations. The wording of subsection 55.2(4) is silent on the creation of regulations that have retroactive or retrospective effects or an interference with vested rights. Given its silence, subsection 55.2(4) must be interpreted as not authorizing such effects: *Smith v. Callander*, [1901] A.C. 297 at page 305.

[emphasis added]

No express language requiring retrospective interpretation

[106] The Tribunal accepted that the Regulation affected vested rights, but found that this was intended by the Legislature. The Tribunal's main reason for concluding that the Regulation was intended to have retrospective effect was the use of the word "any" to modify "dealer agreements" in ss. 1(1) and 1(2) of the Regulation, which the Tribunal described as "an expansive and all-encompassing word that infers dealer agreements in existence (past) and dealer agreements yet to be made (future)." I do not agree with the tribunal that the word "any" constitutes a clear and unambiguous expression requiring such a broad application. If the word "any" in the regulation is a clear and unambiguous direction that the Regulation is to have retrospective effect, I would expect the same language to appear in the delegating power. I note, however, that the delegation in s. 35(c) of the Act 35 does not use that same language. It states:

35. The Minister may make regulations,

(c) prescribing information to be included in a dealership agreement and setting out rights and obligations for parties to the agreement [emphasis added]

[107] The Tribunal reasoned that the Legislature used the word "any" as opposed to "a" in the Regulation as a clear and unambiguous expression of its intention that the Regulation would have retrospective effect. Reading the word "any" in the manner suggested by the Tribunal would render the entire Regulation invalid. Applying that same analysis to the delegating power in the statute would mean that the use of the word "a" rather than "any" would not grant the power to create regulations with retrospective effect. To interpret the Regulation in a manner consistent with the powers granted under s. 35(c) of the Act would require interpreting "any" in the Regulation as the equivalent of "a" or "the" in the delegating section of the Act, which in my view is in keeping with the ordinary meaning of those words in any event. Thus, if the

Regulation is to have retrospective effect, it cannot be because of the use of the word “any” in the Regulation. To do so would create invalidity.

[108] Another basis relied upon by the Tribunal in giving the Regulation retrospective effect is the lack of any temporal references in the Regulation. The Tribunal contrasted this with temporal references in various provisions of the Act and reasoned that if the Legislature meant for the Regulation to be temporally limited, it would have said so.¹⁶

[109] Usually, the absence of temporal modifiers in a regulation means that the regulation will be prospective, applying only to the future and not changing any vested rights. The Tribunal erred in law by coming to the opposite conclusion. Again, the failure to apply the presumption against retrospective effect is the root of the problem.

[110] The provisions of the Act relied upon by the Tribunal were ss. 3(2), 8(9) and 23(2). Subsection 3(2) and sections 24 to 30 are long-standing provisions in the legislation, and were not part of the 2005 amendments to the Act and Regulations. In my view, an examination of these provisions of the Act does not support the Tribunal’s conclusion as to retrospective effect. However, I do not consider the existence of some temporal limitations in the Act to be fatal to the Tribunal’s ultimate findings on retrospectivity. That is because the provisions containing temporal limits must be considered in their historical context and in light of the legislative intent (a point to which I will return).

Retrospective application as a necessary implication

[111] The Regulation is assumed not to have retrospective effect, a presumption that can be rebutted by express language, or where it arises by necessary implication. As discussed, the use of the word “any” cannot be sufficient to constitute express language rebutting the presumption, nor is there any other express language capable of rebutting the presumption. The case law is clear that where the words of a statute are clear and unambiguous, there is no need to look to external sources to determine their meaning. Although holding that the words of this Regulation statute were clear and unambiguous, the Tribunal nevertheless looked at external sources as to the intent of the Legislature to assist its interpretation, perhaps as an alternative to its findings on the language being unambiguous.

[112] Unlike the Tribunal, I find that the use of the word “any” is not a clear expression that the Regulation is required to be given retrospective effect. On the contrary, I consider “any” to be ambiguous. Most dictionary definitions equate “any” with the word “every.” Arguably, this is broader than the article “a” before the modified noun, but it does not necessarily involve a reference to the past. Because this is not completely clear, in my view it is relevant to consider

¹⁶ Reasons of the Tribunal at p. 19

the legislative history and the purpose of the legislation to determine whether retrospective effect was the necessary intention of the drafters. In this regard, I agree with the ultimate decision of the Tribunal that the intention was to give retrospective effect to Regulation 123.

[113] The modern approach to statutory interpretation is now well-established and is conveniently summarized by LaForme J.A. in *1392290 Ontario Ltd and Riocan Holdings Ltd. v. Corporation of the Town of Ajax*,¹⁷ as follows (at paras. 9-10):

The modern approach to statutory interpretation, first set out in E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) is well-settled:

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 first step of statutory interpretation is to determine the meaning that "would be understood by a competent language user upon reading the word in their immediate context." The immediate context consists of as much of the text surrounding the words to be interpreted as is needed to make sense of those words and usually consists of the section in which the words appear: see R. Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007) at 50-51. Although the use of the past tense in s. 447.70(21)(c) is consistent with a retrospective application, in this case, a textual analysis is not necessarily conclusive. I accordingly turn to the appellant's three submissions, which speak to the legislative scheme and intention of the legislature.

[114] In *Riocan*, the Court of Appeal considered whether amendments to property tax legislation should be given a retrospective effect. The Court noted that the text of the provision contained the past tense, but found this was not conclusive and that an examination of the scheme and intent of the legislation was required. So too in the case before me; I do not see the use of the word "any" to be conclusive and an examination of the intent of the Legislature is therefore necessary.

[115] In *Riocan*, one of the issues considered by the Court was the motivation of the legislation, which was to rectify a taxation system that was seen as being "grossly out of date and, as a result, extremely unfair" because taxpayers in similar situations were paying very different

¹⁷ *1392290 Ontario Ltd and Riocan Holdings Ltd. v. Corporation of the Town of Ajax*, 2010 ONCA 37 ["*Riocan*"]; see also *Rizzo Shoes*, *supra*, Note 4

taxes.” The motivation of the Legislature to rectify this unfairness was seen by the Court as a factor supporting the application of the legislation in a retrospective manner.¹⁸

[116] In the case now before this Court, it is clear from the legislative history that the Legislature was concerned about the power imbalance between large manufacturers and distributors of farm implements on the one hand and farm implement dealers on the other. The Legislature sought to ensure greater fairness for dealers and to foster competition and increased consumer choice by prohibiting exclusivity (or dealer purity) clauses in dealer agreements. Previously, many dealer agreements required dealers to carry the stock of only one manufacturer and prohibited them from selling other brands. The Legislature sought to remedy this situation by a provision added to the Act itself, through the 2005 amendments, which states:

3. (5) A dealership agreement shall not require that the dealer,
 - (a) offer no farm implements or parts for sale at retail other than those manufactured by the manufacturer specified in the agreement; or
 - (b) not make a dealership agreement with any other distributor.

[117] The Tribunal makes a compelling argument for why this provision must have been intended to apply retrospectively, as to do otherwise would create a great unfairness to existing dealers who were restricted by exclusivity or purity clauses, as compared to new entrants into the dealer markets who would have no such encumbrances.

[118] That is not a full answer to this question, however, as the Regulation deals with termination and renewal of dealer agreements, not dealer purity clauses. It does not necessarily follow that because some provisions in the Act are retrospective, the same interpretation must be given to the Regulation. Nevertheless, there is a link between these amendments in the Act and the enactment of Regulation 123. They were part of the same set of reforms meant to protect dealers who were subject to what were perceived to be unfairly one-sided agreements. Although not strictly speaking necessary for its analysis given its finding of clear and unambiguous language, the Tribunal heard evidence on this point and considered the history and intent of the amendments, through other sources such as *Hansard*. The Tribunal held that the reforms were also directed towards termination of dealer agreements by distributors and that unfairness in this process was part of the “mischief” that the amendments were meant to address. The Tribunal also found that all of the reforms were originally intended to be part of the same legislative amendments, but that it was then decided to deal with the contractual terms for terminations and renewals in a regulation instead, which would be both quicker and more flexible than putting such provisions in the Act itself. The Tribunal’s factual findings in this regard are squarely within its area of expertise and are entitled to considerable deference.

¹⁸ *Riocan*, at paras. 13-16

[119] Given the motivation of the Legislature to level the playing field and remedy unfairness to dealers, it would not make sense to provide such relief only to dealers who were entering into new agreements with distributors, to the obvious detriment of dealers who were already parties to agreements and therefore labouring under the very unfairness the Legislature was seeking to redress.

[120] As I have already mentioned, the 2005 amendments to s. 3 of the Act included the addition of s. 3(5) to prohibit exclusivity clauses in dealer agreements. At the same time, changes were made to s. 3(4) of the Act. Previously, s. 3(4) merely stipulated that a dealership agreement “shall be in writing and shall contain the information that is prescribed. As a result of the amendment, dealership agreements were also required to contain the prescribed rights and obligations of the parties. A similar amendment was made to the delegating power in s. 35(c). It is useful to look at the amendments of these two provisions side by side. They are set out below with the 2005 amendments underlined for emphasis.

3. (4) A dealership agreement shall be in writing, shall contain the information that is prescribed and shall contain the legal rights and obligations that are prescribed for the parties to the agreement, subject to subsection (5).

35. The Minister may make regulations,

(c) prescribing information to be included in a dealership agreement and setting out legal rights and obligations for parties to the agreement, subject to subsection 3(5);

[121] CNH submits that the language of s. 3(4), and in particular the words “shall be in writing,” indicates that the section is to be given a prospective, rather than a retrospective interpretation. CNH relies on the Supreme Court of Canada’s 1920 decision in *Upper Canada v. Smith* in which the Court considered similar language in the amendments to the *Statute of Frauds*. The amendment in that case stipulated that agreements to pay commissions for the sale of lands “shall be in writing.” The Supreme Court held that in the absence of express words or necessary implication, the statute was not to be given retrospective effect and that the amendments therefore did not operate to prevent recovery of commissions based on oral agreements that preceded the amendments. CNH made this same argument before the Tribunal and the Tribunal stated that “it did not take the direction of the Supreme Court in the *Smith* case as suggesting every time the words ‘shall be in writing’ are used by a legislature or parliament that means a prospective rather than retrospective application of the legislation.” I agree. The Supreme Court did not hold that the words “shall be in writing” created a prospective effect. It held that there is a presumption against retrospectivity in the absence of clear language or a

necessary implication to the contrary. Therefore, the *Smith* case does not assist in the interpretation of the subject Regulation or Act here, except with respect to these basic principles.

[122] Chesterman relies on the 1915 decision of the Alberta Supreme Court in *Chapin v. Matthews*.¹⁹ Interestingly, the *Chapin v. Matthews* case involves a provision of Alberta's *Farm Machinery Act* which stipulated that no condition in "any agreement" shall be binding upon a purchaser of farm machinery if a judge determines it to be unreasonable. The plaintiff had entered into such an agreement and purchased a farm tractor before the enactment of the legislation, which tractor broke down after the legislation came into effect. The issue was whether the trial judge could apply the legislation and disregard a condition in the agreement he considered to be "unreasonable." On appeal, the Alberta Supreme Court noted that the Legislature had found that agreements for the sale of farm machinery often contained conditions that were "plainly unfair and unjust", which was the reason for the enacting the legislation. The Court held (at para. 19); "When the legislature was confronted with the facts that unreasonable conditions were being continually inserted in such agreements, it seems to me quite contrary to reason to suppose that it intended to allow all unreasonable conditions created in the past to continue to operate, as they certainly did, with unfairness and injustice, and to withhold from the Court the new power of disregarding them while not extending the power and jurisdiction only to agreements thereafter entered into." Although this decision is not recent, it continues, in my view, to have resonance.

[123] Likewise, the decision of the Supreme Court of Canada in *Acme (Village) School District No. 2296 v. Steele Smith*,²⁰ although decided in 1933, continues to be relevant and analogous to the case at hand. In that case, the *Alberta School Act* was amended in 1931 to provide that except in the month of June, no notice terminating a teacher's engagement could be given without the prior approval of a school inspector. In July 1931, the School Board gave notice of termination to Mr. Steele, relying on a clause in the employment contract signed in 1929, which provided that the agreement would continue in force from year to year unless terminated on 30 days' notice. Thus, the contract was prior to the amendment and provided for automatic one-year renewals subject to 30 days' notice of termination. The question was whether the legislative amendment, which was subsequent to the contract being formed but prior to the termination, had any application to the termination – precisely the issue in this case. The Supreme Court of Canada held that the amendment applied, relying upon the intention of the legislation. Crockett J., writing for the majority, held:

To confine the words to future contracts only would be, if not entirely to defeat the remedial object of the enactment, to at least render it ineffective for years to come in the great majority of schools of the province. There would, of course, be

¹⁹ *Chapin v. Matthews* (1915), 24 D.L.R. 457 (Alta.S.C.)

²⁰ *Acme (Village) School District No. 2296 v. Steele Smith*, [1933] S.C.R. 47

no contracts to which it would apply in any way at the time the Act was passed or at the time it came into force, and after that it would only be as existing contract were cancelled and new ones substituted here and there that the legislation could begin to speak.

[124] Although the Supreme Court of Canada's landmark decision in *Rizzo Shoes* did not involve the retrospective application of a statute, it nevertheless turned on a principle of direct application in this case – the interpretation of legislation so as to prevent inequality of its application and promote its underlying remedial purpose. At issue were the provisions of the Ontario *Employment Standards Act*, which stated that “no employer shall terminate the employment of an employee” without giving mandated periods of notice depending on length of service. The question that arose was whether these provisions applied if the employment was terminated by a creditor petitioning the employer into bankruptcy. The Ontario Court of Appeal had held that because the termination was caused by the act of bankruptcy, not by the employer, the statutory provisions did not apply and employees terminated at that point did not have a claim in the bankruptcy for termination pay and severance pay. The Supreme Court of Canada disagreed, restoring the decision of the trial judge, Farley J., that the employees affected were entitled to make those claims in the bankruptcy.

[125] Farley J. had ruled that denying the claims of employees terminated as a result of the bankruptcy would lead to the arbitrary and unfair result that an employee whose employment was terminated just prior to the bankruptcy would be entitled to termination and severance pay, whereas an employee whose termination resulted from the bankruptcy itself would not. The Supreme Court of Canada agreed, pointing out (at para. 28) that the absurdity of this consequence was particularly evident in a unionized workforce where seniority determines the order of lay-offs, such that it would be the most senior personnel who had been employed the longest and entitled to the largest amounts of severance pay who would be most likely denied any payment at all. The Supreme Court held (at para. 25) that this would be contrary to the “objects of the termination and severance pay provisions themselves [which] are broadly premised upon the need to protect employees.” The Court held, further, (at para. 27) that this would be contrary to the principle of statutory interpretation that the Legislature does not intend to produce absurd consequences, defining as absurd interpretations that would be “extremely unreasonable or inequitable” or “incompatible . . . with the object of the legislative enactment.”

[126] On the argument advanced by CNH, the provisions mandated to be part of dealer agreements would only apply to agreements entered into after the Regulation came into effect on April 2005. This would create inequality between those dealers whose contracts were already in existence at the time of the enactment, and those dealers who enter into agreements after April 2005. It is hard to understand how the Legislature could have meant to benefit only dealers in the future and to oblige existing dealers to continue under what the Legislature considered to be the very unfair provisions the Regulation was meant to address. In my opinion, those existing dealers are in the same position as senior personnel at *Rizzo Shoes*, in circumstances most deserving of relief, but cut out of legislative provisions meant to remedy the very mischief they are now facing. The result of not applying the Regulation to existing contracts would largely

defeat the intent of the Regulation, and require it to be implemented bit by bit as new dealers enter the market. That is not consistent with the remedial intent of the Regulation.

[127] Accordingly, I agree with the Tribunal that the Regulation applies to the Agreement between CNH and Chesterman, although not for the primary grounds advanced by the Tribunal. On a fair reading of the Tribunal's Reasons, I consider the "necessary implication" rationale for giving retrospective effect to the legislation to be an alternative basis for the Tribunal's decision. Even if that is not the case, since this Court has the discretion to substitute its decision for that of the Tribunal on a question of law, I would hold that the Regulation must be given retrospective effect on the basis I have described above and that it applies to the agreement at issue in this case.

(ii) Incorporating Regulation 123 into the CNH/Chesterman Agreement

[128] Regulation 123 provides in s. 1(3) that a provision in a dealership agreement that "limits, varies or attempts to waive a term set out in sections 2 and 3 is void." Given that the Dealer Agreement in this case has quite different provisions with respect to renewals than are provided for in s. 3(3) of the Regulation, the first question is whether those provisions of the Dealer Agreement are simply void.

[129] The Tribunal rejected such an approach for reasons I consider valid. The Regulation provides that where a dealer wishes to renew an agreement, the dealer is required to give notice in writing to the distributor. Chesterman's long-standing Agreement with CNH provided that it renewed automatically unless one of the parties gave 90 days' notice to the contrary. If the renewal clause is declared void, then Chesterman would have failed to deliver written notice of its intention to renew and would lose the right to do so. The Tribunal recognized the unfairness in that situation, as well as the fact that this would be contrary to the expectation of both parties. Further, the Tribunal heard evidence that 50% of the dealers in Ontario have similar auto-renewal clauses and none of those surveyed had felt it necessary to deliver written notices of an intent to renew after the Regulation came into effect.

[130] In those circumstances, the Tribunal elected to revise the contract language so as to make it compatible with the Regulation. That is consistent with the intention of the Regulation, principles of contract interpretation, and the agreement between the parties which provided (in paragraph 31) that if performance was unlawful, it should be "modified to the extent necessary to comply with the law." It was open to the Tribunal to apply this legal principle as opposed to a rigid application of the statutory provision finding the contractual terms void.

[131] In my view, the modifications proposed by the Tribunal, as set out in paragraph 39 above (p. 25 of the Tribunal's Reasons) are appropriate, reasonable, and in keeping with both the spirit of the legislation and the terms of the Agreement itself.

[132] Under this scenario, given the auto-renew clause, the Agreement itself is deemed to be written notice by Chesterman of its intent to renew. The Agreement would then renew

automatically unless CNH gives written notice to Chesterman at least 45 days prior to the end of term (which would be mid-November) setting out its reasons for non-renewal. Chesterman would then have 15 days to address the underlying concerns. At the expiry of the 15 days, CNH may elect to not renew the contract, but its refusal to renew must not be unreasonable in the circumstances.

[133] For the most part, this is a mixed question of fact and law. There is a preliminary legal issue as to whether the Tribunal had the option of incorporating the Regulation into the Agreement by essentially re-writing the terms of the Agreement or whether it was obliged to find the auto-renew clause to be void. In my view, the Tribunal was correct in law when it held that this re-writing option existed. The Tribunal's decision to take that route, and manner in which it incorporated the Regulation into the Agreement, are questions of mixed fact and law, and not subject to appeal. Alternatively, if they are questions of law, I agree with the Tribunal's conclusion. I find no error.

(iii) Validity of Non-Renewal by CNH

[134] The Tribunal held that Chesterman was not required to deliver a written notice that it intended to renew on the grounds that the auto-renewal clause in the Dealer Agreement satisfied the written renewal request requirement in the Regulation. I find this to be correct in law regardless of whether it was conceded by counsel, regardless of whether that concession was clear, and regardless of whether counsel could or did withdraw such concession. In all of the circumstances, including the express terms of the Agreement that it should be modified only to the extent necessary to make it lawful, the automatic renewal of the contract should continue year after year. It follows that unless Chesterman expresses a contrary intention, it intends to renew, and that intention is embodied in the written Agreement between the parties.

[135] I also accept the Tribunal's reasoning that any requirement to deliver a written notice to renew was obviated in any event by the notice delivered by CNH on September 30, 2006, stating that it was not renewing the Agreement at the end of its term.

[136] The Tribunal then held that the September 30, 2006 notice from CNH was invalid because: (1) it purported to exercise a right to non-renewal under paragraph 22 of the Dealer Agreement that did not exist in its original format; (2) it did not comply with the Regulation by setting out the reasons for non-renewal; and (3) it did not give Chesterman an opportunity to address the concerns raised. In my view, all of these findings are errors of law and cannot stand. In this regard, I part company with the views of my two colleagues who would characterize these issues as questions of mixed fact and law.

Reliance on a contractual provision that "did not exist"

[137] With respect to the first ground, the Tribunal found that the September 30 letter from CNH could not be considered a written refusal to approve Chesterman's deemed notice to renew,

but rather an attempt to exercise a right under paragraph 22 of the Dealer Agreement “that no longer existed.” This is an error of law. The Tribunal had already determined that it would not treat paragraph 22 of the Agreement as void for non-compliance with the Regulation. Having made that determination, the Tribunal must act judicially and treat each of the parties to the Agreement in an even-handed manner.

[138] The Tribunal held that the Agreement would continue to automatically renew, even though the paragraph that contained the renewal clause was inconsistent with the Regulation. The Tribunal also held that the requirement under the Regulation for the dealer to deliver a written notice of intent to renew, thereby triggering the obligations of the distributor and time limits for performance under the Regulation, was satisfied by the mere existence of paragraph 22 without the dealer having to do anything further. In effect, the Tribunal deemed Chesterman to have delivered a written request to renew, by virtue of paragraph 22 of the Agreement. These are interpretations that are generous to the dealer and I have no difficulty with that.

[139] However, the Tribunal cannot find that paragraph 22 survives and operates to the benefit of the dealer with respect to automatic renewal and written notice of renewal, and at the same time find that that paragraph 22 no longer exists as far as the distributor is concerned. In fact, paragraph 22 does continue to exist, although now interpreted by the Tribunal in a manner consistent with the Regulation. The Tribunal itself ruled this to be the case. Both the Regulation and the rewritten paragraph 22 provide the distributor with a right to reject the dealer’s written request to renew. To hold otherwise, is an incorrect interpretation of the rights and obligations flowing to the parties under the Regulation.

[140] The Tribunal fails to address this very concern which was raised by the Divisional Court in its oral Reasons delivered on March 12, 2012 by Aston J., as follows (at p.4):

In addition, we are of the view that the tribunal should have the opportunity to consider issues not expressly addressed in its reasons. The tribunal’s understanding of the agreement between counsel may have obviated the tribunal’s need to address the appellant’s contentions on appeal that, first, the interplay between the new regulation and paragraph 22 of the dealer agreement cannot be inconsistent, that is to say void and unenforceable for the appellant [CNH], but valid and enforceable for the respondent [Chesterman]; and secondly, whether the regulation has retrospective or retroactive effect.

We are not directing the tribunal to consider these issues, but rather affording the tribunal an opportunity to do so if it chooses.

[141] As noted by Aston J. on the last occasion in the Divisional Court, this was an opportunity for the Tribunal to consider this issue, not a direction. Nevertheless, the issue raised is a serious one and the Tribunal’s failure to address it is quite problematic. The Tribunal has adopted an approach that is inconsistent, in which the Agreement means one thing for one party, and something quite different for the other party. For example, the Tribunal held that: the CNH letter

“sought to engage a non-renewal right that CNH no longer enjoyed” (p. 32); that the letter “communicated a non-renewal right that had become void” (p. 33); and (at p. 29) that the letter “was not written notice of refusing to approve [Chesterman’s] renewal request,” but rather, notice “that sought to exercise a right from paragraph 22 of the Dealer Agreement that no longer existed in its original format.” An impartial decision-maker cannot re-write an agreement to generously extend the rights of one of its provisions for the benefit of one party, and then declare that same paragraph void as against the other party. This is an irrational interpretation that cannot be accepted.

[142] Under the modified paragraph 22, Chesterman was deemed to have delivered its written notice to renew and the Agreement would then automatically renew unless: (1) CNH gave “written notice to the Dealer; (2) at least forty-five (45) days prior to the end of the . . . extension term; (3) setting out [CNH’s] non-renewal reasons.” These are the very words that the Tribunal itself wrote into the Agreement.²¹ In this case: (1) CNH gave written notice; (2) it gave that notice on September 30, 2006, substantially more than the 45-day notice period before December 31, 2006; and (3) in that letter, CNH stated, “The decision not to renew is based upon serious breaches of the [Dealer Agreement]”.

