

BRITISH COLUMBIA TRANSMISSION CORPORATION

Section 5 Inquiry

BOOK OF AUTHORITIES

AUTHORITIES

1. *Administrative Tribunals Act* [S.B.C. 2004], c. 45
2. *Apsassin et al v. BC Oil and Gas et al*, 2004 BCSC 92
3. *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al*, 2004 BCSC 1597
4. Bryan A. Garner ed., *Black's Law Dictionary* 8th ed., (St. Paul, Minn.: West Publishing Co., 2004) s.v. determination)
5. *Canada (M.N.R.) v. Coopers and Lybrand Ltd.*, [1979] 1 S.C.R. 495
6. *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67
7. *Haida Nation v. British Columbia (Ministry of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73
8. *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159
9. *Rigaux v. Gove*, (1998), 155 D.L.R (4th) 716
10. *Sierra Club of Canada (British Columbia) v. British Columbia Utilities Commission*, 2008 BCCA 98
11. *Utilities Commission Act*, R.S.B.C. 1996, c. 473

This Act is Current to July 15, 2009

ADMINISTRATIVE TRIBUNALS ACT

[SBC 2004] CHAPTER 45

Assented to May 20, 2004

Contents

Section

- 1 Definitions
- 2 Chair's initial term and reappointment
- 3 Member's initial term and reappointment
- 4 Appointment of acting chair
- 5 Member's absence or incapacitation
- 6 Member's temporary appointment
- 7 Powers after resignation or expiry of term
- 8 Termination for cause
- 9 Responsibilities of the chair
- 10 Remuneration and benefits for members
- 11 General power to make rules respecting practice and procedure
- 12 Practice directives tribunal must make
- 13 Practice directives tribunal may make
- 14 General power to make orders
- 15 Interim orders
- 16 Consent orders
- 17 Withdrawal or settlement of application
- 18 Failure of party to comply with tribunal orders and rules
- 19 Service of notice or documents
- 20 When failure to serve does not invalidate proceeding
- 21 Notice of hearing by publication
- 22 Notice of appeal (inclusive of prescribed fee)
- 23 Notice of appeal (exclusive of prescribed fee)
- 24 Time limit for appeals
- 25 Appeal does not operate as stay
- 26 Organization of tribunal
- 27 Staff of tribunal

- 28 Appointment of person to conduct dispute resolution process
- 29 Disclosure protection
- 30 Tribunal duties
- 31 Summary dismissal
- 32 Representation of parties to an application
- 33 Interveners
- 34 Power to compel witnesses and order disclosure
- 35 Recording tribunal proceedings
- 36 Form of hearing of application
- 37 Applications involving similar questions
- 38 Examination of witnesses
- 39 Adjournments
- 40 Information admissible in tribunal proceedings
- 41 Hearings open to public
- 42 Discretion to receive evidence in confidence
- 43 Discretion to refer questions of law to court
- 44 Tribunal without jurisdiction over constitutional questions
- 45 Tribunal without jurisdiction over *Canadian Charter of Rights and Freedoms* issues
- 46 Notice to Attorney General if constitutional question raised in application
- 46.1 Discretion to decline jurisdiction to apply the *Human Rights Code*
- 46.2 Limited jurisdiction and discretion to decline jurisdiction to apply the *Human Rights Code*
- 46.3 Tribunal without jurisdiction to apply the *Human Rights Code*
- 47 Power to award costs
- 48 Maintenance of order at hearings
- 49 Contempt proceeding for uncooperative witness or other person
- 50 Decisions
- 51 Final decision
- 52 Notice of decision
- 53 Amendment to final decision
- 54 Enforcement of tribunal's final decision
- 55 Compulsion protection
- 56 Immunity protection for tribunal and members
- 57 Time limit for judicial review
- 58 Standard of review if tribunal's enabling Act has privative clause
- 59 Standard of review if tribunal's enabling Act has no privative clause
- 60 Power to make regulations
- 61 Application of *Freedom of Information and Protection of Privacy Act*
- 62 Application of Act to appointments under *Criminal Code*
- 63- Consequential Amendments
- 188
- 189 Transitional: existing appointments

190 Repeal

191 Commencement

Definitions

1 In this Act:

"applicant" includes an appellant, a claimant or a complainant;

"application" includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court;

"appointing authority" means the person or the Lieutenant Governor in Council who, under another Act, has the power to appoint the chair, vice chair and members, or any of them, to the tribunal;

"constitutional question" means any question that requires notice to be given under section 8 of the *Constitutional Question Act*;

"court" means the Supreme Court;

"decision" includes a determination, an order or other decision;

"dispute resolution process" means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute;

"intervener" means a person who is permitted by the tribunal to participate as an intervener in an application;

"member" means a person appointed to the tribunal to which a provision of this Act applies;

"privative clause" means provisions in the tribunal's enabling Act that give the tribunal exclusive and final jurisdiction to inquire into, hear and decide certain matters and questions and provide that a decision of the tribunal in respect of the matters within its jurisdiction is final and binding and not open to review in any court;

"tribunal" means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act;

"tribunal's enabling Act" means the Act under which the tribunal is established or continued.