[143] It is beyond question that the September 30, 2006 notice from CNH falls squarely within the notice of non-renewal by the distributor under the Agreement as modified by the Tribunal, and within the meaning of Regulation 123, which requires the distributor to “notify the dealer in writing of the reasons for the refusal.” In my view, the Tribunal’s conclusion to the contrary is wrong in law. This is not a question of contractual interpretation of concern only to the parties themselves. The intention of the parties and the surrounding circumstances in which they entered into their original contract are irrelevant. This is a statutory term that was incorporated into the contract between the parties by operation of law, and one that is extraneous to whatever may have been in the minds of the parties when they first entered into their contract. The terms of the Regulation, and their interpretation, apply to every agreement between farm equipment dealers and distributors and/or manufacturers in Ontario. As such, it has a broad application that goes well beyond the interests of these two parties. Further, even if one considers the Agreement itself, the Tribunal’s interpretation in this case is not merely an interpretation of the contract between the parties, but rather of the contract as re-written by the Tribunal to incorporate the requirements of the Regulation. This was a standard form agreement imposed by the distributor, and the Tribunal itself found that 50% of the dealers in Ontario were operating under agreements with similar auto-renewal clauses. As such, even if regarded as a question of contractual interpretation, the issue is one of law rather than mixed fact and law because it establishes a legal principle affecting the rights of all dealers and distributors, rather than being of limited application to anyone beyond the parties. Applying the rationale expressed by the Supreme

²¹ Reasons of the Tribunal dated March 24, 2014, at p.25

Court of Canada in *Southam* and *Sattka*, this is a question of law, not one of mixed fact and law. To the extent there is a factual context, it is easily extricable from the general legal principle, within the Supreme Court's reasoning in *Housen*.

Reasons for non-renewal

[144] The second reason given by the Tribunal for finding CNH's notice to be invalid was that the notice failed to properly set out the reasons for the refusal to renew. In its notice, CNH stated that the reason for the non-renewal was repeated breaches of the Dealer Agreement. It set out, in full, the paragraph of the Dealer Agreement alleged to be breached, dealing with maintaining market share. It then set out a grid showing the performance of Chesterman with respect to four product categories and how it had failed to meet the contractual requirements for the years 2003, 2004, 2005 and the year to date (up to July of 2006). Finally, it stated that the Dealer Agreement would not be renewed because of "these long-standing and continued breaches."

[145] The Tribunal found the notice to be invalid because Mr. Mackow, who testified for CNH at the hearing, gave four "other" reasons for termination, being: poor high-power tractor sales performance; poor hay and forage equipment sales performance; declining total revenue; and a lack of trained salespeople. The Tribunal held that because not all of these reasons were in the September 30, 2006 notice, the notice was invalid. That is a conclusion that is so irrational and without foundation on the evidence as to amount to an error of law. Poor high-tractor sales and poor hay and forage equipment sales are quite obviously examples of the failure to meet the market share targets. Likewise, declining total revenue is an offshoot of declining sales and declining performance in meeting market share. The lack of trained salespeople might be an explanation for that decline, or not. It is irrelevant. This is not a situation in which the distributor gave one reason in writing, but where the reasons given were a subterfuge for the real reasons for termination. All of the reasons relate to the poor performance of Chesterman in selling CNH's products, which performance fell far below the targets it was required to meet in its Dealer Agreement. A conclusion that is made arbitrarily, in the absence of any absence whatsoever to support it, is an error of law.

[146] In any event, the Tribunal erred in law by interpreting the Agreement and/or the Regulations as requiring the distributor to state every single reason it could think of for not renewing the Agreement. That is not a requirement. The distributor is required to state its reasons. Those are the only reasons the dealer is required to address. If the distributor has other reasons, but fails to state them, the distributor will be without recourse if the dealer is able to address the concerns raised in the notice. It may also be the case that if the dealer states reasons that turn out to be wrong (which is not the case here), the dealer will not be able to rely on additional reasons not stated as grounds for not renewing (also not the case here). However, by requiring a distributor to set out 100% of its reasons for not continuing an agreement, in default of which its notice would be invalid, the Tribunal gave an interpretation to the Agreement and to the Regulation that neither can bear as a question of law. Further, it based its decision of invalidity on a wholly irrelevant factor, which also constitutes an error of law.

[147] Again, this is a question of law as to the content required under the Regulation for a refusal to renew. For the reasons I stated above, the ruling that a distributor's refusal will be invalid if the distributor fails to provide a comprehensive list of every single one of its reasons, is one that will apply to every distributor giving such a notice under the Regulations. It is a matter of general principle that will have broad application for all distributor/dealer agreements throughout Ontario. Based on the reasoning of the Supreme Court in *Southam* and *Sattka*, this is a question of law and therefore subject to review by this Court.

Opportunity to address concerns

[148] Finally, the Tribunal held that the CNH notice was invalid because it failed to give Chesterman an opportunity to address the concerns raised. The Regulation requires the distributor to give the dealer 45 days' notice of the reasons for refusal, following which the dealer is allowed 15 days to address the underlying concerns set out in the notice. Under paragraph 22 of the Agreement, as modified by the Tribunal to conform to the Regulation, CNH was required to give written notice at least 45 days prior to December 31, whereupon the Chesterman would have 15 days to address the concerns raised. The Tribunal accepted that it was not incumbent on CNH to specifically advise Chesterman of its right to address the concerns raised. I agree. The period of notice given by CNH on September 30, 2006 was twice as long as was required under the Agreement or the Regulation. Notwithstanding that, the evidence is quite clear, Chesterman did absolutely nothing to attempt to address the issue raised by CNH. Under the terms of the Agreement and the Regulation, in the absence of a response by the dealer, the distributor may refuse the renewal. That, in my opinion, is the end of the analysis.

[149] The Tribunal, however, held that any attempt by Chesterman to address the concerns would be "academic" because CNH had already decided that no cure would be effective. That finding is made without any evidence whatsoever to support it and is nothing more than speculation and conjecture. As such it is an error of law.

[150] It can likely be assumed that in any situation in which a distributor elects not to renew a relationship with a dealer because of performance concerns, it is because the distributor has formed the view that this is the appropriate course of action, rather than reviewing options to address the performance concerns. The fact that CNH may have held such a view prior to hearing any proposal for remedying the problems from Chesterman is irrelevant. After the concerns are set out, the onus is on Chesterman to address them in some manner, e.g. by disputing that the concerns are accurate; by seeking an extension of time to gradually build up the business; by committing to increased advertising or sales personnel; or by presenting a business plan to demonstrate how sales can be improved. If Chesterman had done something of this nature, the onus would be on CNH to demonstrate why refusing to renew was nevertheless reasonable. But Chesterman did nothing. The Tribunal erred in law by holding there was no requirement on Chesterman to abide by the terms of the Agreement and the Regulation based on the Tribunal's subjective, looking-into-the-future, and wholly speculative view that no matter what Chesterman proposed, CNH would refuse. No such conclusion or view was communicated by CNH to Chesterman. CNH merely delivered the notice and, hearing nothing from

Chesterman, communicated nothing further. That was its right under the Regulation and the Agreement. The Tribunal erred in law by not recognizing the rights of CNH under the scheme.

(iv) Reasonableness of Refusing to Renew

[151] In its initial decision dated March 11, 2011, the Tribunal held, “Debate over what [Chesterman] could or could not have achieved in the prescribed period is academic since CNH failed to comply with the *Regulation*.” Except for the fact that CNH did comply with the Regulation, that was a reasonable position to take. Moreover, the same reasoning applies to the analysis of whether CNH’s refusal to renew was reasonable. Debate over whether CNH should or should not have proceeded with the non-renewal in light of Chesterman’s response is academic since Chesterman failed to comply with the Regulation by addressing the concerns raised. Moreover, Chesterman did not present any evidence at the hearing as to how it would have been able to address any of the concerns raised by CNH. The Tribunal found this to be the case, and found that Chesterman had consistently failed to meet the sales targets required in the Agreement. However, notwithstanding Chesterman’s failure to address the concerns raised at any time after receipt of the notice, and notwithstanding Chesterman’s failure to present any evidence at the hearing as to how it could have addressed the concerns raised if it had attempted to so do, the Tribunal went on to consider whether CNH had acted reasonably.

[152] In its earlier March 11, 2011 decision, and repeated essentially verbatim in its March 24, 2014 decision, the Tribunal rejected arguments by Chesterman that the contract and/or the non-renewal by CNH were either unconscionable or in bad faith. The Tribunal noted that this was a standard-form Agreement, but that the parties had worked within it for two decades in a mutually beneficial relationship, such that it could not be said to be unconscionable. The Tribunal also rejected the arguments that CNH’s decision to terminate had been made in bad faith. Although Chesterman argued before the Tribunal that the data relied upon by CNH was “suspect” or “wrong,” the Tribunal held that there was no evidence to support the argument that these numbers were wrong. The Tribunal rejected Chesterman’s argument that CNH’s decision was based on some personal dislike or animosity between Dave Chesterman and CNH’s sales manager, Real Prefontaine, and held that there was no evidence that this friction “had anything to do with” the decision not to renew. That decision, it held, was made by Mr. Mackow who was completely unaware of the friction between the two. The Tribunal was satisfied that CNH’s decision was made based on market data and Chesterman’s poor performance measured against that data, as provided for in the Agreement. The Tribunal held (at p. 14-15):

The Tribunal does not find that CNH’s reliance on market data from AEM [Association of Equipment Manufacturers] to be in “bad faith” as a basis for its decision not to renew the Dealer Agreement. The parties governed their dealings for almost two decades relying on the AEM data. While questions about the reliability of the data have been raised, the question for the Tribunal is not whether CNH’s conclusion that [Chesterman] was performing poorly can be

objectively proven correct today. The question is whether when that decision was taken did CNH have a good faith belief that [Chesterman] was performing poorly. The evidence from Mackow was he saw [Chesterman's] performance had been declining when he became Market Representation Manager in the spring of 2006. He testified that when the July 2006 results confirmed his view of the decline, the non-renewal decision was finalized and implemented. As previously noted, [Chesterman] did not challenge the AEM data about its own sales in units or revenue. That data reflected that for the years 2003, 2004, 2005 and the first six months of 2006, [Chesterman's] tractor sales, in units, had declined from 16 to 10 to 9 to 5. During that same period for hay and forage equipment, its unit sales had declined from 8 to 4 to 4 to 1. Chesterman's sales revenue of CNH products over that same period declined from \$1,595 million to \$1,317 million, to \$901,000 to \$469,000.

The Tribunal cannot find any "bad faith" in these circumstances.

[153] I see no error of law in those findings. The conclusion that there was no bad faith and no unconscionability is amply grounded in the factual findings of the Tribunal.

[154] Nevertheless, in its 2011 decision, the Tribunal found, without much elaboration, that CNH's decision not to renew was unreasonable. One of the questions referred back to the Tribunal by the Divisional Court in its October 6, 2011 Order was whether reasonableness, unconscionability and bad faith were mutually exclusive, or whether a finding of one, leads to a finding of the others. The Tribunal addressed this issue at pp. 31-32 of its Reasons, holding that "but for" the Regulation, CNH's non-renewal was not unreasonable because it was authorized under the terms of the Dealer Agreement, and in particular paragraph 22 thereof. However, the Tribunal reasoned that the Regulation brought the concept of reasonableness back into play because it took away CNH's absolute right to not renew and stipulated that CNH could not withhold its consent to a renewal "unreasonably." The Tribunal held (at p. 32) that when the CNH decision to withhold renewal approval was examined, the Tribunal must ask whether the decision was "reasonable," and that "this statutory standard of reasonableness incorporated the common law reasonableness standard."

[155] The Tribunal found that it was therefore not inconsistent to "make findings of no unconscionability and no bad faith but still make a finding of unreasonableness." I agree that is a correct statement of the applicable legal principles.

[156] Unfortunately, when the Tribunal turned to consider the issue of whether CNH acted unreasonably in refusing to renew, it based its decision largely on its view that the September 30, 2006 notice was invalid because paragraph 22 of the Agreement was void, that the letter did not set out all of the reasons for non-renewal and that Chesterman was not given an opportunity to address CNH's concerns. The Tribunal concluded (at p. 34):

Therefore, if the Tribunal notionally considered the September 30th, 2006 letter as CNH's required written response under the *Regulation*, we find that CNH failed to fully explain its non-renewal decision, and it also failed to give [Chesterman] an opportunity to address its concerns. In this hypothetical and the circumstances, we would therefore find CNH to have unreasonably withheld renewal approval and to have breached the *Regulation*.

[157] I agree that if there had been a failure by CNH to comply with the terms of the Regulation in its notice refusing renewal, that would render its decision unreasonable and it would be in breach of the Regulation, and in breach of the Dealer Agreement as those terms are incorporated into the Agreement. However, CNH was in full compliance with the Regulation; it was Chesterman that did not comply with the Regulation. In those circumstances, and in the absence of any finding that CNH did not have valid grounds to refuse to renew, there is no basis for concluding, in law, that CNH acted unreasonably.

[158] By basing its conclusion on irrelevant factors, and incorrect legal principles, the Tribunal erred in law. Further, as previously stated, these are principles of general application because these were statutory terms, not contractual terms freely negotiated by the parties. These are principles of broad application and are therefore more in the nature of questions of law.

[159] I do note, however, that the Tribunal listed a number of factors that it considered could be part of a reasonableness analysis. A careful reading of the decision shows that the Tribunal did not actually take any of those factors into account in its analysis of reasonableness. I consider that to be legally correct in light of the lack of any response by Chesterman. However, if Chesterman had made any kind of proposal to address the concerns of CNH, and if CNH had then refused to renew, it would have been relevant to look at the reasonableness of CNH's refusal in light of Chesterman's proposal, along with other factors including a number of factors listed (but not applied) by the Tribunal at pp. 32-33, notably:

- The parties had a 19-year business relationship.
- Chesterman's premises were subject to inspections and grading by CNH.
- Chesterman's business performance was tracked and graded by CNH.
- Chesterman received CNH's President's Prestige Award commending Chesterman's business premises standards for 2004-05 and 2005-06.
- Between 2003-2006, CNH sales and services accounted for the majority of Chesterman's business.
- CNH did not issue Chesterman any written warnings its dealership status was in jeopardy.

[160] Had the circumstances been appropriate to conduct such an analysis of reasonableness, and if the Tribunal had considered relevant factors such as these, I would agree that this was a question of mixed law and fact. However, the threshold question (the failure of Chesterman to provide any response to CNH's valid stated grounds for refusing to renew) is an extricable question of law. Further, the failure to consider relevant factors and taking into account irrelevant factors are both errors of law. I therefore do not agree that this finding by the Tribunal is a question of mixed fact and law. It is a legal error and subject to appeal before this Court.

(v) Breach of Contract and Damages

[161] The Tribunal committed fundamental legal errors in reaching its conclusion that CNH breached the contract. For the reasons I have stated above, CNH did not breach the contract or the Regulations. I would, therefore, have considered it was not liable for any damages. From my perspective, that would have been sufficient to dispose of this appeal. However, my colleagues disagree that these are errors of law subject to review by this Court and are of the view that the Tribunal's conclusion of breach of contract must stand. I will therefore review the various other grounds of appeal raised by the parties.

Damages for Obsolete Items

[162] The Tribunal awarded damages of approximately \$80,000 for the various manuals and specialized tools and equipment which Chesterman was required to purchase over the years and which are now useless to Chesterman. CNH submits that the Tribunal erred in law by awarding damages for these items. I agree.

[163] The Tribunal correctly held (at p. 40) that, unlike farm implements and parts, the Act does not require the distributor to repurchase tools and manuals. The Tribunal, however, went on to hold that it was "reasonably foreseeable" that once Chesterman ceased to be a CNH dealer, the special tools and manuals it had purchased from CNH and which were unique and specific to CNH products, would be obsolete. The Tribunal reasoned further that it would therefore be "reasonably foreseeable" to CNH that Chesterman would suffer a loss in respect of those tools and manuals. The Tribunal therefore held that Chesterman was entitled to damages in respect of the obsolete assets and accepted Chesterman's evidence as to their value, based on estimates derived from 2006 pricing or internet information.

[164] The Tribunal erred in law by applying concepts of "reasonable foreseeability" rather than looking to the terms of the Dealer Agreement itself. As such, it failed to consider a relevant factor (the terms of the Agreement) and took into account an irrelevant factor (foreseeability). Both, as confirmed in *Sattva*, are errors of law.

[165] Section 25 of the Dealer Agreement specifies the property that CNH will repurchase upon expiration or termination of the Agreement. The Agreement specifies that CNH will only repurchase product, which is a defined term under the Agreement, and which does not include

tools and manuals. Indeed, such items are specifically excluded under paragraph 25 of the Agreement.

[166] Further, there was expert evidence before the Tribunal that the cost of manuals and tools were expensed by Chesterman as a cost of doing business and not recorded as an asset in its books. Accordingly, those expenses would have been written off against income. In awarding damages for these items in addition to lost profit, the Tribunal improperly permitted double-recovery. This also, is an error in principle on a question of law.

[167] In my view, there was no basis in law for awarding any damages for these items. I would have set aside the award for obsolete items.

Cross-Appeal: Loss of Profits

[168] Chesterman cross-appealed the Tribunal's award with respect to loss of profits. Chesterman submits that the Tribunal erred in basing its loss of profits award on the theory that the contract could be terminated upon reasonable notice, which it found in the circumstances to be two years. There is no error of law in that finding. Chesterman was not entitled to an award of damages based on the theory that this contract would continue into perpetuity. That is particularly the case given that the Tribunal found that the non-renewal was based on a breach of a term of the contract, the particulars of which were not refuted.

[169] The Tribunal made findings of fact as to the appropriate model for damages in the circumstances and on the expert evidence it found was best supported by the evidence. The Tribunal made express findings of fact as to the unreliability of the basis for Chesterman's expert's calculation of the losses.

[170] The quantum of damages is a question of fact, not reviewable by this Court. There is no basis for this Court to intervene.

Interest

[171] The Tribunal awarded interest on the damages, calculated pursuant to the *Courts of Justice Act*. CNH argues that the Tribunal has no jurisdiction to award interest.

[172] The Tribunal reasoned that the disputes it is called upon to adjudicate would otherwise be determined in the courts and the parties should be entitled to recover from the Tribunal what they would obtain in the courts, which would include an award of interest on any damages.

[173] I agree. Section 33 of the Act stipulates that the rights, duties and obligations under the Act "are in addition to the rights, duties and remedies under any other Act and the common law." The parties before the Tribunal in this case were engaged in a dispute as to the application of the Act and Regulations. That dispute was referred to the Tribunal which is empowered by s.5(6) to "decide the issue that is before it for a hearing." If one of the parties to this dispute would have been entitled to damages at common law, the tribunal is empowered to award those damages. At

common law, and before the courts under the *Courts of Justice* Act, the parties would be entitled to interest on any award of damages, in the discretion of the Court. In those circumstances, I see no jurisdictional obstacle to the Tribunal awarding interest on any damage award it might make. That would simply be one aspect of compensating a party for what it has lost; a matter that is squarely within the Tribunal's jurisdiction.

[174] Although the Court of Appeal's decision in *Billes v. Parkin Architects Planners*²² dealt with the power of arbitrators to award interest, the same general principles apply. The Court of Appeal held that although no specific clause empowered the arbitrator to award interest, such jurisdiction flowed from the power to award damages. The Court endorsed the following statement from the Alberta Court of Appeal:

If the matter is at large and to be resolved as a question of policy, I would strongly favour permitting arbitrators to award interest. I can think of no valid reason why arbitrators deciding a claim should be powerless to grant a remedy that a judge hearing the same claim would be bound to grant. The claimant before the arbitrator would be severely prejudiced in this day of high interest rates. I can think of no good reason why the arbitrator should not be able to give him a complete remedy. An award in a commercial case that does not take into account the cost of money will not do justice between the parties because it will have disregarded a major cost of most enterprises.

[175] In my view, the same reasoning applies to the Tribunal. A specific statutory grant of the power to award interest is not required in order to vest jurisdiction in the Tribunal to award interest on damages awards designed to compensate a party for a loss.

[176] CNH also objected to the rate of interest applied by the Tribunal, which was 6% throughout notwithstanding considerable fluctuations in the *Courts of Justice* rate since 2006. If the Tribunal is attempting to track what a court would award in interest, it may wish to consider that courts will typically take the average interest rate in those circumstances. However, the Tribunal's choice of interest rate is not an error of law; it is an exercise of discretion on a question of fact. I would not intervene.

I. ANALYSIS: COSTS DECISION

²² *Billes v. Parkin Architects Planners* (1983), 40 O.R. (2d) 525 (C.A.), citing *Westcoast Transmission Co. Ltd. v. Majestic Wiley Contractors Ltd.* (1982), 31 B.C.L.R. 174 (Bouck J.), affirmed June 2, 1982 (unreported [now reported, 139 D.L.R. (3d) 97, [1982] 6 W.W.R. 149, 38 B.C.L.R. 310]) at W.W.R. 154.

[177] The Tribunal invited the parties to provide written submissions as to costs. Chesterman sought costs in the amount of \$639,340. CNH opposed any costs award, but submitted that if costs were to be awarded, the Tribunal should adopt an approach similar to that applied by an Assessment Officer under the *Rules of Civil Procedure*.

[178] CNH submits that the Tribunal erred in law and exceeded its jurisdiction in awarding costs in this case. I agree.

[179] The Tribunal correctly held that s. 17.1 of the *Statutory Powers Procedure Act (SPPA)*²³ sets out two statutory prerequisites to the Tribunal's jurisdiction to award costs. That section provides:

Costs

17.1 (1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding.

Exception

(2) A tribunal shall not make an order to pay costs under this section unless,

(a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and

(b) the tribunal has made rules under subsection (4).

Amount of costs

(3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4).

Rules

(4) A tribunal may make rules with respect to,

(a) the ordering of costs;

²³ *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22

(b) the circumstances in which costs may be ordered; and

(c) the amount of costs or the manner in which the amount of costs is to be determined.

[180] One precondition²⁴ is that before a Tribunal can order costs, it must have enacted Rules with respect to costs, and it must award those costs only in accordance with those Rules. The Tribunal does have Rules governing awards of costs in proceedings before it, thus satisfying that precondition.

[181] The second precondition²⁵ is that the conduct of the party has been “unreasonable, frivolous or vexatious or a party has acted in bad faith.”

[182] This same language is tracked in the Tribunal’s own Rules. Rule 28.01 provides:

Where a party believes that another party has acted clearly unreasonably, frivolously, vexatiously or in bad faith considering all of the circumstances, it may ask for an award of costs.

[183] Under the heading “Circumstances in which Costs Order May be Made”, Rule 28.04 provides as follows:

28.04 Clearly unreasonable, frivolous, vexatious or bad faith conduct can include, but is not limited, to:

- a. Failing to attend a hearing event or to sending a representative when properly given notice, without contacting the Tribunal;
- b. Failing to give notice or adequate explanation or lack of co-operation during pre-hearing proceedings, changing a position without notice, or introducing an issue or evidence not previously mentioned;
- c. Failing to act in a timely manner or to comply with a procedural order or direction of the Tribunal where the result was undue prejudice or delay;
- d. Conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;
- e. Failing to present evidence, continuing to deal with issues, asking questions or taking steps that the Tribunal has determined to be improper;
- f. Failing to make reasonable efforts to combine submissions with parties of similar interest;
- g. Acting disrespectfully or maligning the character of another party; and

²⁴ *SPPA*, ss. 17.1(2)(b) and 4

²⁵ *SPPA*, s. 17.1(2)(a)

- h. Knowingly presenting false or misleading evidence. The Tribunal will consider the seriousness of the misconduct. If a party requesting costs has also conducted itself in an unreasonable manner, the Tribunal may decide to reduce the amount awarded. (The Tribunal will not consider factors arising out of a mediation or settlement conference except where, for example, it finds that a request for change to a settlement is unreasonable.)

[184] Ordinarily, courts will only impose extreme costs sanctions based on the conduct of the party in the litigation. A similar interpretation applies to the type of conduct that will attract a costs award under s. 17.1 of the *SPPA* and, indeed, under the Tribunal's own Rules. It is apparent from the list of circumstances under Rule 28.04 that the behavior contemplated is conduct within the hearing itself, not conduct in relation to the initial dispute between the parties. This is reinforced by the Tribunal's own commentary as to its Rules, which is published on its website, as follows:

A cost order may be made if a party requests it, if one party has in the Tribunal's opinion acted inappropriately, as in Rule 28.04. Such orders and the amount awarded are to discourage conduct that wastes a great deal of the Tribunal's and parties' time as well as other resources. Note that for matters under the Drainage Act, costs are awarded only as provided in that Act.

An order for costs is very rare. Recovery of costs is not standard as in court proceedings. It is only where the Tribunal finds that a party wrongly brought the appeal or participated unacceptably in preparation or hearing events, that an award of cost will be made.

[185] Although the website commentary does not have binding effect in the same manner as the Rules themselves, the commentary is fully consistent with the Rules and with s. 17.1(2)(a) of the *SPPA*. Decisions of the Agricultural, Food, and Rural Affairs Appeal Tribunal in other cases have been to the same effect.²⁶

[186] The Tribunal in this case did not adhere to the restrictions set out in s. 17.1(2)(a) of the *SPPA*, or its own Rules, or its own published commentary on those Rules, or its own case authority. In awarding costs against CNH, the Tribunal relied upon its previous finding that CNH's conduct in ending the Dealer Agreement with Chesterman was "unreasonable", which it said satisfied the second criteria. That is a legal error. Conduct that relates to the subject matter of the proceeding (*i.e.* breach of contract) is not a basis for an award of costs under the Tribunal's Rules or s. 17.1 of the *SPPA*.

²⁶ *LaGantoise Inc. v. Dairy Farmers of Ontario*, 2012 ONAFRAAT 21, p.2; *HSBB Drain (RE)*, 2010 ONAFRATT 26; *Short and No.2A Drain (RE)*, 2011 ONAFRAAT 37; *OQRO v. DFO*, 2009 ONAFRAAT 27

[187] The Tribunal also relied on s. 33 of the Act which preserves common law rights and remedies as authority to apply the “common law principle of costs following the event.” There is no such principle at common law. Courts order costs under statutory power to do so and have developed jurisprudence to the effect that the successful party will normally have its costs. That does not in any way confer power on a Tribunal to do the same. The Tribunal, as a creature of statute, has only the jurisdiction specifically conferred upon it. Its jurisdiction to award costs is restricted by statute and by its own Rules.

[188] The Tribunal pointed to the fact that Chesterman had claimed costs in its pleadings before the tribunal and noted that if the parties had litigated this matter in the courts they would have expected to pay costs. The Tribunal therefore held that it was “unreasonable” for CNH to expect that CNH would be entitled to recover its costs before the Tribunal. First of all, the reasonable expectation of the parties does not confer jurisdiction where there is none. Secondly, what would be in the reasonable expectation of the parties is that the Tribunal would adhere to its own Rules, particularly given its published commentary on its own website, along with those Rules, explaining to the public that “an order for costs is very rare” and that “recovery of costs is not standard as in court proceedings.”

[189] The Tribunal pointed to only two factors that could be seen to be related to the conduct of the proceedings by CNH, those being CNH’s change in position with respect to whether it conceded that the auto-renewal clause could be treated as the written notice of intent to renew required by Regulation 123, and the argument about retrospective or retroactive effect. The latter point is a legal issue that arises from the legislation and the factual record. Even if not raised by the parties it should have been addressed by the Tribunal, and was addressed by the Divisional Court. Indeed, in the appeal before this Panel, we required the parties to file further facts on this issue. Regardless of the change in position or the retrospective/retroactive issue, the Divisional Court in 2011 would have returned the matter to the Tribunal for further consideration on how Regulation 123 interacted with the Dealer Agreement. The cost of the second hearing cannot be laid entirely at the feet of CNH.

[190] The Tribunal was clearly frustrated by the degree to which a proceeding that was meant to be inexpensive and expeditious became as complex as commercial litigation in the courts. The Tribunal pointed to the fact that there was a claim for damages of \$1 million, hundreds of documents, multiple expert witnesses, multiple lawyers, and a hearing that involved 17 hearing days spread over three years. All of that is true, and obviously makes it a rare case for the Tribunal. However, the fact that it is a rare case does not mean that costs are therefore warranted against CNH. CNH did not advance a \$1 million damages claim. Chesterman did that, and only recovered a small fraction of that amount. Chesterman had five lawyers working on the case and was financed throughout by its association, CEEDA, as this was regarded as a test case. Again, that cannot be laid at the feet of CNH.

[191] The Tribunal considered whether this was the kind of case in which substantial indemnity costs would have been warranted against CNH if this had been a court proceeding, and held that only partial indemnity costs would have been appropriate. For those very same reasons, the

Tribunal ought to have found that there was no conduct of a nature to attract a costs award at all, or if there was one, it would only have been related to any additional costs resulting from CNH's change in position on the effect of the auto-renewal, which was minimal.

[192] Finally, in my view, proportionality is always a relevant factor in determining costs. A failure to take into account is an error of law.

[193] Given these errors of law, the costs award cannot stand.

MOLLOY J.

Released: March 7, 2016

CITATION: *Chesterman Farm Equipment Inc. v. CNH Canada Ltd.*, 2016 ONSC 698
DIVISIONAL COURT FILE NO.: 14-0033-00
DATE: 20160307

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

MOLLOY, HACKLAND and HAMBLY JJ.

BETWEEN:

CHESTERMAN FARM EQUIPMENT INC.

Applicant /Respondent on Appeal)

– and –

CNH CANADA LTD.

Respondent/Appellant

REASONS FOR JUDGMENT

Hambly and Hackland JJ.,
Molloy J. (dissenting in part)
Divisional Court

Released: March 7, 2016

TAB 8

Gustavson Drilling (1964) Limited*Appellant;*

and

The Minister of National Revenue*Respondent.*

1974: November 1, 5; 1975: December 4.

Present: Martland, Judson, Pigeon, Dickson and de Grandpré JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation—Income tax—Oil companies—Deductions—Drilling and exploration expenses—Transferability of right to deduct to successor corporation—Income Tax Act, R.S.C. 1952, c. 148, as amended, s. 83A(8a), now 1970-71-72, (Can.) c. 63, s. 66(6).

Since 1949 the exploration for petroleum and natural gas has been encouraged by the provision in the *Income Tax Act*, R.S.C. 1952, c. 148 as amended 1970-71-72, c. 63, that oil companies could deduct drilling and exploration expenses from income earned in subsequent years. In 1956 the right was extended to successor corporations by legislation which provided that an oil company which acquired all or substantially all of the property of another oil company could deduct drilling and exploration expenses incurred by the predecessor corporation. The acquisition had however to be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor on the winding up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed. The appellant oil company incurred drilling and exploration expenses in excess of its income prior to 1960 when its parent company acquired substantially all of its property in consideration of the cancellation of a debt due. Entitlement to claim the undeducted drilling and exploration expenses did not accrue to the parent company as the transaction was not carried out as required by the 1956 Act. The appellant remained inactive until 1964 when its shares were acquired by another corporation following the liquidation of its previous parent company. After a change of name it recommenced business with newly acquired assets, none of which had been used or owned by it prior to June 1964. It sought to deduct the accumulated drilling and exploration expenses for the ensuing taxation years. The Minister re-assessed and disallowed the deductions. The appellant successfully appealed to the

Gustavson Drilling (1964) Limited*Appelante;*

et

Le ministre du Revenu national *Intimé.*1974: le 1^{er} et 5 novembre; 1975: le 4 décembre.

Présents: Les juges Martland, Judson, Pigeon, Dickson et de Grandpré.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Revenu—Impôt sur le revenu—Compagnies pétrolières—Dédutions—Dépenses d'exploration et de forage—Transmissibilité du droit de déduire ces dépenses à la compagnie remplaçante—Loi de l'impôt sur le revenu, S.R.C. 1952, c. 148, avec modifications, art. 83A(8a), maintenant 1970-71-72 (Can.), c. 63, art. 66(6).

Depuis 1949, la *Loi de l'impôt sur le revenu*, S.R.C. 1952, c. 148, modifié par 1970-71-72, c. 63, encourage la recherche du pétrole et du gaz naturel en autorisant les compagnies pétrolières à déduire les dépenses de forage et d'exploration du revenu des années subséquentes. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi prévoyant qu'une compagnie pétrolière qui acquerrait tous ou presque tous les biens d'une autre compagnie pétrolière pouvait déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Cependant, il fallait que l'acquisition résulte a) d'un échange d'actions du capital social de la remplaçante, ou b) de la distribution des biens à la compagnie remplaçante lors de la liquidation de la compagnie remplacée, postérieurement à l'achat des actions de la compagnie remplacée, par la compagnie remplaçante, moyennant les actions de cette dernière. En 1962, on a retiré ces conditions. La compagnie pétrolière appelante a engagé des dépenses de forage et d'exploration d'un montant supérieur à son revenu avant 1960, année durant laquelle la compagnie-mère a acquis presque tous ses biens en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. La compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que l'opération ne s'est pas faite selon les conditions énoncées dans la Loi de 1956. L'appelante est restée inactive jusqu'en 1964, date à laquelle une autre compagnie a acheté, à la suite de la liquidation de la compagnie-mère, l'ensemble de ses actions. Après un changement de nom, l'appelante a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été pos-

Tax Appeal Board but on a Special Case stated by consent, the Minister was successful in the Federal Court before Cattanach J. and on appeal.

Held (Pigeon and de Grandpré JJ. dissenting): The appeal should be dismissed.

Per Martland, Judson and Dickson JJ.: The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. On a literal construction of the legislation the appellant was in the category of a predecessor company and had thereby lost the right to deduct. As the language of the statute was unambiguous and clear, there was no need to have recourse to rules of construction to establish legislative intent. It could not be said that the 1962 legislation was retrospective or that any vested right acquired by the appellant by the repealed paragraphs was affected by their repeal.

Per Pigeon and de Grandpré JJ. *dissenting*: The legislative change effected in 1962 was not an alteration in the scheme of deductions for drilling and exploration expenses. It was a modification in the transferability of the entitlement to those deductions. While the rule against retrospective operation of statutes is no more than a rule of construction which operates more or less strongly according to the nature of the enactment, it operates nowhere more strongly than when any other construction would result in altering the effect of contracts previously entered into. The effect of the 1962 change was to facilitate the transfer of the right to deductions not to alter the result of past contracts so as to effect a forfeiture of the rights of oil companies that had previously transferred their properties under conditions that did not involve the transfer of the valuable right of entitlement to deduct to the transferee.

[*Assessment Commissioner of The Corporation of the Village of Stouffville v. Mennonite Home Association*, [1973] S.C.R. 189; *Acme Village School District v. Steele-Smith*, [1933] S.C.R. 47; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] S.C.R. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961] C.T.C. 490 (Exch.); *Director of*

sédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu des années subséquentes, l'appelante a cherché à déduire les dépenses accumulées de forage et d'exploration. Le Ministre a établi une nouvelle cotisation et rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante mais, par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattanach dont le jugement a été confirmé en appel.

Arrêt (les juges Pigeon et de Grandpré étant dissidents): Le pourvoi doit être rejeté.

Les juges Martland, Judson et Dickson: Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Interprétée littéralement, la Loi attribue nettement à l'appelante la qualité de compagnie remplacée; cette dernière perd donc le droit aux déductions. En présence d'un texte de loi clair et précis il n'est pas nécessaire de recourir aux règles d'interprétation pour déterminer quelle était l'intention du législateur. On ne peut soutenir que la Loi de 1962 avait un effet rétroactif ou que l'abrogation des paragraphes en question a eu un effet sur quelque droit acquis par l'appelante sous leur régime.

Les juges Pigeon et de Grandpré, *dissidents*: La modification législative de 1962 n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration. Elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation et sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. L'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire.

[Arrêts mentionnés: *Assessment Commissioner of The Corporation of the Village of Stouffville c. Mennonite Home Association*, [1973] R.C.S. 189; *Acme Village School District c. Steele-Smith*, [1933] R.C.S. 47; *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board & A.G. (Alta.)*, [1933] R.C.S. 629; *Abbott v. Minister for Lands*, [1895] A.C. 425; *Western Leaseholds Ltd. v. Minister of National Revenue*, [1961]

Public Works v. Ho Po Sang, [1961] 2 All E.R. 721 (P.C.); *Hargal Oils Ltd. v. Minister of National Revenue*, [1965] S.C.R. 291 referred to].

APPEAL from a judgment of the Federal Court of Appeal¹ affirming the judgment of Cattanach J. allowing an appeal by way of special case stated from a decision of the Tax Appeal Board allowing an appeal by the appellant from an income tax assessment. Appeal dismissed, Pigeon and de Grandpré JJ. dissenting.

John McDonald, Q.C., F. R. Matthews, Q.C., and D. C. Nathanson, for the appellant.

G. W. Ainslie, Q.C., and L. P. Chambers, for the respondent.

The judgment of Martland, Judson and Dickson JJ. was delivered by

DICKSON J.—This is an income tax case concerning the right of the appellant Gustavson Drilling (1964) Limited to deduct in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years drilling and exploration expenses incurred by it from 1949 to 1960.

Parliament since 1949 has encouraged the exploration for petroleum and natural gas by permitting corporations “whose principal business is production, refining or marketing of petroleum, petroleum products or natural gas or exploring or drilling for petroleum or natural gas” (hereafter referred to as “oil companies”) to deduct their drilling and exploration expenses in computing income for the purpose of the *Income Tax Act*. In 1956 the right was extended to successor corporations by legislation which provided that a corporation whose principal business was exploring and drilling for petroleum or natural gas and which acquired all or substantially all of the property of another corporation in the same type of business could deduct drilling and exploration expenses incurred by the predecessor corporation. In the absence of this legislation neither the successor corporation nor the predecessor corporation could have availed itself of such drilling and exploration

¹ [1972] F.C. 1193.

C.T.C. 490 (Ech.); *Director of Public Works v. Ho Po Sang*, [1961] 2 All E.R. 721 (C.P.); *Hargal Oils Ltd. c. Le ministre du Revenu national*, [1965] R.C.S. 291].

POURVOI interjeté d'un arrêt de la Cour d'appel fédérale¹ confirmant le jugement du juge Cattanach accueillant un appel exposé dans un mémoire spécial à l'encontre d'une décision de la Commission d'appel de l'impôt qui avait accueilli un appel interjeté par l'appelante d'une cotisation à l'impôt sur le revenu. Pourvoi rejeté, le juge Pigeon et de Grandpré étant dissidents.

John McDonald, c.r., F. R. Matthews, c.r., et D. C. Nathanson, pour l'appelante.

G. W. Ainslie, c.r., et L. P. Chambers, pour l'intimé.

Le jugement des juges Martland, Judson et Dickson a été rendu par

LE JUGE DICKSON—Il s'agit d'une question d'impôt sur le revenu portant sur le droit de l'appelante Gustavson Drilling (1964) Limited de déduire dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, les dépenses de forage et d'exploration qu'elle a faites de 1949 à 1960.

Depuis 1949, le Parlement encourage la recherche du pétrole et de gaz naturel en autorisant les compagnies dont «l'entreprise principale est la production, le raffinage ou la mise en vente du pétrole, des produits du pétrole ou du gaz naturel, ou l'exploration ou le forage en vue de découvrir du pétrole ou du gaz naturel» (ci-après appelées «compagnies pétrolières») à déduire leurs dépenses de forage et d'exploration, dans le calcul de leur revenu aux fins de la *Loi de l'impôt sur le revenu*. En 1956, les corporations remplaçantes ont été autorisées à exercer ce droit en vertu d'un texte de loi qui prévoyait qu'une corporation dont l'entreprise principale est l'exploration et le forage en vue de découvrir du pétrole ou du gaz naturel et qui acquiert tous les biens ou sensiblement tous les biens d'une autre corporation dont l'entreprise principale est la même, peut déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. En l'absence de cette loi, ni la

¹ [1972] C.F. 1193.

expenses for tax purposes. The 1956 legislation contained qualifications, however. In order to entitle the successor corporation to the deduction it was imperative that the acquisition of the property of the predecessor by the successor be (a) in exchange for shares of the capital stock of the successor or (b) as a result of the distribution of such property to the successor upon the winding-up of the predecessor subsequently to the purchase of shares of the predecessor by the successor in consideration of shares of the successor. In 1962 these limitations were removed; thereafter the legislation simply provided that every oil company which at any time after 1954 acquired all or substantially all of the property of another oil company could claim a deduction in respect of drilling and exploration expenses incurred by the predecessor company and the predecessor company was denied the right to make any such claim. Within this context the present case arises.

The appellant was incorporated in 1949 under the name of Sharples Oil (Canada) Ltd., as a wholly owned subsidiary of Sharples Oil Corporation, an American corporation, and until 1960 it carried on the business of an oil company in Canada, incurring during that period drilling and exploration expenses of \$1,987,547.19 in excess of its income from the production of petroleum and natural gas. On November 30, 1960, the parent company, Sharples Oil Corporation, acquired substantially all of the property of the appellant in consideration for the cancellation of a debt owing to it by the appellant. The parties agree that at this time entitlement to claim the theretofore undeducted drilling and exploration expenses did not accrue to the parent company because the transaction was not carried out in either manner prescribed by the Act.

After disposal of its property the appellant discontinued business and remained inactive until 1964. In June 1964, however, Mikas Oil Co. Ltd. purchased all of the issued and outstanding shares in the capital stock of the appellant from the shareholders of Sharples Oil Corporation following the liquidation of that corporation. The appellant's

corporation remplaçante ni la corporation remplacée n'aurait pu se prévaloir pour des fins fiscales des dépenses de forage et d'exploration. Toutefois, cette loi de 1956 comporte certaines réserves. La corporation remplaçante n'a droit à cette déduction que si elle acquiert les biens de la corporation remplacée (a) en échange d'actions de son propre capital social, ou (b) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat des actions de la corporation remplacée, par la corporation remplaçante, moyennant des actions de cette dernière. En 1962, on a retiré ces conditions; dans la suite, la loi prévoyait simplement que toute compagnie pétrolière qui, en tout temps après 1954, avait acquis tous les biens ou sensiblement tous les biens d'une autre compagnie pétrolière, pouvait réclamer une déduction à titre de dépenses de forage et d'exploration faites par la corporation remplacée alors que cette dernière ne pouvait, elle, se prévaloir de ce droit. Le présent litige tire son origine de ce contexte.

En 1949, l'appelante a été constituée en corporation sous le nom de Sharples Oil (Canada) Ltd., en tant que filiale exclusive de la corporation américaine Sharples Oil Corporation, et jusqu'en 1960, elle était une compagnie pétrolière au Canada qui a engagé, durant cette période, des dépenses de forage et d'exploration d'un montant de \$1,987,547.19 supérieur au revenu que lui a procuré la production de pétrole et de gaz naturel. Le 30 novembre 1960, la compagnie-mère Sharples Oil Corporation, a acquis presque tous les biens de l'appelante en contrepartie de l'annulation d'une dette que celle-ci avait à son égard. Les parties conviennent qu'à cette époque-là la compagnie-mère n'a pas acquis le droit de déduire les dépenses de forage et d'exploration parce que la transaction ne s'est pas opérée aux termes de l'une ou l'autre des conditions énoncées dans la Loi.

A la suite du transfert de ses biens, l'appelante a interrompu ses opérations et est restée inactive jusqu'en 1964. Cependant, en juin 1964, Mikas Oil Co. Ltd. a acheté des actionnaires de Sharples Oil Corporation, à la suite de la liquidation de cette dernière, l'ensemble des actions émises du capital social de l'appelante. En octobre 1964, l'appelante

name was changed to Gustavson Drilling (1964) Limited, in October 1964; thereafter the appellant recommenced business as an oil company with newly acquired assets, none of which had been used or owned by the appellant prior to June 1964. In computing its income for the 1965, 1966, 1967 and 1968 taxation years the appellant claimed deductions of \$119,290.49; \$447,369.99; \$888,084.10; and \$31,179.00 respectively as part of the accumulated drilling and exploration expenses of \$1,987,547.19. The Minister re-assessed and disallowed the claimed deductions. The appellant successfully appealed to the Tax Appeal Board but a Special Case was stated by consent, pursuant to Rule 475 of the Federal Court, and the appeal of the Minister was successful before Cattnach J. whose judgment in the Federal Court was upheld by the Federal Court of Appeal. The question on which the opinion of the Court was sought in the Special Case reads:

The question for the opinion of the Court is whether subsection (8a) of section 83A of the *Income Tax Act* as amended by the repeal of paragraphs (c) and (d) thereof by Statutes of Canada, 1962-63, c. 8, section 19, subsections (11) and (15), precludes the Respondent from deducting in the computation of its income for the 1965, 1966, 1967 and 1968 taxation years amounts on account of the drilling and exploration expenses mentioned in paragraph 4 hereof, which but for the repeal would have been deductible by the Respondent under subsections (1) and (3) of section 83A of the Act.

Subsections (1) and (3) of s. 83A of the *Income Tax Act*, under which the appellant claims the right to deductions, read as follows as applied to the 1965 to 1968 taxation years:

83A. (1) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of

- (a) the aggregate of such of the drilling and exploration expenses . . . as were incurred during the calendar years 1949 to 1952, to the extent that they were not deductible in computing income for a previous taxation year, or
- (b) of that aggregate, an amount equal to its income for the taxation year

a adopté le nom de Gustavson Drilling (1964) Limited; par la suite, elle a repris ses activités comme compagnie pétrolière avec des biens nouvellement acquis dont aucun n'avait été possédé ni utilisé par elle avant juin 1964. Dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968, l'appelante a déduit des sommes de \$119,290.49, \$447,369.99, \$888,084.10 et \$31,179.00 respectivement, qu'elle a réclamées comme partie des dépenses accumulées de forage et d'exploration chiffrées à \$1,987,547.19. Le Ministre lui a imposé une nouvelle cotisation et a rejeté ces déductions. La Commission d'appel de l'impôt a accueilli l'appel interjeté par l'appelante; par la suite, les parties se sont entendues pour exposer les questions en appel dans un mémoire spécial, conformément à la règle 475 de la Cour fédérale, et l'appel interjeté par le Ministre devant la Cour fédérale a été accueilli par le juge Cattnach dont le jugement a été confirmé par la Cour d'appel fédérale. Voici le libellé de la question litigieuse exposée dans le mémoire spécial:

[TRADUCTION] La question soumise à la Cour est celle de savoir si le paragraphe (8a) de l'article 83A de la *Loi de l'impôt sur le revenu* tel que modifié par l'abrogation des alinéas c) et d) dudit article par les statuts du Canada, 1962-63, c. 8, article 19, paragraphes (11) et (15), interdit à l'intimée de déduire, dans le calcul de son revenu pour les années d'imposition 1965, 1966, 1967 et 1968 les sommes représentant les dépenses de forage et d'exploration mentionnées au paragraphe 4 des présentes que, n'eût été l'abrogation, l'intimée aurait pu déduire en vertu des paragraphes (1) et (3) de l'article 83A de la Loi.

Les paragraphes (1) et (3) de l'art. 83A de la *Loi de l'impôt sur le revenu*, en vertu desquels l'appelante prétend avoir droit aux déductions, se lisent comme suit, tels qu'ils s'appliquaient aux années d'imposition 1965 à 1968:

83A. (1) Une corporation . . . peut déduire, dans le calcul de son revenu, aux fins de la présente Partie, pour une année d'imposition, le moindre de

- a) l'ensemble des dépenses de forage et d'exploration . . . qui ont été faites au cours des années civiles 1949 à 1952, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou
- b) de cet ensemble, un montant égal à son revenu pour l'année d'imposition

minus the deductions allowed for the year by subsections (8a) and (8d) of this section . . .

(3) A corporation . . . may deduct, in computing its income under this Part for a taxation year, the lesser of

- (c) the aggregate of such of
 - (i) the drilling and exploration expenses . . .

as were incurred after the calendar year 1952 and before April 11, 1962, to the extent that they were not deductible in computing income for a previous taxation year, or

(d) of that aggregate, an amount equal to its income for the taxation year

minus the deductions allowed for the year by subsections (1), (2), (8a) and (8d) of this section . . .

There can be no doubt that in the absence of subs. (8a) of s. 83A the drilling and exploration expenses claimed by the appellant would have been deductible by it. One must, then, turn to subs. (8a) upon the construction of which this case falls to be decided. In 1960, when the property of the appellant was acquired by Sharples Oil Corporation, the pertinent parts of subs. (8a) read:

83A. (8a) Notwithstanding subsection (8), where a corporation (hereinafter in this subsection referred to as the "successor corporation") . . .

has, at any time after 1954, acquired from a corporation (hereinafter in this subsection referred to as the "predecessor corporation") . . . all or substantially all of the property of the predecessor corporation used by it in carrying on that business in Canada,

- (c) pursuant to the purchase of such property by the successor corporation in consideration of shares of the capital stock of the successor corporation, or
- (d) as a result of the distribution of such property to the successor corporation upon the winding-up of the predecessor corporation subsequently to the purchase of all or substantially all of the shares of the capital stock of the predecessor corporation by the successor corporation in consideration of shares of the capital stock of the successor corporation,

moins les déductions allouées pour l'année par les paragraphes (8a) et (8d) du présent article . . .

(3) Une corporation . . . peut déduire, dans le calcul de son revenu aux fins de la présente Partie, pour une année d'imposition, le moindre de

- c) l'ensemble
 - (i) des dépenses de forage et d'exploration . . .

qui ont été faites après l'année civile 1952 et avant le 11 avril 1962, en tant qu'elles n'étaient pas déductibles dans le calcul du revenu pour une année d'imposition antérieure, ou

d) dudit ensemble, un montant égal à son revenu pour l'année d'imposition

moins les déductions allouées pour l'année par les paragraphes (1), (2), (8a) et (8d) du présent article . . .

Il n'y a aucun doute qu'en l'absence du par. (8a) de l'art. 83A, l'appelante aurait pu déduire les dépenses de forage et d'exploration qu'elle réclame. Il faut donc examiner ce par. (8a) dont l'interprétation sera déterminante du sort de cette affaire. En 1960, lorsque Sharples Oil Corporation a acquis les biens de l'appelante, les dispositions pertinentes du par. (8a) se lisaient comme suit:

83A. (8a) Nonobstant le paragraphe (8), lorsqu'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplaçante»). . .

a, en tout temps après 1954, acquis d'une corporation (ci-après appelée, au présent paragraphe, la «corporation remplacée»). . . tous les biens ou sensiblement tous les biens de la corporation remplacée, utilisés par elle dans l'exercice de ladite entreprise au Canada,

- c) en vertu de l'achat desdits biens par la corporation remplaçante moyennant des actions du capital social de la corporation remplaçante, ou
- d) par suite de la distribution desdits biens à la corporation remplaçante lors de la liquidation de la corporation remplacée, postérieurement à l'achat de toutes les actions ou sensiblement toutes les actions du capital social de la corporation remplacée, par la corporation remplaçante, moyennant des actions du capital social de la corporation remplaçante,

there may be deducted by the successor corporation, in computing its income under this Part for a taxation year, the lesser of

- (e) the aggregate of
 - (i) the drilling and exploration expenses ... incurred by the predecessor corporation ...

and, in respect of any such expenses included in the aggregate determined under paragraph (e), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

Paragraphs (c) and (d) of subs. (8a) were repealed by c. 8, 1962-63 (Can.), s. 19, subs. (11), and the repeal was made applicable to the 1962 and subsequent taxation years.

In summary, therefore: Company A incurred drilling and exploration expenses; Company B acquired the property of Company A in 1960 but because of the manner in which the transaction was carried out Company B did not at that time qualify as a successor company and did not become entitled to deduct from its income the undeducted drilling and exploration expenses of Company A; in 1962 and thereafter, if the contentions of the Minister prevail, Company B qualified as a successor company and as such became entitled to claim such expenses as a deduction; Company A was denied such right by the concluding words of subs. (8a).

Before examining the rival contentions, several observations might be made. The first is with regard to the onus on a taxpayer who claims the benefit of an exemption. He must bring himself clearly within the language in which the exemption is expressed: *The Assessment Commissioner of the Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*², at p. 194.

² [1973] S.C.R. 189.

cette dernière peut déduire, dans le calcul de son revenu selon la présente Partie pour une année d'imposition, le moindre

- e) de l'ensemble
 - (i) des dépenses de forage et d'exploitation...faites par la corporation remplacée...

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa e), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Le paragraphe (11) de l'art. 19 du c. 8 des Statuts du Canada 1962-63 a abrogé les al. c) et d) du par. (8a), et cette abrogation est entrée en vigueur à compter de l'année d'imposition 1962 et suivantes.

En résumé: la compagnie A a fait des dépenses de forage et d'exploration; la compagnie B a acquis les biens de la compagnie A en 1960, mais à cause de la façon dont s'est opérée la transaction, la compagnie B ne pouvait pas être considérée à cette époque-là comme une compagnie remplaçante de sorte qu'elle n'a pu acquérir le droit de déduire de son revenu les dépenses non déduites de forage et d'exploration engagées par la compagnie A; en 1962 et par la suite, si l'on s'en tient aux prétentions du Ministre, la compagnie B a acquis la qualité de compagnie remplaçante et à ce titre, elle était dorénavant autorisée à déduire les dépenses en question; la fin du par. (8a) empêchait la compagnie A de se prévaloir de ce droit.

Avant d'examiner les prétentions rivales, il convient de formuler quelques remarques. La première porte sur le fardeau incombant au contribuable qui se prévaut d'une exemption. Il doit établir clairement que son cas s'insère dans l'exemption réclamée: *The Assessment Commissioner of the Corporation of the Village of Stouffville c. The Mennonite Home Association of York County et The Corporation of the Village of Stouffville*², à la p. 194.

² [1973] R.C.S. 189.

Secondly, the concept of a deduction being made by a taxpayer other than the one who incurred the expenditure is not unknown to the *Income Tax Act*. Section 85I(3) of the Act permits a new corporation formed on the amalgamation of two or more corporations after 1957 to deduct drilling and exploration expenses incurred by the predecessor corporation. Section 83A(3c) permits a joint exploration corporation to elect to renounce in favour of another corporation an agreed portion of the aggregate of the drilling and exploration expenses incurred by the joint exploration corporation.

Thirdly, by deleting paras. (c) and (d) of subs. (8a), Parliament liberalized the provision by making available to an expanded number of successor corporations a right to deduct. I do not think Parliament ever contemplated that a company which had sold or otherwise disposed of its assets could later have recourse to s. 83A. Parliament chose to grant a successor company the right to deduct drilling and exploration expenses incurred by a predecessor and the only problem in implementing its policy was with respect to the company which would have the right to deduct in the year of acquisition. The successor was accorded that right by the statute. The result of the amendment to the legislation in 1962 was to confer a right to claim deductions upon certain successor companies. This was a new right, coming from Parliament, not one acquired from a company's predecessor. At no time during the currency of the legislation has a predecessor company been able to transfer to a successor company entitlement to claim deductions in respect of drilling and exploration expenses.

It will be convenient now to consider in more detail the submissions of the appellant and of the Minister. Those of the Minister may be shortly put, resting on the language of the Act which, the Minister submits, is precise and unambiguous when read in the context of the whole statute and the general intentment of the Act. It is argued that there is no need to have recourse to presumptions of legislative intent, for such rules of construction are only useful in ascertaining the true

Deuxièmement, le principe selon lequel une déduction peut être effectuée par un contribuable autre que celui qui a encouru la dépense n'est pas étranger à la *Loi de l'impôt sur le revenu*. Le paragraphe (3) de l'art. 85I de la Loi autorise la nouvelle corporation, issue de la fusion de deux ou plusieurs corporations après 1957, à déduire les dépenses de forage et d'exploration engagées par la corporation remplacée. Le paragraphe (3c) de l'art. 83A permet à une corporation d'exploration en commun de renoncer en faveur d'une autre corporation à une partie convenue de ses dépenses de forage et d'exploration.

Troisièmement, en abrogeant les al. c) et d) du par. (8a), le Parlement a élargi les cadres de la disposition en permettant à un plus grand nombre de corporations remplaçantes de s'en prévaloir. Je crois que le Parlement n'a jamais envisagé la possibilité qu'une compagnie qui a vendu ses biens ou en a autrement disposé puisse plus tard se prévaloir de l'art. 83A. Le Parlement a choisi d'accorder à la compagnie remplaçante le droit de déduire les dépenses de forage et d'exploration engagées par la compagnie remplacée et, la seule difficulté dans la mise en œuvre de cette politique consistait à déterminer quelle compagnie serait autorisée à se prévaloir de la déduction pour l'année de l'acquisition. La loi a accordé ce droit au remplaçant. Les dispositions modificatrices de 1962 ont conféré à certaines compagnies remplaçantes le droit de se prévaloir des déductions en question. C'était donc un droit nouveau accordé par le Parlement et non par la compagnie remplacée. Jamais la loi n'a permis à une compagnie remplacée de céder à une compagnie remplaçante le droit de se prévaloir des déductions relatives aux dépenses de forage et d'exploration.

Il convient maintenant d'examiner de plus près les allégations de l'appelante et du Ministre. Les allégations de ce dernier se résument en quelques mots et reposent sur le texte de la Loi qui, selon lui, est clair et précis lorsque son lecteur tient compte de l'ensemble et de l'esprit général de la Loi. On allègue qu'il n'est pas nécessaire d'avoir recours aux présomptions portant sur l'intention du législateur puisque ces règles d'interprétation ne sont utiles dans la détermination du sens vérita-

meaning where the language of the statute is not clear and plain: per Lamont J. in *Acme Village School District v. Steele-Smith*³, at p. 51. There is much to this submission. I do not think that the appellant can sustain its position on a literal reading of subs. (8a), the language of which places appellant fairly and squarely in the category of a predecessor company. The appellant, however, seeks to avoid a literal construction of the subsection with a three-pronged argument, which must fairly be considered, based upon (a) the presumption against retrospective operation of statutes; (b) the presumption against interference with vested rights; (c) the meaning to be given to the word "aggregate" in subs. (8a). With regard to points (a) and (b) it would not be sufficient for the appellant to establish that the legislation had retrospective effect; it must also show it had an accrued right which was adversely affected by the legislation.

First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of

³ [1933] S.C.R. 47.

ble que lorsque le texte est obscur et ambigu: voir les propos du juge Lamont dans *Acme Village School District c. Steele-Smith*³, à la p. 51. Cette allégation est fort pertinente. Je ne crois pas que l'appelante puisse obtenir gain de cause en s'en tenant au sens littéral du par. (8a) puisque sa rédaction attribue nettement à l'appelante la qualité de compagnie remplacée. Toutefois, elle cherche à éviter une interprétation littérale de ce paragraphe et soumet à cet effet une triple argumentation qu'il convient d'examiner équitablement et qui se fonde sur a) la présomption à l'encontre de la rétroactivité des lois; b) la présomption voulant qu'on ne puisse porter atteinte aux droits acquis; c) la signification à donner au mot «ensemble» du par. (8a). Concernant les points a) et b), l'appelante doit faire plus que démontrer la portée rétroactive de la loi; elle doit également établir qu'elle possédait un droit acquis auquel la loi a porté atteinte.

Premièrement, la rétroactivité. Selon la règle générale, les lois ne doivent pas être interprétées comme ayant une portée rétroactive à moins que le texte de la Loi ne le décrète expressément ou n'exige implicitement une telle interprétation. Une disposition modificatrice peut prévoir qu'elle est censée être entrée en vigueur à une date antérieure à son adoption, ou qu'elle porte uniquement sur les transactions conclues avant son adoption. Dans ces deux cas, elle a un effet rétroactif. A première vue, la présente affaire peut s'apparenter au deuxième cas, mais je suis d'avis que l'analyse de la disposition abrogative démontre qu'elle n'a aucune portée rétroactive dans le sens qu'elle modifie des droits acquis, bien qu'elle porte incontestablement atteinte aux transactions passées. L'article, tel que modifié par la disposition abrogative, ne vise pas les années d'imposition antérieures à la date de la modification; il ne cherche pas à s'immiscer dans le passé et ne prétend pas signifier qu'à une date antérieure, il faille considérer que le droit ou les droits des parties étaient ce qu'ils n'étaient pas alors. Pour autant que l'appelante soit concernée, cet article ne vise qu'à retirer pour l'avenir le droit de faire certaines déductions dont il était aupara-

³ [1933] R.C.S. 47.

the amending statute.

The appellant maintains that in 1960, at the time of the relevant transaction, it had the status of a non-predecessor company under s. 83A(8a), as it then read, and the right to carry over deductions to subsequent tax years; that the 1962 amendment could not operate retrospectively to change its status from non-predecessor company under s. 83A(8a) with the consequence that the drilling and exploration expenses became thereafter deductible only by Sharples Oil Corporation, the successor company. The appellant concludes that the right to deduct the said expenses remains with it in perpetuity. I cannot agree. It is immaterial that the appellant company had a particular status as the result of previous legislation. Parliament, acting within its competence, has said that as of 1962 and for the purposes of calculating taxable income in future years, the appellant has a different status.

The contention of appellant that the repeal has application only in respect of acquisitions carried out subsequent to the passage of the repealing enactment would introduce a limitation upon the amplitude of subs. (8a), as amended, which is not supported by the language of the subsection. It would also deny successor corporations rights which s. 83A would seem to accord them. The interpretation pressed by appellant tends also to ignore the words "at any time after 1954". Appellant submits that these words may, and should, have application to the extent of preserving the rights of a successor corporation which, prior to the repealing enactment, carried out an acquisition in one or other of the manners set out in subs. (c) and (d) and therefore prior to repeal enjoyed the benefit of subs. (8a) but they should not have further force or effect. The difficulty with this submission is that one can find nothing in the legislation as it read in respect of the 1965 and subsequent taxation years which would support a distinction between those corporations which

vant possible de tirer avantage; l'article n'a aucune incidence sur ce droit dans la mesure où il a été exercé à une date antérieure à l'adoption de la loi modificatrice.

L'appelante prétend qu'elle avait en 1960, à l'époque de la transaction en question, la qualité d'une compagnie non remplacée aux termes du par. (8a) de l'art. 83A, tel qu'alors libellé, ainsi que le droit de reporter des déductions au cours des années d'imposition subséquentes; elle soutient également que la modification de 1962 ne peut avoir d'effet rétroactif de façon à lui conférer maintenant la qualité de compagnie remplacée aux termes du par. (8a) de l'art. 83A, de sorte que les dépenses de forage et d'exploration pouvaient être déduites, par la suite, uniquement par Sharples Oil Corporation, la compagnie remplaçante. Finalement, l'appelante conclut qu'elle conserve à perpétuité le droit de déduire les dépenses en question. Je ne peux partager cette prétention. Il importe peu que la compagnie appelante ait eu une qualité particulière sous l'ancienne loi. Sans outrepasser sa compétence, le Parlement a statué qu'à compter des années d'imposition 1962 et suivantes, pour les fins du calcul du revenu imposable, l'appelante aurait une qualité différente.

La prétention de l'appelante selon laquelle l'abrogation agit seulement sur les acquisitions faites ultérieurement à l'adoption de la loi abrogative, a pour effet de restreindre la portée du par. (8a) dans sa forme modifiée, ce que le texte du paragraphe en question ne démontre aucunement. Cette prétention a également pour effet d'empêcher les corporations remplaçantes de se prévaloir des droits que leur accorde semble-t-il, l'art. 83A. L'interprétation mise de l'avant par l'appelante tend également à ignorer les mots «en tout temps après 1954». Cette dernière prétend que ces mots peuvent et doivent agir uniquement dans la mesure où ils permettent de garantir les droits d'une corporation remplaçante qui, antérieurement à la loi abrogative, a fait une acquisition suivant l'une ou l'autre des méthodes décrites aux al. c) et d) et qui, par conséquent, tirait avantage du par. (8a) avant l'abrogation. Ce qui fait obstacle à cette prétention est l'impossibilité de trouver dans cette partie de la loi portant sur les années d'imposition 1965 et suivantes, un indice qui étayerait une

acquired the property of other corporations prior to the 1962 amendment, in accordance with subs. (c) and (d), and those which acquired the property of other corporations following the amendment.

The *Income Tax Act* contains a series of very complicated rules which change frequently, for the annual computation of world income. The statute in force in the particular taxation year must be applied to determine the taxpayer's taxable income for that year. The effect of the repealing enactment of 1962 was merely to provide that in future years certain new rules should apply affecting deductions from income of exploration and development expenses. Although the effect of the repealing enactment may appear to have been to divest the appellant of a right to deduct which it had earlier enjoyed and in some manner have caused a transmutation of an antecedent transaction, I do not think that, when the matter is closely examined, such is the true effect. In each of the years 1949 to 1960 the appellant had a right to deduct. The Act in each of those years conferred the right. In 1960 the appellant transferred its assets. The contract of sale, if any, forms no part of the record. So far as the record discloses, no mention was made of drilling and exploration expenses at the time. After disposing of its property, it was no longer a corporation whose principal business was that of exploring or drilling for petroleum or natural gas nor did it have income. It, therefore, no longer had a right to deduct. No claim was made by it in the 1961, 1962, 1963 or 1964 taxation years. By the time the appellant resumed business it had no right under the then legislative scheme to claim for drilling and exploration expenses incurred in earlier years. Any claim which it might make for exploration and drilling expenses could only be in respect of expenses incurred following resumption of business. It may seem unfortunate that an amendment which was intended to liberalize the legislation by removing a barrier to the inheritance of drilling and exploration expenses should have the effect of denying a predecessor company such as the appellant from enjoying a right which it would have enjoyed in the absence of the repeal but the legis-

distinction entre les corporations qui ont fait l'acquisition des biens d'autres corporations avant la modification de 1962, en conformité avec les al. c) et d), et celles qui ont fait l'acquisition des biens d'autres corporations postérieurement à la modification.

La *Loi de l'impôt sur le revenu* contient une série de règles très complexes modifiées fréquemment qui servent au calcul annuel du revenu global. Pour déterminer le revenu imposable d'un contribuable pour une année particulière, il faut appliquer la loi qui était alors en vigueur. La disposition abrogative de 1962 a simplement pour effet d'introduire pour les années subséquentes de nouvelles règles touchant la déductibilité des dépenses d'exploration et de mise en valeur. Bien que la disposition abrogative puisse paraître avoir pour effet de dépouiller l'appelante du droit dont elle jouissait auparavant de faire certaines déductions et d'une certaine façon causé la transmutation d'une transaction antérieure, je suis d'avis qu'un examen attentif de la question démontre qu'il n'en est pas ainsi. De 1949 à 1960, la Loi en vigueur au cours de chacune de ces années autorisait l'appelante à se prévaloir de la déduction. En 1960, l'appelante a transféré son actif. Le contrat de vente, s'il en existe un, n'apparaît pas au dossier et dans la mesure des révélations qui y sont contenues, il n'a pas été question à l'époque des dépenses de forage et d'exploration. Après avoir disposé de ses biens, l'appelante n'était plus une corporation s'occupant principalement de faire de l'exploration ou forage pour la découverte de pétrole ou de gaz naturel, et elle n'avait plus de revenu. Elle ne pouvait donc plus se prévaloir de la déduction en question. Au cours des années d'imposition 1961, 1962, 1963 et 1964, elle n'a fait aucune réclamation. A l'époque où l'appelante a repris ses activités, elle n'avait plus le droit, en vertu de la loi alors en vigueur, de réclamer les dépenses de forage et d'exploration engagées antérieurement. Il lui était possible de réclamer uniquement les dépenses de forage et d'exploration engagées après qu'elle eut repris ses activités. Il est peut-être malheureux qu'une modification dont le but est de libéraliser la loi en facilitant la transmission des dépenses de forage et d'exploration, ait pour effet de priver une compagnie remplacée comme l'appe-

lation as amended is unambiguous and clear. After the repeal of paras. (c) and (d) of subs. (8a) in 1962 and for the purpose of paying income tax in the years following 1962, the appellant company is a predecessor company within the meaning of subs. (8a) and precluded from deducting the drilling and exploration expenses incurred by it prior to November 10, 1960.

Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*⁴, at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception. The only rights which a taxpayer in any taxation year can be said to enjoy with respect to claims for exemption are those which the *Income Tax Act* of that year give him. The burden of the argument on behalf of appellant is that appellant has a continuing and vested right to deduct exploration and drilling expenses incurred by it, yet it must be patent that the *Income Tax Acts* of 1960 and earlier years conferred no rights in respect of the 1965 and later taxation years. One may fall into error by looking upon drilling and exploration expenses as if they were a bank account from which one can make withdrawals indefinitely or at least until the balance is exhausted. No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmen-

⁴ [1933] S.C.R. 629.

lante d'un droit dont elle aurait pu se prévaloir en l'absence de l'abrogation, mais il n'en demeure pas moins que la loi dans sa forme modifiée est claire et précise. Après l'abrogation des al. c) et d) du par. (8a) en 1962 et aux fins du calcul de l'impôt à payer pour les années postérieures à 1962, la compagnie appelante est une compagnie remplacée au sens du par. (8a) et de ce fait, il lui est impossible de déduire les dépenses de forage et d'exploration engagées par elle avant le 10 novembre 1960.

Deuxièmement, l'interférence avec des droits acquis. Selon la règle, une loi ne doit pas être interprétée de façon à porter atteinte aux droits existants relatifs aux personnes ou aux biens, sauf si le texte de cette loi exige une telle interprétation: *Spooner Oils Ltd. c. Turner Valley Gas Conservation Board*⁴, à la p. 638. La présomption selon laquelle une loi ne porte pas atteinte aux droits acquis à moins que la législature ait clairement manifesté l'intention contraire, s'applique sans discrimination, que la loi ait une portée rétroactive ou qu'elle produise son effet dans l'avenir. Ce dernier type de loi peut être mauvais s'il porte atteinte à des droits acquis sans l'exprimer clairement. Toutefois, cette présomption s'applique seulement lorsque la loi est d'une quelconque façon ambiguë et logiquement susceptible de deux interprétations. Il est évident que la plupart des lois modifient des droits existants ou y portent atteinte d'une façon ou d'une autre, et les lois fiscales ne font pas exception. Les seuls droits dont un contribuable peut se prévaloir au cours d'une année d'imposition au regard de réclamations d'exemptions sont ceux que lui accordent la *Loi de l'impôt sur le revenu* alors en vigueur. L'appelante fonde son argumentation sur le fait qu'elle possède un droit acquis et continu de déduire dans le calcul de son revenu les dépenses de forage et d'exploration engagées par elle, alors qu'il est clair que la *Loi de l'impôt sur le revenu* de 1960 et des années antérieures n'accorde aucun droit à l'égard des années d'imposition 1965 et suivantes. C'est une erreur que de considérer les dépenses de forage et d'exploration comme un compte en banque duquel il est possible d'effectuer des retraits indéfiniment ou, du moins,

⁴ [1933] R.C.S. 629.

tal policy. A taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed.

The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued: *Abbott v. Minister of Lands*⁵, at p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*⁶; *Director of Public Works v. Ho Po Sang*⁷.

Section 35 of the *Interpretation Act*, R.S.C. 1970, c. I-23 is cited in support of the appellant. It reads:

35. Where an enactment is repealed in whole or in part, the repeal does not

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

I agree with Mr. Justice Thurlow of the Federal Court of Appeal that it cannot be said that the repeal of paras. (c) and (d) affected their previous operation or anything done or suffered by appellant thereunder since paras. (c) and (d) never had any operation upon or application to anything done or suffered by appellant. I am also in agreement with Mr. Justice Thurlow that it cannot be said that any right acquired by appellant under paras. (c) or (d) was affected by their repeal, since no right was ever acquired by appellant under either of them. This section is merely the statutory embodiment of the common law presumption in respect of vested rights as it applies to the repeal of legislative enactments and in my opinion the sec-

⁵ [1895] A.C. 425.

⁶ [1961] C.T.C. 490 (Exch.).

⁷ [1961] 2 All E.R. 721 (P.C.).

jusqu'à l'épuisement du solde. Personne n'a le droit acquis de se prévaloir de la loi telle qu'elle existait par le passé; en droit fiscal, il est impérieux que la législation reflète l'évolution des besoins sociaux et de l'attitude du gouvernement. Un contribuable est libre de planifier sa vie financière en se fondant sur l'espoir que le droit fiscal demeure statique; il prend alors le risque d'une modification à la législation.

Le simple droit de se prévaloir d'un texte législatif abrogé, dont jouissent les membres de la communauté ou une catégorie d'entre eux à la date de l'abrogation d'une loi, ne peut être considéré comme un droit acquis: *Abbott v. Minister of Lands*⁵, à la p. 431; *Western Leaseholds Ltd. v. Minister of National Revenue*⁶, *Director of Public Works v. Ho Po Sang*⁷.

L'article 35 de la *Loi d'interprétation*, S.R.C. 1970, c. I-23 est cité en appui de la thèse de l'appelante. En voici le texte:

35. Lorsqu'un texte législatif est abrogé en tout ou en partie, l'abrogation

b) n'atteint ni l'application antérieure du texte législatif ainsi abrogé ni une chose dûment faite ou subie sous son régime;

c) n'a pas d'effet sur quelque droit, privilège, obligation ou responsabilité acquis, né, naissant ou encouru sous le régime du texte législatif ainsi abrogé.

Je partage l'avis du juge Thurlow de la Cour d'appel fédérale selon lequel il ne peut être dit que l'abrogation des al. c) et d) atteint leur application antérieure ni une chose dûment faite ou subie sous leur régime par l'appelante, puisque les al. c) et d) ne se sont jamais appliqués à l'appelante ni à une chose dûment faite ou subie par elle. Je souscris encore une fois à l'avis du juge Thurlow lorsqu'il affirme que l'on ne peut pas dire que l'abrogation des al. c) et d) a eu un effet sur quelque droit acquis par l'appelante sous leur régime, puisque cette dernière n'a jamais acquis de droits sous le régime de l'un quelconque d'entre eux. Cet article représente simplement la consécration législative de la présomption de droit commun relative aux

⁵ [1895] A.C. 425.

⁶ [1961] C.T.C. 490 (Exch.).

⁷ [1961] 2 All E.R. 721 (P.C.).

tion does nothing to advance appellant's case. Appellant must still establish a right or privilege acquired or accrued under the enactment prior to repeal, and this it cannot do.

Third, "aggregate". The somewhat tortuous argument on this point is largely a mere embellishment of the retrospectivity argument. It runs as follows. Even if the appellant is regarded as a predecessor corporation, the accumulated drilling and exploration expenses may nevertheless be deducted by the appellant because (1) the prohibition expressed in the concluding paragraph of subs. (8a) extends only to "the aggregate determined under paragraph (e)"; (2) such aggregate in each of the years 1965 to 1968 is *nil* by reason of the necessity under subparas. (iii) and (iv) thereof of determining such aggregate in the first instance "for the taxation year in which the property so acquired was acquired by the successor corporation", *i.e.*, 1960; (3) subparas. (iii) and (iv) of subs. (8a)(e) have been construed by this Court in *Hargal Oils Ltd. v. Minister of National Revenue*⁸, at pp. 295-6, where it was held that the "aggregate" is to:

... consist of expenses not deductible by the predecessor corporation in the taxation year in which the property was acquired by the successor corporation, but which would have been deductible by the predecessor corporation in that taxation year, "but for the provisions of ... this subsection."

(4) this passage presupposes the existence of the qualified predecessor and a qualified successor corporation in the taxation year in which the transfer of property took place and the amount to be included in the aggregate can only be determined in the taxation year in which the transaction occurred; (5) in the 1960 taxation year subs. (8a) was not applicable to appellant and there cannot be in that taxation year either a successor corporation or a predecessor corporation nor any "aggregate" to which the concluding paragraph of

droits acquis telle qu'elle existe à l'égard de l'abrogation des dispositions législatives et, selon moi, cet article n'ajoute rien à l'argumentation de l'appelante. Cette dernière doit toujours démontrer qu'elle possède un droit ou un privilège né ou acquis sous le régime du texte législatif avant son abrogation, ce qu'elle ne peut faire.

Troisièmement, le mot «ensemble». Cet argument quelque peu tortueux reprend en grande partie, sous un jour plus favorable, l'argument de la rétroactivité. En voici l'essentiel: même si l'appelante est considérée comme une corporation remplacée, elle peut néanmoins déduire les dépenses accumulées de forage et d'exploration parce que (1) l'interdiction spécifiée dans le dernier alinéa du par. (8a) porte uniquement sur «l'ensemble déterminé selon l'al. e»»; (2) cet ensemble pour chacune des années d'imposition 1965 à 1968 est nul, vu la nécessité, aux termes des sous-al. (iii) et (iv) de l'al. e), de déterminer d'abord cet ensemble «pour l'année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante», *c.-à-d.* 1960; (3) les sous-al. (iii) et (iv) de l'al. e) du par. (8a) ont été interprétés par cette Cour dans *Hargal Oils Ltd. c. Le ministre du Revenu national*⁸, aux pp. 295 et 296, où cette dernière a statué que le mot «ensemble»:

[TRADUCTION] ... comprend les dépenses qui n'étaient pas déductibles par la compagnie remplacée dans le calcul de son revenu pour l'année d'imposition où ses biens ont été acquis par la compagnie remplaçante, mais qui auraient été déductibles par la compagnie remplacée dans le calcul de son revenu pour cette année d'imposition-là «en l'absence des dispositions ... du présent paragraphe».

(4) cet extrait présuppose l'existence de corporations remplacées et remplaçantes autorisées à l'époque du transfert des biens, et il est possible de déterminer le montant à inclure dans l'ensemble uniquement au cours de l'année d'imposition où s'est effectuée la transaction; (5) au cours de l'année d'imposition 1960, le par. (8a) n'était pas applicable à l'appelante, et il ne pouvait y avoir à cette époque soit une corporation remplacée ou une corporation remplaçante, ni aucun «ensemble» auquel pourrait se rattacher dans les années d'im-

⁸ [1965] S.C.R. 291.

⁸ [1965] R.C.S. 291.

subs. (8a) can be related in subsequent taxation years; (6) the repealing enactment is made applicable to the 1962 and subsequent taxation years and cannot be given earlier effect in determining what is to be included in the "aggregate".

I do not think that the language of subs. (8a) or the gloss which it is suggested was put upon that language in the quoted passage from *Hargal's* case leads to the conclusion for which appellant contends. The quoted passage from *Hargal's* case merely compresses the words of subs. (8a). As applied to the facts of the case now before us, subs. (8a) provides that there may be deducted by the successor corporation the "aggregate" of the drilling and exploration expenses incurred by the appellant (*i.e.* approximately \$2,000,000) to the extent that such expenses (a) were not deductible by the appellant in 1960 or earlier; and (b) would but for subs. (8a) have been deductible by the appellant in 1960. The subsection does not postulate the existence of a successor corporation and a predecessor corporation in the year of acquisition. The amount of the aggregate must be determined each year in which the deduction is sought, not for the taxation year of acquisition. The starting point in computing the aggregate is to total the expenditures on drilling and exploration; this amount must then be reduced to the extent that the expenses were deductible by the predecessor corporation in the year of acquisition or in earlier years; the amount which the successor corporation may deduct must not exceed the amount which would have been deductible by the predecessor in the year of acquisition in the absence of subs. (8a). It will be observed that the appellant is claiming to be entitled to a deduction under s. 83A(1) and (3), both of which subsections speak of the "aggregate" of drilling and exploration expenses to the extent that they were not deductible in computing income for a previous taxation year. It would be strange if the "aggregate" computed in accordance with the wording of s. 83A(1) and (3) would amount to \$2,000,000 but computed in accordance with the analogous wording of s. 83A(8a) would be nil. In my opinion the "aggregate" is the same whether computed under s. 83A(1) and (3) or under s. 83A(8a). There is no difficulty in applying the words of s. 83A(8a) in this case. The

position subséquentes, le dernier alinéa du par. (8a); (6) le texte législatif abrogatif est applicable aux années d'imposition 1962 et suivantes et ne peut rétroagir de façon à déterminer ce qu'il faut inclure dans l'«ensemble».

Je ne suis pas d'avis que le texte du par. (8a) et l'interprétation spécieuse qui, prétend-on, en a été donnée dans l'extrait cité de l'arrêt *Hargal* mènent à la conclusion recherchée par l'appelante. L'extrait cité de l'arrêt *Hargal* ne fait que condenser le texte du par. (8a). Tel qu'appliqué aux faits de la présente affaire, le par. (8a) dispose que la corporation remplaçante peut déduire l'«ensemble» des dépenses de forage et d'exploration engagées par l'appelante (*c.-à-d.* approximativement \$2,000,000) dans la mesure où lesdites dépenses a) n'étaient pas déductibles par l'appelante en 1960 ou avant cette date; et b) auraient été déductibles par l'appelante en 1960 en l'absence des dispositions du par. (8a). Ce paragraphe ne présuppose pas l'existence, au cours de l'année d'acquisition, de corporations remplaçantes et remplacées. Le montant de l'ensemble doit être déterminé chaque année où l'on se prévaut de la déduction, et non pour l'année d'imposition où s'est fait l'acquisition. Pour déterminer le montant de l'ensemble, il faut d'abord établir le total des dépenses de forage et d'exploration; ce montant doit ensuite être réduit dans la mesure où les dépenses étaient déductibles par la corporation remplacée dans le calcul de son revenu pour l'année d'acquisition ou pour toute l'année antérieure; le montant déductible par la corporation remplaçante ne doit pas dépasser celui que la compagnie remplacée aurait pu déduire du calcul de son revenu pour l'année de l'acquisition en absence du par. (8a). Il convient de souligner que l'appelante prétend avoir droit à une déduction en vertu des par. (1) et (3) de l'art. 83A, qui traitent de l'«ensemble» des dépenses de forage et d'exploration, dans la mesure où elles n'étaient pas déductibles du revenu d'une année d'imposition antérieure. Il serait plutôt étrange que l'«ensemble» calculé en conformité du texte des par. (1) et (3) de l'art. 83A totalise un montant de \$2,000,000, tandis qu'il serait nul lorsque calculé en conformité du texte analogue du par. (8a) de l'art. 83A. A mon avis, l'«ensemble» est le même, qu'il soit calculé selon les par. (1) et (3) de l'art. 83A ou selon

aggregate of the drilling and exploration expenses deductible by the appellant prior to the repealing enactment and since that time deductible by the successor corporation is readily identifiable and has been quantified.

I would dismiss the appeal with costs.

The judgment of Pigeon and de Grandpré JJ. was delivered by

PIGEON J. (*dissenting*)—The appellant is an oil producing company. It was incorporated under the laws of Canada on May 26, 1949, under the name of Sharples Oil (Canada) Ltd. It was a wholly owned subsidiary of Sharples Oil Corporation, a U.S. company. It did incur drilling and exploration expenses for which it would, in later years, be entitled to claim a deduction from income for taxation purposes. As of November 30, 1960, the amount of such expenditures that could be carried forward was nearly \$2,000,000 (the exact amount was agreed to be \$1,987,547.19). Preliminary to the winding-up of the parent company, the appellant transferred to it on that date substantially all its assets. Under subs. (8a) of s. 83A of the *Income Tax Act* as it then read (that is as enacted by 1956 c. 39, s. 23 with some immaterial amendments), this conveyance did not transfer to the parent company appellant's entitlement to future deductions because it did not meet the requirements of subparas. (c) and (d). Therefore, the conveyance did not have the effect of depriving the appellant from its entitlement to deductions in the future on that account by virtue of the concluding paragraph of subs. (8a):

and, in respect of any such expenses included in the aggregate determined under paragraph (e), no deduction may be made under this section by the predecessor corporation in computing its income for the taxation year in which the property so acquired was acquired by the successor corporation or its income for any subsequent taxation year.

In the winding-up of the parent company, the appellant's shares were distributed to the parent's

le par (8a) de l'art. 83A. L'application des termes du par. (8a) de l'art. 83A ne soulève aucune difficulté en l'espèce. L'ensemble des dépenses de forage et d'exploration déductibles par l'appelante avant le texte législatif abrogatif, et depuis lors déductible par la corporation remplaçante, est facilement identifiable et a été déterminé.

Je suis d'avis de rejeter le pourvoi avec dépens.

Le jugement des juges Pigeon et de Grandpré a été rendu par

LE JUGE PIGEON (*dissident*)—L'appelante est une compagnie pétrolière. Elle a été constituée par charte fédérale le 26 mai 1949 sous le nom de Sharples Oil (Canada) Ltd. Elle était une filiale exclusive de Sharples Oil Corporation, une compagnie américaine. Elle a engagé des dépenses de forage et d'exploration pour lesquelles il lui était possible, dans les années à venir, de réclamer une déduction dans le calcul de son revenu imposable. Le 30 novembre 1960, le montant de ces dépenses susceptibles d'être reportées totalisait presque \$2,000,000 (les parties ayant convenu d'un montant exact de \$1,987,547.19). Antérieurement à la liquidation de la compagnie-mère, l'appelante lui a transféré, à cette date-là, presque tout son actif. En vertu du par. (8a) de l'art. 83A de la *Loi de l'impôt sur le revenu*, tel qu'alors libellé (c'est-à-dire, tel que mis en vigueur par 1956 c. 39, art. 23 avec quelques modifications non pertinentes), ce transfert de l'actif n'a pas entraîné le transfert à la compagnie-mère du droit de l'appelante à des déductions futures parce que l'actif n'a pas été acquis conformément aux dispositions des al. c) et d). Par conséquent, en vertu du dernier alinéa du par. (8a) que voici, ce transfert n'a pas eu pour effet de retirer à l'appelante le droit de réclamer, pour les années d'imposition à venir, des déductions relatives aux dépenses engagées:

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa e), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

Au cours des procédures de liquidation de la compagnie-mère, ses actionnaires ont acquis les

shareholders who, as of June 18, 1964, sold all those shares to Mikas Oil Co. Ltd. for \$280,000. The appellant's name was then changed to Gustavson Drilling (1964) Limited and it resumed operations as an oil producing company. Having made profits, it claimed deductions from income on account of the previously incurred drilling and exploration expenses above mentioned. These deductions totalling over \$1,500,000 for 1965-68 were disallowed by reassessments. They were restored by the Tax Appeal Board but, on appeal, they were denied by the Federal Court at trial and on appeal.

The reason for which the deductions were denied was that in 1962, some two years after the transfer of appellant's assets to its parent, subparas. (c) and (d) of ss. (8a) had been repealed by statute applicable to 1962 and following taxation years. It was said in effect that by virtue of this amendment, the entitlement to the future deductions had gone with the assets to the parent company as a "successor corporation". Of course, as the latter had been wound-up, it could not take advantage of the provision but it was said that this had destroyed, as of 1962, any right which the appellant had to claim deductions on account of drilling and exploration expenditures incurred before November 30, 1960, by virtue of the concluding paragraph of ss. (8a) amended by the 1962 statute to read:

and, in respect of any such expenses included in the aggregate determined under paragraph (e), no deduction may be made under this section by the predecessor corporation in computing its income for a taxation year subsequent to its taxation year in which the property so acquired was acquired by the successor corporation.

In my view, the legislative change effected in 1962 by the repeal of paras. (c) and (d) of subs. (8a) was not an alteration in the scheme of deductions for drilling and exploration expenses, but a modification in the transferability of the entitlement to those deductions. In essence, the Minister's contention which prevailed in the court below against the Tax Appeal Board's conclusion was that, although the transfer of appellant's property

actions de l'appelante et, le 18 juin 1964, ils les ont vendues à Mikas Oil Co. Ltd. pour la somme de \$280,000. L'appelante a alors adopté le nom de Gustavson Drilling (1964) Limited et elle a repris ses activités comme compagnie pétrolière. Ayant réalisé des profits, l'appelante a réclamé, dans le calcul de son revenu, la déduction de certaines sommes au regard de ses dépenses de forage et d'exploration engagées antérieurement. Ces déductions, qui totalisaient plus de \$1,500,000 pour les années 1965 à 1968, ont été refusées à l'occasion de nouvelles cotisations. La Commission d'appel de l'impôt les a rétablies mais elles ont ensuite été refusées par la Cour fédérale en première instance et en appel.

Les déductions ont été refusées en raison de l'abrogation, en 1962, soit deux ans après le transfert de l'actif de l'appelante à la compagnie-mère, des sous-alinéas c) et d) du par. (8a) par une loi applicable aux années d'imposition 1962 et suivantes. En fait, on a statué qu'en vertu de cette modification, la compagnie-mère en tant que «corporation remplaçante» avait acquis, en même temps que l'actif, le droit aux déductions futures. Naturellement, vu la liquidation de cette dernière, elle n'a pu tirer profit de cette disposition, mais on a statué, en vertu du dernier alinéa du par. (8a), tel que modifié en 1962 et reproduit ci-après, que cela avait retiré à l'appelante, à compter de 1962, le droit de se prévaloir d'une déduction à titre de dépenses de forage et d'exploration engagées avant le 30 novembre 1960:

et, à l'égard de toutes semblables dépenses comprises dans l'ensemble déterminé selon l'alinéa e), aucune déduction ne peut être faite aux termes du présent article par la corporation remplacée dans le calcul de son revenu pour une année d'imposition subséquente à son année d'imposition où les biens ainsi acquis l'ont été par la corporation remplaçante.

A mon avis, la modification législative apportée en 1962 par l'abrogation des al. c) et d) du par. (8a) n'a apporté aucun changement au principe de la déductibilité des dépenses de forage et d'exploration; elle a seulement modifié les règles de la transmissibilité du droit à ces déductions. Selon le Ministre, bien que le transfert des biens de l'appelante à Sharples Oil Corporation effectué le 13 novembre 1960 ne s'étendait pas au droit à ces

to Sharples Oil Corporation made on November 13, 1960, did not include the entitlement to the deductions in question, this right became included in this transfer when, in 1962, an amendment to the *Income Tax Act* repealed the provisions that had prevented it from going to the transferee with the property transferred.

The rule against retrospective operation of statutes is, of course, no more than a rule of construction. It operates more or less strongly according to the nature of the enactment. However, nowhere does it operate more strongly than when any other construction would result in altering the effect of contracts previously entered into. In *Reid v. Reid*⁹, Bowen L.J. said (at pp. 408-9):

Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a large retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.

Now as to sect. 5, it applies in express terms to marriages contracted before the commencement of the Act. Then are we to take the view which Mr. Barber puts forward, . . . this construction may displace or disturb previous dispositions of property, and therefore unless we can read in plain language that the Legislature intended what Mr. Barber contends for, the principle of construction with which I set out forbids us to adopt that construction.

Here, the effect of the contract was to leave the entitlement to the deductions intact in the hands of the transferor but, if the legislative change is read as applicable to that contract, the result is an outright forfeiture or confiscation of this valuable

déductions, ce droit a été incorporé au transfert en question lorsqu'en 1962 une modification à la *Loi de l'impôt sur le revenu* a abrogé les dispositions qui consacraient l'intransmissibilité de ce droit à la personne à qui les biens avaient été transférés. Cette prétention du Ministre a prévalu devant le tribunal d'instance inférieure à l'encontre de la conclusion de la Commission d'appel de l'impôt.

Le principe de la non-rétroactivité des lois n'est qu'une règle d'interprétation. Sa force varie selon la nature du texte législatif, mais elle n'est jamais plus grande que lorsqu'une autre interprétation modifierait l'effet de contrats déjà conclus. Dans *Reid v. Reid*⁹, le lord juge Bowen tient les propos suivants (aux pp. 408 et 409):

[TRADUCTION] Or, la règle particulière d'interprétation dont on a fait mention, mais qui est utile uniquement lorsque le texte d'une loi du Parlement est obscur, se rattache à la célèbre maxime *omnis nova constitutio futuris formam imponere debet non praeteritis*, c'est-à-dire que sauf exception, la nouvelle loi doit être interprétée de façon à minimiser au possible l'interférence avec des droits acquis. Selon moi, même lorsque nous interprétons une loi ou un article qui ont une portée rétroactive, nous devons toujours avoir à l'esprit que cette maxime entre en jeu dès que le texte cesse d'être clair. Il s'agit là d'un corollaire nécessaire et naturel de la règle générale selon laquelle il ne faut pas donner à un article une portée rétroactive plus considérable que celle que la législature a manifestement voulu lui donner, même si cette loi a, dans une certaine mesure, un effet rétroactif.

Or, quant à l'art. 5, il s'applique expressément aux mariages contractés avant l'entrée en vigueur de la Loi. Allons-nous donc adopter l'opinion émise par M. Barber, . . . cette interprétation peut toucher ou porter atteinte à des actes antérieurs, elle est donc inadmissible selon le principe énoncé au début de mes motifs, à moins qu'il nous apparaisse clairement que la prétention de M. Barber est conforme à l'intention du législateur.

En l'espèce, le contrat avait pour effet de laisser intact entre les mains du cédant le droit aux déductions, mais, si la modification législative est jugée applicable, il y a alors déchéance complète de ce droit précieux à cause de la liquidation du

⁹ (1886), 31 Ch.D. 402.

⁹ (1886), 31 Ch.D. 402.

right, the transferee having been wound-up. On that construction, if the transferee was a subsisting oil company it would, without any consideration therefor, obtain this valuable right in addition to the properties conveyed. In the instant case, the appellant's shares were sold after the 1962 amendment but, on the Minister's submission, it would make no difference if they had been bought before the amendment, the purchasers would have lost what they paid for. Bearing in mind the presumption against retrospective operation, can the statute be read so as to avoid this unjust result?

The application provision of the 1962 amending act enacts that the relevant subsection is applicable to the 1962 and subsequent taxation years. The Minister says this means that assessments for those years are to be made in accordance with the law as changed by the new statute. I do not deny that such is ordinarily the effect of an enactment in those terms. However, I cannot see why, in view of the nature of the substantive enactment, it would not be read differently with respect to the provisions with which we are concerned, namely, provisions which concern the legal effect of contracts in relation to a scheme of entitlement to deductions intended to be available for many years in the future. Because of the special risk involved in exploring and drilling for oil Parliament has departed from the principle of yearly deductions of expenses, deductions for drilling and exploration expenses are available to oil companies in subsequent years.

While after the sale of its assets the appellant was no longer in a situation in which it could claim deductions for drilling and exploration expenses, it had a perfect right to resume active operations and claim in later years. It had not lost its entitlement to such deductions in appropriate circumstances, such entitlement was a valuable asset of enduring value involving substantial potential benefits just as some other kinds of tax losses. While the realization of actual benefits from such assets is subject to restrictions and conditions, they are commonly bought and sold through the acquisition of the shares of the company holding them. This is some-

cessionnaire. Selon cette interprétation, si le cessionnaire était une compagnie pétrolière existante il obtiendrait, sans contre-partie, ce droit précieux en plus des biens cédés. Dans la présente affaire, on a vendu les actions de l'appelante après l'entrée en vigueur de la modification de 1962 mais, de l'aveu même du Ministre, les acheteurs auraient perdu l'objet de leur achat même s'ils avaient acheté les actions avant l'entrée en vigueur de la modification. En ayant à l'esprit la présomption contre la rétroactivité, peut-on interpréter la loi présentement en cause de façon à éviter ce résultat injuste?

La disposition visant l'application de la loi modificatrice de 1962 prévoit que le paragraphe en question s'appliquera aux années d'imposition 1962 et suivantes. Selon le Ministre, cela signifie que les cotisations pour ces années-là doivent s'effectuer en conformité du droit modifié par la nouvelle loi. Je ne nie pas que ce soit ordinairement l'effet d'un texte législatif ainsi libellé. Toutefois, en raison de la nature du système de déductions dont il s'agit, je ne vois pas pourquoi on ne pourrait pas l'interpréter différemment à l'égard des dispositions en cause, c'est-à-dire celles qui portent sur l'effet juridique des contrats conclus en relation avec ce système de déductions à faire pendant plusieurs années à venir. A cause du risque particulier propre à l'exploration et au forage visant à découvrir du pétrole, le Parlement s'est écarté du principe de la déduction annuelle des dépenses en autorisant les compagnies pétrolières à déduire au cours des années subséquentes leurs dépenses de forage et d'exploration.

Bien qu'après la vente de son actif l'appelante ne fût plus en mesure de se prévaloir du droit de déduire ses dépenses de forage et d'exploration, elle conservait néanmoins le droit légitime de reprendre plus tard ses activités et de réclamer alors les déductions. Elle n'avait pas perdu le droit de faire ces déductions dans des circonstances appropriées, et ce droit était un bien précieux de valeur permanente qui comporte d'importants avantages éventuels à l'instar d'autres types de pertes admissibles pour fins fiscales. Bien que la réalisation profitable de semblables actifs soit soumise à des restrictions et conditions, ils sont régu-

thing which appears from the facts of the case and of which we should anyway take judicial notice. It is not something of which Parliament may be deemed to have been unaware in passing the legislation. Due to the nature of the entitlement to future deductions for drilling and exploration expenses, it should not be presumed that a company holding such an asset will not seek to realize its value in later years just because, at one point, it has sold or otherwise disposed of its properties. The 1962 amendment should not be looked upon purely as conferring the right to claim deductions upon the purchaser of the properties. There is a correlative withdrawing of this right from the vendor which Parliament's so-called liberality effected at the same time. Thus the true nature of the operation is a transfer of the entitlement to the deductions.

I cannot agree that our present income tax legislation should be construed on the basis of the special rules that were developed in the days when the taxation statutes were yearly drawn up in the Ways and Means Committee. Our *Income Tax Act* is permanent legislation and we are here dealing with incentive provisions, that is a system of deductions designed to encourage investment. It is true that it is within Parliament's power to breach the promises of special treatment on the faith of which investments have been made. There is however a strong presumption against any intention to do this. In the present case, there was clearly no such intention. The scheme of deductions was not repealed. Appellant would admittedly be entitled to the deductions were it not for the fact that, some years previously, it transferred its property to another corporation, as it could lawfully do without prejudicing its entitlement to the deductions. At that time, this transfer did not carry the right to the deductions although it would now do so. Under such circumstances, it does not appear to me that the application provision may properly be read as making the new law applicable to a contract previously executed so as to change its effect especially when such change is nothing but an entirely unjustified forfeiture or confiscation of valuable rights.

lièrement achetés et vendus par l'acquisition des actions de la compagnie qui les possède. Les faits de l'espèce le démontrent et, de toute façon, j'estime que nous devons en prendre connaissance d'office. Il ne s'agit pas d'une situation dont le Parlement pouvait ignorer l'existence lors de l'adoption du texte législatif. Vu le caractère du droit aux déductions futures pour dépenses de forage et d'exploration, on ne doit pas présumer qu'une compagnie qui possède un tel actif ne cherchera pas plus tard à le réaliser, uniquement parce qu'à une certaine époque, elle a vendu ses biens ou en a autrement disposé. On ne doit pas interpréter la modification de 1962 comme ayant pour seul effet de donner à l'acquéreur le droit aux déductions. La prétendue générosité du Parlement comporte également le retrait corrélatif de ce droit au vendeur. La disposition a donc pour but véritable d'effectuer le transfert du droit aux déductions.

Je ne peux partager l'avis selon lequel nos présentes lois fiscales doivent être interprétées suivant les règles spéciales établies à l'époque où le Comité des voies et moyens rédigeait annuellement les lois fiscales. Notre *Loi de l'impôt sur le revenu* est une loi permanente, et nous sommes aux prises ici en présence de dispositions visant à encourager les investissements par l'instauration d'un régime de déductions. Il est vrai que le Parlement a le pouvoir de briser les promesses de traitement privilégié sur la foi desquelles des investissements ont été faits. Toutefois, une forte présomption existe à l'encontre d'une intention semblable. En l'espèce, il n'y a trace d'aucune telle intention. Le régime de déduction n'a pas été abrogé. De toute évidence, l'appelante aurait droit aux déductions si elle n'avait, quelques années auparavant, transféré ses biens à une autre corporation comme elle pouvait légitimement le faire sans porter atteinte à son droit de se prévaloir des déductions. A cette époque-là, ce transfert n'emportait pas celui du droit aux déductions, bien qu'aujourd'hui il en soit autrement. Dans de telles circonstances, j'estime qu'on ne peut, à bon droit, interpréter la disposition visant l'application de la nouvelle loi comme signifiant qu'elle est applicable à un contrat déjà exécuté, de façon à en modifier l'effet, surtout lorsqu'une telle modification ne constitue rien de moins qu'une confiscation entièrement injustifiée de droits précieux.

Concerning the decision of this Court in *Acme Village School District v. Steele-Smith*¹⁰, I would point out that the situation was quite different. The dispute was between a school teacher and a school board which was his employer. The agreement between them provided for termination by either party giving thirty days notice in writing to the other. Subsequent to the making of the agreement, the Legislature amended the section of the *School Act* contemplating the termination of teachers' engagements by such notice. The amendment provided that except in the month of June, no such notice shall be given by a Board without the approval of an inspector previously obtained. This Court held that the teacher was entitled to the benefit of the amendment. Lamont J. said, speaking for the majority (at p. 52):

Considering the nature and scope of the Act and the control over the agreement between teacher and Board retained by the Minister, and considering also that the mischief for which the legislature was providing a remedy was a presently existing evil which the legislature proposed to cure by making the right of either party to terminate the agreement depend upon the consent of the inspector, I am of opinion that sufficient has been shewn to rebut the presumption that the section was intended only to be prospective in its operation.

With deference for those who hold a different view, it seems to me that if a similar reasoning is applied to the contract and legislation in question herein, the result ought to be that the intention of Parliament in effecting the legislative change in 1962 was to facilitate the transfer of the right to deductions, not to alter the result of past contracts so as to effect a forfeiture of the rights of those oil companies that had previously transferred their properties under conditions that did not involve a transfer of their entitlement to the transferee. In my view, the words used by Parliament do not compel us to reach the result contended for by the Minister. That this is a matter of taxation in which it is said no resort to equity can be had, makes in my view no difference.

I would allow the appeal with costs throughout to the appellant, reverse the judgments of the

¹⁰ [1933] S.C.R. 47.

Quant à l'arrêt rendu par cette Cour dans *Acme Village School District c. Steele-Smith*¹⁰, je tiens à souligner que la situation était très différente. Le litige était entre un enseignant et son employeur, une commission scolaire. La convention qui les liait stipulait que l'une ou l'autre des parties pouvait y mettre fin par préavis de trente jours. Après la conclusion de la convention, la législature a modifié l'article du *School Act* relatif à la cessation d'emploi d'un enseignant suite à un tel préavis. Selon la modification, le préavis ne pouvait plus être donné, sauf au mois de juin, sans l'accord préalable d'un inspecteur. Cette Cour a statué que l'enseignant était autorisé à se prévaloir de la modification. Le juge Lamont, au nom de la majorité, s'est exprimé ainsi (à la p. 52):

[TRADUCTION] Compte tenu du caractère et de la portée de la Loi et du contrôle que le Ministre a conservé sur la convention liant l'enseignant et la Commission, et compte tenu également du fait que le redressement apporté par la Législature s'adresse à un problème actuel que cette dernière se propose de régler en subordonnant au consentement d'un inspecteur le droit de chacune des parties de mettre fin à la convention, j'estime qu'il y en a assez pour réfuter la présomption que l'article ne doit produire son effet que dans l'avenir.

Avec respect pour l'opinion contraire, je suis d'avis que l'application de ce raisonnement au contrat et à la Loi en question incite plutôt à conclure que l'intention du Parlement, en apportant la modification législative de 1962, était de faciliter le transfert du droit aux déductions, et non de modifier l'effet de contrats antérieurs de façon à confisquer les droits des compagnies pétrolières qui avaient antérieurement transféré leurs biens à certaines conditions qui n'impliquaient pas le transfert des droits en question au cessionnaire. A mon avis, les mots employés par le Parlement ne nous obligent pas à conclure dans le sens que le voudrait le Ministre. Selon moi, il importe peu qu'il s'agisse en l'espèce d'une question de fiscalité à l'égard de laquelle aucun recours en *equity* ne peut être exercé.

J'accueillerai le pourvoi avec dépens dans toutes les cours en faveur de l'appelante, j'infirmem-

¹⁰ [1933] R.C.S. 47.

Federal Court at trial and on appeal, and restore the judgment of the Tax Appeal Board.

Appeal dismissed with costs, PIGEON and DE GRANDPRÉ JJ. dissenting.

Solicitors for the appellant: McDonald & Hayden, Toronto.

Solicitors for the respondent: D. S. Maxwell, Ottawa.

rais les jugements rendus par la Cour fédérale en première instance et en appel, et je rétablirais le jugement de la Commission d'appel de l'impôt.

Pourvoi rejeté avec dépens, les juges PIGEON et DE GRANDPRÉ étant dissidents.

Procureurs de l'appelante: McDonald & Hayden, Toronto.

Procureur de l'intimé: D. S. Maxwell, Ottawa.

TAB 9

Citation: **Krangle (Guardian ad litem of)**
v. Brisco
2000 BCCA 147

Date: 20000306
Docket: CA024083
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

**MERVYN DUDLEY KRANGLE, an infant by his mother
and Guardian ad Litem, Phapphim Krangle, the
said PHAPPHIM KRANGLE, and MURRAY JOHN KRANGLE**

PLAINTIFFS
(APPELLANTS)

AND:

**DR. ELLIE BERTHA BRISCO
DR. STANLEY FRED MORRILL**

DEFENDANTS
(RESPONDENTS)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Hollinrake
The Honourable Mr. Justice Mackenzie

John N. Laxton, Q.C. and
Robert D. Gibbens

Counsel for the Appellants

C.E. Hinkson, Q.C. and
Raj Samtani

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia
May 27 & 28, 1999

Place and Date of Judgment:

Vancouver, British Columbia
March 6, 2000

Written Reasons by:

The Honourable Mr. Justice Mackenzie

Concurred in by:

The Honourable Mr. Justice Hollinrake

Dissenting in Part by:

The Honourable Chief Justice McEachern (Page 24, Paragraph 36)

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[1] This appeal raises issues of assessment of damages for future cost of care in a case of "wrongful birth". Mervyn Krangle was born on 30 September 1991 with Down syndrome, a result of a chromosomal abnormality. His disability will preclude him from ever living independently. While he has loving, caring and attentive parents, it will not be practical for him to continue to live with them in his adult years. He will eventually move to a group home for persons with similar disabilities. Age nineteen, the age of majority in British Columbia, has been accepted as the approximate time of the transition. The main issue is whether Mervyn's parents can recover damages for the cost of caring for Mervyn in a group home after he reaches age nineteen. The trial judge refused to award damages for Mervyn's cost of care after age nineteen, except for a contingency allowance.

[2] The trial resolved all issues of liability. The respondent doctor was found to have been negligent in failing to inform Mervyn's parents, the plaintiff's Phapphim and Murray Krangle, of the availability of an amniocentesis test during Mrs. Krangle's pregnancy. That test would have extracted a sample of amniotic fluid. Genetic analysis of the sample would have diagnosed Down syndrome in the fetus and

permitted termination of the pregnancy. It was conceded that Mrs. Krangle would have elected to terminate the pregnancy if she had been informed of the fetal abnormality in time.

[3] The trial judge held that the respondent was liable to the parents for the damages they have sustained and will in future sustain as a result of Mervyn's disability. Mervyn himself has no cause of action for his birth. There is no appeal from those conclusions.

Cost of care after age nineteen

[4] The parents have appealed the conclusion of the trial judge that Mervyn's group home cost of after age nineteen will be paid from public funds and not by his parents. The appellants contend that government benefits are payable under a means tested "welfare" scheme which are only available if the recipient has no other source of income or assets. They argue that in principle damages payable by a tortfeasor should not be reduced by the "collateral benefit" available from such a social welfare scheme.

[5] The trial judge concluded that Mervyn's parents did not have a legal obligation to support him after age nineteen but they did have a moral obligation sufficient to support a claim for damages. He then went on to conclude, for reasons

discussed more fully below, that there was a five per cent contingency that there would not be publicly funded care available after Mervyn reaches age nineteen. He awarded damages for that five per cent contingency.

[6] The trial judge concluded that at age nineteen Mervyn would be eligible for cost of care benefits under the **Guaranteed Income for Need Act**, now the **BC Benefits (Income Assistance) Act**, R.S.B.C. 1996, c. 27, (hereinafter referred to as "BC Benefits") and the parents would cease to be responsible for those costs at that time. He summarized the position in these terms:

At age nineteen Mervyn will qualify for benefits under the **Guaranteed Income for Need Act**, commonly referred to as "GAIN". (That statute has been replaced by the **BC Benefits [Income Assistance] Act** but the benefits by transition appear to be the same so I will refer to them as GAIN benefits.) If he turned nineteen today, Mervyn would qualify to receive GAIN benefits of \$654 per month. That would meet his group living home expenses. Under the social safety net he would be able to support himself. There is little reason to be concerned that he will not be in an identical position thirteen years from now when he does turn nineteen.

The expert evidence in this case is consistent in recommending that it will be in Mervyn's best interests as an adult that he live in a group home. There is no expert evidence to the contrary. The Krangles want what is best for Mervyn and they want him to have as much independence as possible. Mrs. Krangle expressed a wish, expressed by all realistic parents, for their own independence at the appropriate time. There is nothing in the case as

presented by the plaintiffs inconsistent with this expectation. In his report, Dr. Armstrong said:

Mr. Krangle expressed the desire that Mervyn would have the knowledge, skills and behaviours to function within a group home setting as an adult. His expectations were that this transition to a group home would occur at a time that was typical for normal children leaving home.

I conclude that it is unlikely that there will be any cost to the adult plaintiffs for the care of Mervyn after age nineteen. The social safety net is likely to be in place at that time to provide the same benefits he would be eligible to receive today. This case is indistinguishable from *Wipfli v. Britten* (1984) 56 B.C.L.R. 273 (B.C.C.A.) and similar cases. This is not a collateral benefits situation as argued on behalf of the plaintiffs.

Contingencies must be considered. There is some possibility that the benefits under the legislation will not be fully available thirteen years from now, although if that had to be expressed in percentage terms I would be hard pressed to go above five per cent. There might be some extra benefits and comforts that it would be reasonable for the Krangles to purchase for their son. It might be advisable to keep Mervyn at home for a period of time after his nineteenth birthday or to make the transition gradual thereby extending the need for in-home services. Dr. Joschko mentioned a small risk of psychological difficulties requiring professional attention and there might be some cost associated with that contingency. There was some evidence as to the possibility of Mervyn ageing prematurely and that might give rise to some costs not yet foreseen. There might be other unforeseen costs.

For these contingencies, I award the sum of \$80,000.

The trial judge's reasons have been overtaken by later amendments to the **Family Relations Act**, R.S.B.C. 1996, c. 128.

[7] The trial judge relied on the definition of "child" in the **Family Relations Act**, as limited to a person under the age of nineteen. After the trial, the Act was amended by 1997 S.B.C. c. 20, ss. 16 and 17 to extend the definition of child to include adult children incapacitated by illness or disability for the purpose of support obligations. The pertinent provisions are now as follows:

87. In this Part:

"child" includes a person who is 19 years or older and, in relation to the parents of the person, is unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

88. (1) Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child.

[8] According to the explanatory notes that accompanied the bill, the amendment to s. 87 was intended to make the definition of child in the Family Relations Act consistent with the definition in the **Divorce Act (Canada)**, R.S.C. 1985, c. 3. The note to the s. 88(1) amendment explained that it "simplifies section 88(1) of the Act so that the general obligation of all parents to support their children is not open to confusion with the criteria under child support

guidelines applicable if a child maintenance order is to be made."

[9] The Attorney General expanded on this point during the legislative debate:

. . . Under the old scheme, parents who were separated had more obligations than the parents who were together. For instance, this would now allow a child or children who are over 19 and in full-time attendance, or disabled or ill, to be able to sue the parents for support and maintenance if the parents could afford that support and maintenance.

Later in the debate he added:

I think, philosophically, what we're saying is that if you . . . I really shouldn't extend it to this, but philosophically one could argue that what we're saying is that if you have the means to support your children or your parents, it is your first obligation rather than the state's obligation to support your children or your parents.

[10] In my view the explanatory notes and the remarks of the Attorney General simply confirm the plain and obvious meaning of the words of the amendments. As the Attorney General stated, the parental obligation extends beyond the purview of the ***Divorce Act*** to parents who are not divorced or separated.

[11] Mervyn will never be able to live independently. He will never be able to voluntarily withdraw from his parents charge or independently obtain the necessaries of life. The stark

reality is that he will have to be supported for the rest of his life either by his parents or by the state. Section 88(1) states unambiguously that the parents are "liable for the reasonable and necessary support of" Mervyn. Section 91(3) of the **Family Relations Act** authorizes "any person" to apply for an order for maintenance on behalf of Mervyn if the parents do not discharge their obligation, and the parents could not prevent an application on Mervyn's behalf. "Any person" would include the Public Trustee, who could represent an adult child lacking legal capacity.

[12] The Supreme Court of Canada recently has recognized the shift of obligations from the state to family members as a legitimate object of family relations legislation. In **M. v. H.** (1999), 171 D.L.R.(4th) 577, Iacobucci J. observed in the context of Part III of the Ontario **Family Relations Act** (at para. 93):

As I see the matter, the objectives of the impugned spousal support provisions were accurately identified by Charron J.A. in the court below. Relying in part on the OLRD description of the goal of the FLA set out above, she identified the objectives of the Part III provisions as both a means to provide "for the equitable resolution of economic disputes that arise when intimate relationships between individuals who have been financially interdependent break down" and to "*alleviate the burden on the public purse by shifting the obligation to provide support for needy persons to those parents and spouses who have the*

capacity to provide support to these individuals" (p. 450). I find support for this position in the legislative debates, the terms of the provisions, as well as the jurisprudence of this Court. [Emphasis added.]

[13] Section 91(5) of the **Family Relations Act** authorizes the appropriate minister to apply for an order for maintenance where the right to apply for an order has been assigned to the minister under s. 24.1 of the **BC Benefits (Income Assistance) Act**. Section 24.1 is an enabling provision:

24.1 (1) The Lieutenant Governor in Council may make regulations governing the assignment of maintenance rights and the recovery of the amount of income assistance provided in place of maintenance including the following regulations:

.

- (b) specifying maintenance rights that are to be assigned to the minister, including, but not limited to, any of the following rights:
 - (i) to make an application under an enactment of British Columbia for a maintenance order; . . .

[14] The current regulations made under s. 24.1 do not extend to the assignment of rights of an adult child under s. 88(1) to maintenance from parents who are not divorced or separated. Thus at present the government has not chosen to enforce the s. 88(1) obligation through a compulsory assignment to the minister of Mervyn's rights to maintenance by his parents. Nonetheless, the parental obligation has been imposed by the

amendments to ss. 87 and 88(1), and the legislation enabling enforcement of the obligation by the minister administering the BC Benefits scheme is in place. Thus the legislation imposing the parental obligation is clear - only the will of the government to enforce it remains in doubt. The philosophy underlying the amendments is that the parents' obligation to support adult disabled children is the primary obligation and the state's obligation is secondary.

[15] We invited submissions from counsel on the question whether the 1997 **Family Relations Act** amendments extending the definition of "child" could be considered by this court inasmuch as the amendments were passed after the date the cause of action arose and the trial. In my opinion the issue of the change in the statutory definition is not one which lends itself to the traditional analysis of retroactive or retrospective legislation. The damages in issue involve future costs not the past. I think the change in legislation has to be regarded as a fact now before the court. It is a fact relevant to the assessment of damages for future costs in the same way that the death of the female plaintiff after the trial in **Cory v. Marsh** (1993), 77 B.C.L.R.(2d) 248 (B.C.C.A.) was a fact before this court on that assessment of damages. To use the language of this court in **Cory v. Marsh** this

amendment to the definition of "child" results in the award before us of \$80,000 for contingencies "no longer [having] any basis in reality. If the change in legislation had been the other way and reduced the parents' liability for cost of future care could it seriously have been contended that the respondent would not be entitled to the benefit of that future cost reduction? In my opinion, it must be a two way street.

[16] The argument against awarded damages to the parents for the cost of care of Mervyn after age 19 is that the government will pay for Mervyn's cost of care in a group home under the BC Benefits scheme and will not enforce the parents obligation under the amendments to ss. 87 and 88(1). To date the government has not promulgated the regulatory machinery to do so. The critical moment will be 30 September, 2010, when Mervyn reaches age 19. Can the court confidently assume that at that time, despite the statutory obligation and the underlying philosophy that the obligation of parents to support children should take precedence over the state's support obligation, the parental obligation will not be enforced? In my respectful view, there is no reliable basis for such an assumption and the court is required to take the parents' statutory obligation at face value. The parents are

entitled to be indemnified against that obligation by the defendant.

[17] I do not think that there is any foundation for a contingency discount from the full present value of the cost of care for the possibility of continued government non-enforcement. No policy statements of ministers responsible for enforcement have been brought to our attention and in the absence of any authoritative statement of the government's position on enforcement, judicial speculation on the intentions of government would be perilous.

[18] The trial judge relied on **Wipfli v. Britten** (1984), 56 B.C.L.R. 273 for the proposition that benefits paid as part of a universal benefits scheme were to taken into account in assessing damages for future cost of care. In my opinion, the benefits under the BC Benefits scheme cannot be equated with benefits payable under a universal hospitalization scheme at issue in **Wipfli**. That case involved a child negligently injured during birth. The brain injury was so catastrophic that the child would be confined to bed and wheelchair for life. The child was the plaintiff and the damages claimed included over \$1 million for future costs of hospitalization. Taggart J.A. for the majority in this Court held that the claim should be limited to the per diem coinsurance cost of

hospitalization in British Columbia, capitalized at a figure of \$70,000. Taggart J.A. stressed that, apart from coinsurance, the cost of hospitalization was paid under a universal scheme covering all residents of the province requiring hospital care and services. This entitlement meant that most of the cost of hospitalization would be paid by this universal plan. The plaintiff was entitled to the benefits of the plan, irrespective of any other funds the plaintiff might have available to pay them. Any award for damages above the coinsurance cost would provide double recovery of those costs by the plaintiff. He therefore concluded that the cost of future care did not result in a loss to the plaintiff for which he should be compensated.

[19] The critical difference in the case at bar is that the BC Benefits scheme is not universal. It is means tested, available only to those who are not self supporting in accordance with the income and asset criteria established by the regulations. The BC Benefits scheme is complex but I think it allows the government to treat the parents' obligation under s. 88(1) of the **Family Relations Act** as the primary obligation and either refuse BC Benefits assistance to Mervyn or, alternatively, claim indemnity from the parents under an assignment of Mervyn's s. 88(1) right to maintenance.

The plaintiffs are characterized financially by their counsel as upper middle class and it is unlikely that they would be able to resist an application under s. 88(1) on grounds of economic hardship.

[20] The respondent contended that an award of damages to the parents would not affect Mervyn's eligibility for BC Benefits because the damages would be the parents' money, to do with as they saw fit, and not Mervyn's. That ignores the parents' s. 88(1) obligation. Nor is there any reason to doubt the parents' commitment to use the funds only for Mervyn's benefit. We have not been directed to anything in the BC Benefits regulations that would ignore the existence of a fund in the parents hands intended to cover the cost of care in determining Mervyn's eligibility. The administration of BC Benefits would expect the parents to discharge that obligation and Mervyn would be ineligible for BC Benefits or the government would seek reimbursement from the parents. The position will be even stronger if the fund is impressed with a trust, as discussed below. BC Benefits is a welfare scheme for persons who need its benefits and who are otherwise unable to pay the cost of their care. In the result, the problem in *Wipfli* of a double recovery of the cost of future care is unlikely to arise. The judgment of this Court in *Semenoff v.*

Kokan (1991), 59 B.C.L.R.(2d) 195 dealing with medical services benefits is similarly distinguishable. Accordingly, in my opinion damages for cost of future care should be assessed without reference to BC Benefits.

[21] It follows that the collateral benefits cases, concerned with the question of when overlapping benefits should be taken into account or ignored in the assessment of damages, are of no assistance. It is unnecessary to enter on the controversy over where the line should be drawn in those cases.

[22] The trial judge did not determine the quantum of the post age nineteen cost of future care. His contingency figure of \$80,000 included five per cent of the cost, but as part of a lump sum which included other contingencies. It is not clear how much of the \$80,000 represented the five per cent contingency. Counsel for the parties extrapolated widely divergent totals for the capitalized costs. I do not think we are able to determine the amount on the basis of counsels' submissions and the reasons of the trial judge. Accordingly I would refer the assessment of the post age nineteen cost of care back to the Supreme Court for determination.

Should the damages for cost of future care be impressed with a trust for the benefit of Mervyn Krangle?

[23] During the course of oral argument we raised with counsel the question whether any award of damages for post age nineteen cost of future care of Mervyn Krangle should be impressed with a trust for his benefit. Written submissions were submitted after the hearing by the parties and the Public Trustee also submitted comment at the Court's invitation.

[24] If the damages claimed had been based on a catastrophic birth injury, the cause of action would have been Mervyn's and the damages would routinely be held in trust for his benefit. Here, however, the child has no cause of action for his "wrongful birth" and the damages are awarded to the parents to compensate them for the cost of discharging their obligation to support him over his lifetime. The damages awarded are therefore tightly linked to Mervyn's cost of care, and intended for no other purpose.

[25] The parents recognize the link between the damages awarded and the obligation to pay the cost of care. They have volunteered by way of an undertaking to the court to place the damages awarded for cost of care in trust for Mervyn. Counsel for the parents, however, opposes a trust imposed by the court. The respondent contends that no trust should be

imposed because it would circumvent the fact that Mervyn has no cause of action.

[26] The parents offer of a voluntary undertaking to place the damage award in trust is commendable and their good faith is unquestioned. Notwithstanding, I think the question whether these are circumstances in which the court should impose a trust is a question of principle which should be determined independently of the parents offer.

[27] The use of a court imposed trust is not unknown in damage actions. In personal injury cases, damages for voluntary services are impressed with a trust routinely in favour of the third party who has supplied the services to the plaintiff:

[see the cases summarized in Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed., 187-88]. The present case would represent an extension of that concept. It arises because of advances in medicine which allow fetal detection of Down syndrome and create the circumstances that have led to this litigation. The law should respond to changing circumstances where existing remedies can be adapted to meet new exigencies. The trust remedy is flexible and well-suited to the circumstances of this case. The sole purpose of the damages awarded for cost of future care of Mervyn is to pay his cost of care. The imposition of a trust would insure that

the damages awarded for cost of care are dedicated to the purpose for which they are intended. The trust would protect the funds from dissipation or imprudent investment, insulate them from potential creditors of the parents and ensure that the portion of the funds remaining on the death of the parents would remain available for his care if he survives them.

[28] In **Ratysh v. Bloomer** (1990), 69 D.L.R. (4th) 25, at 54 (S.C.C.) McLachlin J. approved the use of a trust for voluntary services and contemplated the extension of the concept when the court is satisfied that it "is both necessary and appropriate in the interests of justice." Here the damages are awarded to satisfy a particular obligation to Mervyn who will be dependent upon his parents for the rest of his life to fulfill that obligation. If the award was lost or dissipated for whatever reason and the parents were unable to discharge their obligation Mervyn would have to be cared for at public expense. There is a public interest in maintaining the award through prudent investment for Mervyn's benefit. In my opinion it is necessary that the damages awarded be dedicated to that purpose and a trust in his favour is the most appropriate mechanism to achieve that objective. Accordingly I would direct that the damages to be awarded for

cost of future care after age nineteen be held by the parents in trust for Mervyn.

[29] Trust funds will be invested by the parents as trustees in investments authorized by the **Trustee Act**, R.S.B.C 1996, c. 464. The parents as trustees should have the power to apply the income from the funds so invested and portions of the capital as required from time to time for the care and benefit of Mervyn. The parents should be directed to submit an accounting to the Public Trustee every two years, in sufficient detail to permit the Public Trustee to review investments for compliance with the **Trustee Act** and to confirm expenditures made provide a direct benefit to Mervyn. Other terms of the trust may be addressed before the trial judge.

Special education and in-home services issues

[30] The appellants submit that the trial judge erred in determining certain items of the cost of care to age nineteen, related to special education assistance and in-home services.

[31] The appellants contend that the award of only \$10,000 as a contingency fund for special education assistance is inadequate. The appellants claimed for the cost of privately paid services to supplement the services generally available for special needs children in the public school. The

appellants do not contest the finding by the trial judge that partial removal of Mervyn from the classroom for at-home tutoring would not be in his best interest. The claim is for privately paid assistance while Mervyn is in the classroom, on the premise that funding restrictions will impair the ability of the school to provide adequate assistance. The trial judge concluded that the parents would not be permitted to hire an educator to manage and teach Mervyn in the school. The appellants called evidence from a union representative to the effect that the union representing special education assistants would not object to privately funded assistants in the classroom provided they were employed within the collective agreement. However, the witness agreed that the issue was one for the employer not the union and there was no evidence that the school board would agree to a two-tier system where some students received privately paid services while others in the same classroom with similar special needs did not. In addition, safety is an important factor in the supervision of special needs students and the school authorities would be obliged to provide sufficient assistance to maintain adequate safety standards for special needs students. In my opinion, the appellants have not demonstrated any error in the conclusion of the trial judge on this issue.

[32] The appellants submit that the trial judge erred in not including a GST allowance in the hourly rate determined for in-home services. It is submitted that he also erred in failing to account for Mervyn's attention deficit hyperactivity disorder ("ADHD") in estimating the amount of in home services required to assist the parents in caring for Mervyn.

[33] The trial judge had before him evidence of hourly rates for in-home services ranging from \$10 to \$15.40 plus GST. He concluded that \$12 per hour was an appropriate rate. The figure is an estimate within the range of hourly rates presented and I cannot infer that the trial judge overlooked GST in determining the \$12 rate. I would not vary the estimate.

[34] The trial judge referred to Mervyn's ADHD in his assessment of the parents need for in-home services to relieve the strain of caring for Mervyn. I am not satisfied that the trial judge made any error in his assessment of the medical evidence with respect to Mervyn's ADHD prognosis, or otherwise underestimated ADHD as a factor in determining the need for in-home services. I would dismiss the appeal on this issue.

[35] In the result I would allow the appeal on the issue of the cost of care for Mervyn Krangle after age nineteen and

remit the matter to the trial judge to determine that amount. The award will be impressed with a trust as outlined above. As the appellants have been successful on the dominant issue in this appeal they should have their costs of the appeal in full.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Mr. Justice Hollinrake"

Reasons for Judgment of the Honourable Chief Justice McEachern:

Introduction.

[36] I have had an opportunity to read the Reasons for Judgment of Mr. Justice Mackenzie on this appeal. He and the learned trial judge have adequately set out the facts of this most unfortunate case and there is no need for me to repeat what they have said in that connection.

[37] With respect, I agree with Mr. Justice Mackenzie on the grounds of appeal argued with respect to the plaintiffs' damage award for the additional cost of care of their son Mervyn during his minority, that is until he reaches the age of 19 years.

[38] I regret that I am unable to agree with Mr. Justice Mackenzie about the defendant's liability to the plaintiffs for Mervyn's cost of future care such as for group home living after he attains his majority. Instead, I have concluded that, because Mervyn has no cause of action of his own (because in law the defendant did him no harm), his post-19 years cost of future care may be recoverable from the defendant by his parents only if they have a legal obligation to support him after he attains his majority and if it is probable, subject to contingencies (the civil standard of

proof for future events), that they will be required to do so. With respect, I do not believe that a moral obligation or a willingness on the part of the parents to be responsible for these expenses is sufficient to impose liability upon the defendant as found by the learned trial judge. As will be seen, the nature of the parent's obligation to support Mervyn after he attains his majority is central to this appeal.

[39] As already indicated, the trial judge did make a damage award to the parents for the extra cost they will incur in supporting Mervyn until age 19 because of his disabilities. Then, after finding that the parents had a moral obligation to support Mervyn after he reaches 19 years of age, the trial judge found it was "...unlikely, subject to a 5% contingency, that there would be any cost to the parents for Mervyn's care after age nineteen." With respect, upon a consideration of the relevant law, I conclude that the parents will have no legal obligation to support Mervyn after he reaches 19 years of age, and that, in any event, it will not be necessary for them to do so.

[40] In such circumstances, it is unnecessary for me to pronounce finally on the question of imposing a trust upon the parents with respect to this part of their claim.

Nevertheless I shall have a few things to say about that interesting suggestion.

The claim for post age 19 cost of care.

[41] The quantum of this claim was seriously disputed both at trial and on the appeal. However, in view of the conclusions I have reached on this part of the appeal, it will not be necessary for me to review that aspect of this claim.

[42] The trial judge found:

[100] At age nineteen Mervyn will qualify for benefits under the **Guaranteed Income for Need Act**, commonly referred to as "GAIN". (That statute has been replaced by the **B.C. Benefits [Income Assistance] Act** but the benefits by transition appear to be the same so I will refer to them as GAIN benefits.) If he turned nineteen today, Mervyn would qualify to receive GAIN benefits of \$654 per month. That would meet his group living home expenses. Under the social safety net he would be able to support himself. There is little reason to be concerned that he will not be in an identical position thirteen years from now when he does turn nineteen.

[101] The expert evidence in this case is consistent in recommending that it will be in Mervyn's best interests as an adult that he live in a group home. There is no expert evidence to the contrary. The Krangles want what is best for Mervyn and they want him to have as much independence as possible. Mrs. Krangle expressed a wish, expressed by all realistic parents, for their own independence at the appropriate time. There is nothing in the case as presented by the plaintiffs inconsistent with this expectation. In his report, Dr. Armstrong said:

Mr. Krangle expressed the desire that Mervyn would have the knowledge, skills and behaviours to function within a group home setting as an adult. His expectations were that this transition to a group home would occur at a time that was typical for normal children leaving home.

[102] I conclude that it is unlikely that there will be any cost to the adult plaintiffs for the care of Mervyn after age nineteen. The social safety net is likely to be in place at that time to provide the same benefits he would be eligible to receive today. (Emphasis added.)

[43] The trial judge went on to consider contingencies and concluded that the likelihood of such benefits not being available in Mervyn's case, together with other contingencies, was in the range of 5%. He therefore made an award for these contingencies in the sum of \$80,000, which represents approximately 5% of the present value of the amount claimed for future costs. The Respondents have not appealed against this allowance and I would not interfere with it.

[44] In reaching this conclusion, the trial judge found this case indistinguishable from *Wipfli v. Britten*, [1984] 56 B.C.L.R 273 (B.C.C.A.). With respect, I am not persuaded that is precisely correct. *Wipfli* was a case concerning British Columbia Hospital Insurance, a universal care program. The benefits under GAIN, however, are means tested and, as such, are not available to persons who have sufficient funds to

maintain themselves. In my view, however, this is not a distinction of any importance in this case. The evidence is very clear that Mervyn will never be able to support himself. Thus, he will qualify for GAIN benefits, the present value of which is what the plaintiffs seek in this part of their claim. A distinction between universal plan coverage such as hospital insurance and plans like GAIN is not a useful one in the context of this case.

[45] As there is no question on the findings of the trial judge that Mervyn will qualify for GAIN benefits when he reaches his majority, the conclusions of the majority make it necessary to consider whether any relevant legislation or regulations impose a liability upon the parents to underwrite this social cost. This requires a careful examination of the relevant legislation because, generally speaking, parents in British Columbia were not historically required by law to support their adult children i.e., beyond the age of 19. There have been some exceptions to this, particularly under matrimonial law, which allocates responsibility between parents for costs such as for the education of adult children of a marriage. In this respect, the general rule is stated in the **Family Relations Act**, R.S.B.C. 1996, c. 128, which defines "child" as a person under the age of 19 years.

[46] There have, however, been a number of recent changes to the **Family Relations Act**, particularly sections 87 and 88(1), which were amended after the commencement of these proceedings. Those sections provide:

87. In this Part:

"child" includes a person who is 19 years of age or older and, in relation to the parents of the person, is unable, because of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

88. (1) Each parent of a child is responsible and liable for the reasonable and necessary support and maintenance of the child. (Emphasis added.)

[47] As these sections of the **Act** are found in Part 7 - Maintenance and Support Obligations - they are obviously aimed at family law problems. Nonetheless, the language is probably broad enough, subject to what I shall say below, to cover cases such as this one.

Retroactivity, Retrospectivity and Vested Rights

[48] As mentioned, these new sections of the **Family Relations Act** were enacted after the commencement of this action. Indeed, they were enacted after the delivery of the trial judgment and before the appeal hearing. In light of this, the question arises whether these provisions can have any application to proceedings that were pending at the time of enactment. As should be expected, the law in this area has

become terribly complicated and nice distinctions have been drawn between the three principles mentioned in the heading to this part of my Reasons. I propose to deal with this problem by considering each principle separately.

Retroactivity

[49] In *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) ("*Driedger*, 3d ed."), at 511, the present editor, Professor Sullivan, describes retroactive legislation as that which "changes the *past* legal consequences of completed transactions". Retrospective legislation, on the other hand, is described as that which "changes the *future* consequences of completed transactions by imposing new liabilities or obligations."

[50] Ordinary retroactivity, it is stated, can usually be recognized by simply reading the statute. A retroactive statute will contain a provision that "changes the law as of a time prior to its enactment": *C.A. Driedger, the Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), ("*Driedger*, 2d ed.") at 186. There is nothing in ss. 86 and 87 that purports to accomplish such an effect.

Retrospectivity

[51] Retrospectivity refers to the effect a statutory provision has on existing circumstances. In *Driedger*, 2d ed., at 186 it is stated: "A retrospective statute...changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction" or, as in this case, to a tort.

[52] The issue of retrospective application was clarified by this Court in *MacKenzie v. B.C. (Commr. of Teachers' Pensions)* (1992), 94 D.L.R. (4th) 532 (B.C.C.A.). In this case, a widow claimed she was entitled to certain benefits pursuant to an amendment to the *Pension (Teachers) Act*. In 1978, under the old legislation, her husband, upon his retirement, elected to take his pension under the "single life" plan. The effect of this plan was to maximize his benefits during his lifetime, however, nothing would be provided for his widow on his death. In 1988, s. 14(1.1) was added to the Act. It read:

14(1.1) Where an employee is married on the date he elects a plan under sub-section (1), he shall be deemed to have elected that 60% of his superannuation allowance be paid on the joint life and last survivor plan...

On her husband's death in 1989, the widow claimed to be entitled to 60% of her husband's allowance pursuant to s. 14(1.1).

[53] After some analysis, it was determined that the amendment dealt with the actual act of electing a plan. To apply the amendment to the husband's 1978 election would have the effect of altering the legal character of a past occurrence, clearly a retrospective application.

[54] There is a *prima facie* presumption against the retrospective operations of statutes. In **Phillips v. Eyre** (1870), L.R. 6 Q.B. 1 at 23 Willis J. stated:

Retrospective laws are, no doubt, *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law ... Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.

[55] This accords with the views of the Supreme Court of Canada as expressed by Dickson J. (later C.J.C.) in the case of **Gustavson Drilling (1964) Ltd. v. M.N.R.**, [1977] 1 S.C.R. 271 at 279 where he said:

The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.

[56] Although it is not particularly difficult to define the concept of retrospectivity, it is often a great deal more difficult to recognize when legislation is being given retrospective application. Consider the case of ***A.G. Quebec v. Expropriation Tribunal***, [1986] 1 S.C.R. 732 where the provisions for abandoning an expropriation were changed after the commencement of an expropriation. It was held that the amendments did not operate retrospectively as they did not seek to affect any completed past transactions, but instead applied only to the ongoing expropriation process. In essence, if the relevant facts with which a provision is concerned are not all in the past, the application of the provision, when it is enacted, is "immediate" as opposed to "retrospective".

[57] Considering the above example, I must say that I doubt whether the legislation under consideration can be said to operate retrospectively in the circumstances of this case as it does not actually alter the legal character of a completed past event.

[58] Instead, the effect of the new legislation, if at all, is engaged by "present" or "ongoing" or "future facts", or "facts in progress". These facts relate to the determination of the kinds of damages being considered. Although they are

consequent upon a past tort, these facts will arise when Mervyn reaches 19 years, subsequent to the enactment of the new sections.

[59] Considering the application of the new provisions of the **Family Relations Act** I am not persuaded they can be said to operate retrospectively in the circumstances of this case.

Interference with Existing Rights

[60] The general principle is described by Lord Denning M.R. in his decision in **Attorney General v. Vernazza**, [1960] A.C. 965 (C.A.) where he stated at 978 that it is "clear that in the ordinary way the Court of Appeal cannot take into account a statute which has been passed in the interval since the case was decided at first instance, because the rights of litigants are generally to be determined according to the law in force at the date of the earlier proceedings." In fact, it appears from the cases that the relevant date is not the date of the trial judgment but rather the date the proceedings are commenced by issuing a Writ of Summons or Petition: **Hampton Lumber Mills Ltd. v. Joy Logging Ltd.**, [1977] 2 W.W.W. 289 (B.C.S.C.).

[61] The general presumption with respect to this principle is that "...a new statute does not apply to pending actions, in the

absence of a contrary intention in the statute..": *Driedger*, 2d ed., p. 191. Driedger notes that this presumption arises not because the application of the newly enacted legislation would give it retrospective effect but, rather, because its application would affect existing rights.

[62] There is a great deal of jurisprudence supporting this principle. It was explained in the following terms by Duff C.J.C. in *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638:

A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main v. Stark*), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

[63] In *Gustavson*, (supra) Dickson J. at p. 282 wrote:

The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board* at p. 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation... (Emphasis added.)

Dreidger, 3d ed., at 530 explains the principle as follows:

To deprive individuals of existing interests or expectations that have economic value is akin to expropriation without compensation, which has never been favoured by law. To worsen the position of individuals by changing the legal rules on which they relied in arranging their affairs is arbitrary and unfair. Where the application of new legislation creates special prejudice for some, or windfalls for others, the burdens and benefits of the new law are not rationally or fairly distributed. These effects may be hard on the individuals involved and they undermine the general security and stability of the law. For these reasons interference with vested rights is avoided in the absence of a clear legislative directive.

[64] The principle itself seems clear enough. The difficulty, however, is in identifying the kinds of rights that will be protected by the principle. Academics and others have debated this requirement in various writings but I find much more assistance in the decided cases, many of which recognize immunity from suit as a vested right.

[65] In *Martin v. Perrie*, [1986] 1 S.C.R. 41, the defendant physician had performed a medical procedure on the plaintiff in 1969. At that time, the limitation period for actions against physicians was one year from the termination of medical services. In 1974, legislation amended the limitation period to one year from the date the plaintiff knew or ought to have known of the facts giving rise to a cause of action.

The plaintiff learned of these facts in 1979 and immediately brought an action. Writing for the Court, Chouinard J. adopted the dissenting Reasons for Judgement of Thorson J.A. in the court below which may be found at: **Perrie v. Martin**, (1983), 148 D.L.R. (3d) 193 (Ont. C.A.). Thorson J.A. decided the application of the amended provision would affect the defendant's right to order his affairs based on the reasonable belief that he no longer faced any potential liability. He stated at 204 that the defendant's "accrued legal right to order his affairs on the above basis is, in my opinion, the single most telling argument against any construction of the new legislation which either ignores, or treats as a matter of no significance," the importance to a medical practitioner of ordering his affairs at the expiration of the limitation period.

[66] To the same effect was **Angus v. Sun Alliance Insurance Co.**, [1988] 2 S.C.R. 256 where the plaintiff was injured in a motor vehicle accident caused by the negligence of her husband. At that time, the law of Ontario barred individuals from bringing actions in tort against their spouse. Two months after the accident, an amendment effectively repealed this prohibition. The plaintiff then brought an action against her husband. LaForest J., writing for the Court,

applied the presumption against the application of the amendment because it would substantially affect the "vested rights" of the husband. He said at 266 that "...the removal of the defence entirely ... is in essence an interference with a vested right."

[67] There are a number of other authorities to the same effect, although many rely upon the preservation of pre-existing rights (often defences) only as support for the presumption against retrospectivity. In a number of these cases, the legislation clearly did not operate retrospectively and the court ought to have considered only the presumption against interference with vested rights; however, the confusion is understandable in such a complex area of law. Regardless, it seems clear to me that in the absence of express statutory language (as in this case), there is a presumption that pre-existing causes of action or defences are preserved against legislation enacted after litigation has been commenced: **Stephenson v. Parkdale Motors** (1924), 55 O.L.R. 680 (Ont. C.A.); **Kearley v. Wiley**, [1931] 3 D.L.R. 68; (Ont. C.A.); **Foy v. Foy** (1978), 20 O.R. (2d) 747 (Ont. C.A.); and **Canada (A.G.) v. Lavery** (1991), 76 D.L.R. (4th) 97 (B.C.C.A.); **Karras v. Richter**, [1995] 7 W.W.R. 406 (Sask. Q.B.).

[68] This is not a case like *Western Minerals Ltd. et al. v. Gaumont et al.*, [1953] 1 S.C.R. 345, where it was held that courts should apply recently enacted legislation that declares what the law has always been. The law in this case was quite different before the enactment of these sections of the *Family Relations Act*.

[69] The question then arises whether this protection extends not just to the transaction (or tort) in question, but also to the consequences, in this case a head of damages for a pre-existing tort. According to S.M. Waddams, *The Law of Damages* (Toronto: Canada Law Book Company, 1983) at par. 1100:

One area in which the general rule of early crystallization does not apply is the field of personal injury compensation, where all events right up to the date of assessment are taken into account. Thus, changes in the plaintiff's medical condition, increases in the cost of medical services and increases in rates of remuneration occurring between the injury and the trial are all relevant.
(Emphasis added.)

[70] The same would also apply to the period pending appeal as fresh evidence may often be admitted to prove that the scope of damages has been altered between trial and appeal. It must be recognized, however, that Professor Waddams states that all "events" leading up to the date of final assessment, such as changes in the condition of the plaintiff, may be taken into

account. Such a contention is probably not seriously open to question. In my view, however, a legislated change affecting the rights of either party is quite a different thing, amounting, in this case, to an increased liability on the part of the defendant in the order of several hundred thousands of dollars.

[71] It has been noted that it is often difficult to identify a vested right and determine when it will be protected against the operation of a particular statute. Fortunately, this issue has attracted the attention of a number of scholars. In her recent book, *Statutory Interpretation*, (Concord Ontario: Irwin Law, 1997), Professor Sullivan at 191 draws a distinction between abstract rights (those interests and expectations that are recognized and protected by the courts), and vested rights (protected interests or expectations that are actually held by a particular person). While legislation often and quite legitimately interferes with abstract rights there is a strong presumption that it does not interfere with vested rights.

[72] In *Driedger*, 3d ed. At p. 530, Professor Sullivan suggests that in every case a court must decide "whether the particular interest or expectation for which protection is sought is sufficiently important to be recognized as a right

and sufficiently defined and in the control of the claimant to be recognized as vested or accrued." She also notes that property and contractual rights, rights to [existing] damages or other common law remedies, and defences and immunities from suit are all easily recognized rights. She says that such common law "private" rights are generally considered to be of significant importance.

[73] Some judges have suggested the classification of an interest or right as a vested right depends on whether the denial of the right would cause a grave injustice: ***Syndics des Ecoles Protestantes d'Outremont v. Outremont***, [1952] 2 S.C.R. 506, or whether the right in question has been "personalized" in the sense that the claimant stands in a legal position different from that of other members of society in relation to the right: ***Scott v. College of Physicians & Surgeons (Saskatchewan)***, [1993] 95 D.L.R. (4th) 706 (Sask. C.A.).

[74] In my view, by analogy to immunity from suit, there is no difference in principle between an enactment materially affecting a cause of action and one which materially affects a pre-existing defence to an identifiable claim arising out of a cause of action. In this case, at the time proceedings were commenced, the defendant was not subject to claims by the plaintiffs for future cost of care after Mervyn attained the

age of 19 years. This defence, in my view, satisfies most of the tests that have been suggested for determining whether to classify this immunity as a "vested" right. Therefore, it follows that to apply the recently amended provisions to this case would deprive the defendant of a vested right.

[75] A similar case involving an amendment to the quantum of damages pending suit is **Garnham v. Tessier and Winter** (1959), 27 W.W.R. 682 (Man. C.A.). In that case, at the time the proceedings were commenced, the monetary jurisdiction of the County Court was limited to \$800. Later, before the trial began, this jurisdiction was amended by legislation to a maximum of \$1,000. Even though the plaintiff's claim was amended accordingly, the trial judge, affirmed by the Court of Appeal, held that the statute should not be applied to cases pending at the time of the amendment. The Manitoba courts relied in part on a provision in the Manitoba **Interpretation Act** that created a statutory presumption against the application of enactments to pending litigation unless expressly stated otherwise. In my view, however, the provision relied upon in that case only re-states the common law and the same presumption should be applied here.

[76] **Garnham** is also important in another way. It might be argued that by not applying these amendments the Courts would

prejudice the plaintiffs by imposing upon them the possibility of responsibility for cost of future care. While I doubt that such will come about in this case, I note that in his concurring judgement, Adamson C.J.M. stated that there is no authority for the proposition that a statute should be applied in order to enlarge the rights of a party.

[77] Finally, I should mention the case of **Coward v. Comex Houlder Diving Ltd.** (1988), Kemp Vol. 3, 172-232 C.A. a fatal accident case in which the English Court of Appeal had to consider the applicability of amendments to the tax law which were enacted after damages had been assessed at trial. While recognizing that events occurring during litigation could affect the assessment of future loss, usually by the admission of fresh evidence, the Court declined to consider the changed tax rates more as a matter of discretion than of law. In doing this, the Court relied heavily on the principle that "for better or worse, the assessment at the trial is once and for all". As I read the judgment, it seems that the Court treated the tax changes more as an "event" which could be changed again and again. Although the result in this case is similar, it cannot be regarded as a considered judgement respecting interference with vested rights by subsequently enacted legislation.

[78] In view of the foregoing, and in light of the fact that there is no express or implied language in the legislation indicating that it was intended to apply to pending litigation, I would hold that the newly enacted provisions of the **Family Relations Act** may not be considered in this case.

Alternatively, the Construction of these Amendments

[79] Because these new sections are found in Part 7 of the **Family Relations Act**, headed "Maintenance and Support Objectives", they are obviously intended to reflect the modern trend in family law to require family members to support their less fortunate members in some circumstances. Section 87 has extended the definition of "child" to include a person who "is unable, because of illness, disability or other cause, to withdraw from their [parents'] charge or to obtain the necessaries of life." I take the word "charge" in s. 87 to be equivalent to "care". In the context of this case, however, subject to what follows, I conclude that these sections have no application to this case because the evidence is clear that Mervyn will be able to, and should, in his best interests, withdraw from the "charge" of his parents and live in a group home, at which point he will be able to "obtain the necessaries of life" under GAIN. Section 88 imposes liability

upon parents with respect to children over the age of 19 years only when those conditions cannot be satisfied.

[80] It thus becomes necessary to examine the GAIN legislation. Section 24.1(1) of the **Act** provides that Regulations may be made:

...governing the assignment of maintenance rights and the recovery of the amount of income assistance provided in place of maintenance...

[81] While the meaning of the underlined words is not entirely clear, I believe they refer to benefits that are provided because some form of "maintenance" is not being paid.

[82] Section 24 also provides authority to make regulations prescribing categories of persons who are not eligible for income assistance unless they assign their maintenance rights to the Minister. It is apparent that the intention of this provision is to authorize regulations that will permit the plan to obtain from a person receiving GAIN benefits the assignment of maintenance rights in exchange for those benefits.

[83] Part 7 of B.C. Regulation 75/97 seems to be a regulation made pursuant to s. 24.1(1). Section 77 (which is in Part 7) provides a number of definitions, most of which relate to matrimonial situations. Section 78, headed "Categories of

persons who must assign" provides that persons in the enumerated categories who have a maintenance right specified in s. 79 must assign that right to the Minister. The enumerated categories include spouses, spouses with dependent children, single persons with dependent children, and "(d) a person under 19 years of age who is not residing with his or her parents." Persons over the age of 19 who are neither spouses nor persons with dependent children are not included in s. 78, and they need not assign their maintenance rights, if any, to the Minister.

[84] The categories of maintenance rights specified in s. 79 that must be assigned to the Minister are very broad and include "(a) the right to make an application under an enactment of British Columbia for a maintenance order". However, I consider that this section is controlled by s. 78 which specifically provides the classes of persons who must assign maintenance rights.

[85] I conclude, therefore, that under current legislation, Mervyn would qualify for GAIN benefits upon attaining his majority and there would be no authority to require him to assign any maintenance rights he might have under sections 87 and 88 of the **Family Relations Act**. Upon attaining the age of 19 years, Mervyn would withdraw from the charge of his parents

and he would not be unable "to obtain the necessaries of life". Therefore, he would have no maintenance claims against his parents under the above-quoted sections of the **Family Relations Act** that he could assign to the Minister even if he were then requested to do so.

[86] Thus, in my view, the only contingency is whether GAIN benefits will still be available when Mervyn reaches the age of 19 and beyond. If they are not, then the parents may have a continuing maintenance liability under the **Family Relations Act**. If and when that question arises, it would have to be considered in terms of a retrospective analysis which I need not undertake in this case. It goes without saying that the parents are in a different position from the defendant.

[87] As already mentioned, the trial judge has found that GAIN benefits are "likely" to be available, subject only to a 5% contingency, when Mervyn reaches 19 years of age and beyond. This finding is fully justified both by the history of this kind of legislation in this province, and by ample evidence adduced at trial. I cite the following examples:

1. Dr. Joschko, on behalf of the defendant stated in his report:

Mervyn should be eligible for government funded income assistance and benefits such as those obtained through *Guaranteed Available Income based on Need (GAIN)* funding and, more importantly,

support services through the Ministry of Children and Family Services to Person With Mental Disabilities division. Down syndrome is a very common form of intellectual disability and Ministry staff will be familiar with Mervyn's special needs and the available programs to meet those needs...

2. Dr. Drywaniuk, the plaintiff's consulting psychologist agreed with Dr. Joschko's opinion just quoted.
3. Ms. MacLean, an occupational therapist called by the Plaintiffs gave this answer:

Q. --at the present time there is no user fee to the individual or his family for group home living. For semi-independent living, the individual pays \$22 per day and this money comes out of their GAIN...

A. That's correct.

[88] As already mentioned, there is always a possibility that circumstances will change at some point after the date of trial until Mervyn's majority, or thereafter, for better or worse. However, in practical terms, it is so unlikely that disabled persons like Mervyn will not be looked after by the state in a province like British Columbia, that the trial judge was entitled to conclude on the evidence that the plaintiffs will not be required to maintain Mervyn after he reaches his majority. We should not disregard that finding: ***Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital***, [1994] 1 S.C.R. 114.

[89] The parents argue that the result of the trial judgment is that Mervyn will be kept in poverty so that he will qualify for benefits. With respect, that is not a correct characterization of the trial judgment. In the first place, it is unlikely that he will ever have any assets or that his individual economic prospects will be prejudiced in any way by the outcome of these proceedings. Second, and in any event, the scheme of the GAIN legislation is such that beneficial interests in assets of up to \$100,000 (or possibly more), would not disqualify him from GAIN benefits.

[90] Last, I wish to say a few words about collateral benefits. This is not a collateral benefits case, of which there are so many. Those cases deal with circumstances where a question arises whether the victim of a tort, such as in **Cherry (Guardian ad litem of) v. Borsman**, [1992] 6 W.W.R. 701 (B.C.C.A.), must suffer a reduction in damages otherwise payable by a tortfeasor because the victim is entitled to benefits payable under an insurance, pension or income maintenance scheme or arrangement. The law in this area has become far too subtle and complicated, but we need not deal with it because in this case, unlike the collateral benefits cases, it is conceded that Mervyn, the person who will receive benefits under welfare legislation, has no entitlement to

damages. The only question is whether his parents can recover damages they will not likely be called upon to pay. I have already answered that question and I do not find it necessary to say anything further about collateral benefits.

[91] For these reasons, I agree with the trial judge that the plaintiff-parents are not entitled to recover damages representing the cost of future group home accommodation and income maintenance because funding for such necessities will likely be furnished directly to Mervyn under GAIN. The allowance of \$80,000 as a contingency has not been shown to be wrong or inadequate in the circumstances nor has it been contested.

The Trust Question.

[92] On the Court's motion, counsel and the Public Trustee were requested to furnish submissions about the idea of impressing the parents' recovery for future cost of care, if any, with a trust in favour of Mervyn. Although I have concluded that there should be no recovery on this head of damages, I offer the following comments.

[93] In my judgment, there is no authority justifying the imposition of such a trust in a case such as this. It must be

remembered that Mervyn (the proposed beneficiary of the trust) has no claim to damages. If the parents have a claim, it is to assist them to discharge their legal obligation to support their child after he attains the age of 19 years under legislation that does not affect the defendant. But as already mentioned, Mervyn is not likely to need that assistance from the plaintiffs. Thus, the creation of a trust in these circumstances would serve only to protect a fund that will not likely be needed. In fact, if Mervyn were to be the beneficiary of a substantial trust, the effect might be to deprive him of benefits to which he would otherwise be entitled. Finally, as mentioned earlier, it is conceivable that when Mervyn reaches the age of 19 years or thereafter, the benefits payable under GAIN could even be greater than they are now. I need not go further and discuss the problems that might arise by reason of the likely reduction in actuarially calculated damages for the payment of legal fees.

[94] Because Mervyn does not have a cause of action, there is no parallel between this case and the so-called "in trust" claims for housekeeping and other assistance. Those claims are paid in trust for replacement services required while a parent looks after an injured spouse, parent or child who themselves have a cause of action.

[95] It cannot be disputed, in view of *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940 at 978-983 that the trust concept may be used to provide compensation for voluntary services when necessary and appropriate in the interests of justice. The purpose of the trust here, however, is to impose an unnecessary liability upon the defendant for the benefit of a person who has no claim against him. It has been said, wisely, I think, that new equitable rights should be created only with the greatest possible care.

[96] I have no doubt that occasions will arise when it may be necessary for equity, as a part of the growing tree of the law, to create new remedies. I doubt, however, if it is necessary to establish a rule of equity that a plaintiff's damage award can be impressed with a trust in favour of a third person who has no claim to the money. Any extension of this branch of the law should, in my view, be left to the Legislature.

[97] Last, I wish to observe that, if there is to be a judicially-created trust, I would think the Public Trustee should be a trustee. Further, the order creating such a trust should specify what is to happen to the corpus of the trust if, unhappily, Mervyn does not survive long enough to exhaust

the fund. Presumably it would devolve to the parents as a windfall.

Conclusion.

[98] I would dismiss this appeal.

"The Honourable Chief Justice McEachern"

TAB 10

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrier, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appellants*

c.

Zittrier, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N° du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

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

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «LNE») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. 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. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40a de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. 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. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40a sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words “terminated by an employer” must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer’s bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40a of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l’historique législatif pour déterminer l’intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l’*Employment Standards Amendment Act, 1981*, étaient exemptés de l’obligation de verser des indemnités de cessation d’emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l’obligation de verser une indemnité de cessation d’emploi. Si tel n’était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l’ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40a sont examinés dans leur contexte global, les termes «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inequitable. Une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. La cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40a de la *LNE*. Il était inutile d’examiner la question de l’applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d’avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

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Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40a(1) [abr. & rempl. *ibid.*, art. 5(1)].

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Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. n° 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et Kathleen Martin, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

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order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

³ Pursuant to the receiving order, the respondent, Zittler, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

⁴ In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately \$2.6 million and for severance pay totalling \$14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

⁵ The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

Conformément à l'ordonnance de séquestre, l'intimée, Zittler, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «LNE»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 \$). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act*.

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

- (a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
- (b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «LF») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «LNE»).

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7...

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi*.

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

- a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;
- b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

- (c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
 - (d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
 - (e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
 - (f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
 - (g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
 - (h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,
- and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

- (a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

- (a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
- (b) one or more employees have their employment terminated by an employer with a payroll of \$2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

- c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;
 - d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;
 - e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;
 - f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;
 - g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;
 - h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,
- et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

- a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40a . . .

[TRANSLATION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

- a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;
- b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . . .

- (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRANSDUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . . .

- (3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujéti à la date de la faillite, ou auxquels il peut devenir assujéti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the “*ESAA*”), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo’s former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

n’avaient pas soutenu que les indemnités de licenciement et de cessation d’emploi devaient être prioritaires dans la distribution de l’actif, mais tout simplement qu’elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu’il ne convenait pas d’invoquer la jurisprudence et la doctrine portant sur l’interprétation des dispositions relatives à la priorité de la *LF*.

Même si la faillite ne met pas fin à la relation entre l’employeur et l’employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNF*, le juge Farley était d’avis que les employés en l’espèce avaient néanmoins droit à ces indemnités, car il s’agissait d’engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d’une part qu’aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d’une indemnité de licenciement et d’une indemnité de cessation d’emploi au moment de la cessation d’emploi et d’autre part que l’employeur en faillite est assujéti à l’obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l’employeur et l’employé, soit bien avant la faillite.

Le juge Farley a également examiné le par. 2(3) de l’*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l’*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l’indemnité de cessation d’emploi jusqu’à ce que les modifications aient reçu la sanction royale. Il était d’avis que cette disposition n’aurait pas été nécessaire si le législateur n’avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d’un licenciement s’appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d’obtenir des indemnités de licenciement et de cessation d’emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l’appel formé contre la décision du syndic.

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B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

¹³ Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as “[n]o employer shall terminate the employment of an employee” (s. 40(1)), “the notice required by an employer to terminate the employment” (s. 40(2)), and “[a]n employer who has terminated or who proposes to terminate the employment of employees” (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase “employees have their employment terminated by an employer”. Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40a(1)a), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

¹⁴ In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

[TRADUCTION] Le libellé clair des art. 40 et 40a ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40a.

Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40a de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

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the words, “Where . . . fifty or more employees have their employment terminated by an employer. . . .” Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated “by an employer”.

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated “by an employer”, but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase “terminated by an employer” is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee’s employment is involuntarily terminated by reason of their employer’s bankruptcy, this constitutes termination “by an employer” for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter “*Construction of Statutes*”); Pierre-André Côté, *The Interpretation of Legisla-*

licier un employé . . . » Le paragraphe 40a(1a) contient également les mots: «si [. . .] l’employeur licencie cinquante employés ou plus . . . » Par conséquent, la question dans le présent pourvoi est de savoir si l’on peut dire que l’employeur qui fait faillite a licencié ses employés.

La Cour d’appel a répondu à cette question par la négative, statuant que, lorsqu’un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l’employeur mais par l’effet de la loi. La Cour d’appel a donc estimé que, dans les circonstances de l’espèce, les dispositions relatives aux indemnités de licenciement et de cessation d’emploi de la *LNE* n’étaient pas applicables et qu’aucune obligation n’avait pris naissance. Les appelants répliquent que les mots «l’employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d’emploi volontaire et la cessation d’emploi forcée. Ils soutiennent que ce libellé visait à décharger l’employeur de son obligation de verser des indemnités de licenciement et de cessation d’emploi lorsque l’employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d’emploi forcée résultant de la faillite de l’employeur est assimilable au licenciement effectué par l’employeur pour l’exercice du droit à une indemnité de licenciement et à une indemnité de cessation d’emploi prévu par la *LNE*.

Une question d’interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d’appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l’obligation de verser une indemnité de licenciement et une indemnité de cessation d’emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l’interprétation législative ait fait couler beaucoup d’encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3^e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2^e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act “shall be deemed to be remedial” and directs that every Act shall “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”.

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of “. . . the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2^e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l’interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

[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.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l’approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

Je m’appuie également sur l’art. 10 de la *Loi d’interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s’interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

Bien que la Cour d’appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n’a pas accordé suffisamment d’attention à l’économie de la *LNE*, à son objet ni à l’intention du législateur; le contexte des mots en cause n’a pas non plus été pris en compte adéquatement. Je passe maintenant à l’analyse de ces questions.

Dans l’arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l’importance que notre société accorde à l’emploi et le rôle fondamental qu’il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C’est dans ce contexte que les juges majoritaires dans l’arrêt *Machtinger* ont défini, à la p. 1003, l’objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

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certain minimum standards, including minimum periods of notice of termination”. Accordingly, the majority concluded, at p. 1003, that, “. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not”.

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu’« . . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d’employés possible est à préférer à une interprétation qui n’a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to “cushion” employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L’objet des dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L’article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L’une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s’ensuit que l’al. 40(7)a, qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu’un employeur n’a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l’absence d’une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2^e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer’s business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l’art. 40a, qui prévoit l’indemnité de cessation d’emploi, vient indemniser les employés ayant beaucoup d’années de service pour ces années investies dans l’entreprise de l’employeur et pour les pertes spéciales qu’ils subissent lorsqu’ils sont licenciés. Dans l’arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d’une décision rendue en matière de normes d’emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l’indemnité de cessation d’emploi:

Severance pay recognizes that an employee does make an investment in his employer’s business — the extent of this investment being directly related to the length of

[TRADUCTION] L’indemnité de cessation d’emploi reconnaît qu’un employé fait un investissement dans l’entreprise de son employeur — l’importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. 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 (at pp. 378-80). 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 (Sullivan, *Construction of Statutes, supra*, at p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40a de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. 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 (aux pp. 430 à 432). 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 (Sullivan, *Construction of Statutes, op. cit.*, à la p. 88).

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

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until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40a, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40a, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1^{er} janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40a de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1^{er} janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

... any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the *E.S.A.* ... it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

This interpretation is also consistent with statements made by the Minister of Labour at the time

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40a, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

[TRADUCTION] ... tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la *L.N.E.* [...] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

Cette interprétation est également compatible avec les déclarations faites par le ministre du

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he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . .

. . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

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Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

. . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

[TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.

. . .

. . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1^{er} janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

[TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1^{re} sess., 32^e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

. . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40a de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

36

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amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats, supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

³⁹ The Court of Appeal also relied upon *Re Kemp Products Ltd., supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch, supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

⁴⁰ As I see the matter, when the express words of ss. 40 and 40a of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40a de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words “terminated by the employer” must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer’s bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer’s bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

mots «l’employeur licencié» doivent être interprétés de manière à inclure la cessation d’emploi résultant de la faillite de l’employeur. Adoptant l’interprétation libérale et généreuse qui convient aux lois conférant des avantages, j’estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l’intention du législateur, qui ressort du par. 2(3) de l’*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d’emploi en application de la *LNE* lorsque la cessation d’emploi résulte de la faillite de leur employeur serait aller à l’encontre des fins visées par les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi et minerait l’objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d’employés possible.

À mon avis, les raisons qui motivent la cessation d’emploi n’ont aucun rapport avec la capacité de l’employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu’une telle interprétation irait à l’encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d’emploi résultant de la faillite de l’employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l’art. 121 de la *LF* en vue d’obtenir une indemnité de licenciement et une indemnité de cessation d’emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j’estime inutile d’examiner l’autre conclusion tirée par le juge de première instance quant à l’applicabilité du par. 7(5) de la *LNE*.

Je fais remarquer qu’après la faillite de Rizzo, les dispositions relatives à l’indemnité de licenciement et à l’indemnité de cessation d’emploi de la

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74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, “[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law”. As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43

I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo’s former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l’emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d’emploi résulte de l’effet de la loi à la suite de la faillite de l’employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l’art. 17 de la *Loi d’interprétation* dispose que «[l]’abrogation ou la modification d’une loi n’est pas réputée constituer ou impliquer une déclaration portant sur l’état antérieur du droit», je précise que la modification apportée subséquemment à la loi n’a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Dispositif et dépens

Je suis d’avis d’accueillir le pourvoi et d’annuler le premier paragraphe de l’ordonnance de la Cour d’appel. Je suis d’avis d’y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d’indemnité de licenciement (y compris la paie de vacances due) et d’indemnité de cessation d’emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n’ayant produit aucun élément de preuve concernant les efforts qu’il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d’autorisation de pourvoi auprès de notre Cour en leur nom, je suis d’avis d’ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d’avis de ne pas modifier les ordonnances des juridictions inférieures à l’égard des dépens.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l’intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d’Ontario, Direction des normes d’emploi: Le procureur général de l’Ontario, Toronto.

TAB 11

**SULLIVAN
ON THE
CONSTRUCTION OF STATUTES**

Sixth Edition

by

Ruth Sullivan



else) adjusts his or her understanding of the world to a greater or lesser degree. The impressions produced by every encounter with social science data leave a trace that affects subsequent encounters with statutory provisions and facts. To ensure the truth and validity of legislative facts, courts must be prepared to have their assumptions challenged. The point is neatly made by Binnie J. in the *Spence* case:

[W]hat “everybody knows” may be wrong. Until *Parks*, “everybody” knew the solemnity of a criminal trial and careful jury instructions from the judge meant there was little possibility that potential jurors in Toronto would be influenced by racial prejudice (Doherty J.A., at p. 360 of *Parks*, cites a number of trial decisions where race-based challenges for cause were rejected for that reason). Common law judges in early Tudor England would presumably have taken judicial notice of the “fact” that the sun revolves around the earth.⁴⁹

§22.24 Social science evidence not only promotes the truth, but also promotes impartiality. As McLachlin and L’Heureux-Dubé JJ. wrote in *R. v. S. (R.D.)*:

Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky’s “Embodied Diversity and the Challenges to Law” ... offers the following comment:

What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an “enlargement of mind”. We do this by taking different perspectives into account....^[50]

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law....

An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context ...,⁵¹ from academic studies properly placed before the Court; and from the judge’s personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.⁵²

§22.25 Conclusion. Under Driedger’s modern principle, interpreters are obliged to consider the entire context of the text to be interpreted. As Driedger himself indicated, this includes the external context in its broadest sense. As

⁴⁹ *R. v. Spence*, [2005] S.C.J. No. 74, [2005] 3 S.C.R. 458, at para. 51 (S.C.C.).

⁵⁰ (1997), 42 McGill L.J. 91, at 107.

⁵¹ *R. v. Lavallee*, [1990] S.C.J. No. 36, [1990] 1 S.C.R. 852 (S.C.C.); *R. v. Parks*, [1993] O.J. No. 2157, 15 O.R. (3d) 324 (Ont. C.A.), leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 481, [1994] 1 S.C.R. x (S.C.C.), and *Moge v. Moge*, [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813 (S.C.C.).

⁵² [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484, at paras. 42-44 (S.C.C.).

courts work out the implications of total context, it becomes increasingly evident that interpretation using the modern principle is hard work. It requires interpreters not only to be experts in language and law (including common law, international law, constitutional law and statute law) but also to develop expertise in history, sociology, anthropology, psychology and more.