Chair's initial term and reappointment

2 (1) The chair of the tribunal may be appointed by the appointing authority, after a merit based process, to hold office for an initial term of 3 to 5 years.

(2) The chair may be reappointed by the appointing authority for additional terms of up to 5 years.

Member's initial term and reappointment

3 (1) A member, other than the chair, may be appointed by the appointing authority, after a merit based process and consultation with the chair, to hold office for an initial term of 2 to 4 years.

(2) A member may be reappointed by the appointing authority as a member of the tribunal for additional terms of up to 5 years.

Appointment of acting chair

4 (1) If the chair expects to be absent or is absent, the chair may designate a vice chair as the acting chair for the period that the chair is absent.

(2) If the chair expects to be absent or is absent and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the chair may designate a member as the acting chair for the period that the chair is absent.

(3) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time, the appointing authority may designate a vice chair as the acting chair for the period that the chair is absent or incapacitated.

(4) Despite subsections (1) and (2), if the chair is absent or incapacitated for an extended period of time and there is no vice chair or if there is a vice chair and the vice chair is not willing or able to act as chair, the appointing authority may designate a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for the

period that the chair is absent or incapacitated.

(5) If the tribunal has no chair, the appointing authority may appoint an individual, who is a member, or appoint an individual who would otherwise be qualified for appointment as a member or as the chair, as the acting chair for a term of up to 6 months.

(6) In exceptional circumstances an individual may be appointed as the acting chair under subsection (5) for an additional term of up to 6 months.

(7) Subsections (3), (4) and (5) apply whether or not an individual is designated, under the Act under which the chair is appointed, to act on behalf of the chair.

(8) An individual designated or appointed under any of subsections (1) to (5) has all the powers and may perform all the duties of the chair.

Member's absence or incapacitation

5 (1) If a member is absent or incapacitated for an extended period of time or expects to be absent for an extended period of time, the appointing authority, after consultation with the chair, may appoint another person, who would otherwise be qualified for appointment as a member, to replace the member until the member returns to full duty or the member's term expires, whichever comes first.

(2) The appointment of a person to replace a member under subsection (1) is not affected by the member returning to less than full duty.

Member's temporary appointment

6 (1) If the tribunal requires additional members, the chair, after consultation with the minister responsible for the Act under which the tribunal is established, may appoint an individual, who would otherwise be qualified for appointment as a member, to be a member for up to 6 months.

(2) Under subsection (1), an individual may be appointed to the tribunal only twice in any 2 year period.

(3) An appointing authority may establish conditions and

qualifications for appointments under subsection (1).

Powers after resignation or expiry of term

7 (1) If a member resigns or their appointment expires, the chair may authorize that individual to continue to exercise powers as a member of the tribunal in any proceeding over which that individual had jurisdiction immediately before the end of their term.

(2) An authorization under subsection (1) continues until a final decision in that proceeding is made.

(3) If an individual performs duties under subsection (1), section 10 applies.

Termination for cause

8 The appointing authority may terminate the appointment of the chair, a vice chair or a member for cause.

Responsibilities of the chair

9 The chair is responsible for the effective management and operation of the tribunal and the organization and allocation of work among its members.

Remuneration and benefits for members

10 (1) In accordance with general directives of the Treasury Board, members must be reimbursed for reasonable travelling and out of pocket expenses necessarily incurred in carrying out their duties.

(2) In accordance with general directives of the Treasury Board, the minister responsible for the tribunal's enabling Act must set the remuneration for those members who are to receive remuneration.

General power to make rules respecting practice and procedure

11 (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it.

(2) Without limiting subsection (1), the tribunal may make rules as

follows:

- (a) respecting the holding of pre-hearing conferences, including confidential pre-hearing conferences, and requiring the parties and any interveners to attend a pre-hearing conference;
- (b) respecting dispute resolution processes;
- (c) respecting receipt and disclosure of evidence, including but not limited to pre-hearing receipt and disclosure and pre-hearing examination of a party on oath, affirmation or by affidavit;
- (d) respecting the exchange of records and documents by parties;
- (e) respecting the filing of written submissions by parties;
- (f) respecting the filing of admissions by parties;
- (g) specifying the form of notice to be given to a party by another party or by the tribunal requiring a party to diligently pursue an application and specifying the time within which and the manner in which the party must respond to the notice;
- (h) respecting service and filing of notices, documents and orders, including substituted service;
- (i) requiring a party to provide an address for service or delivery of notices, documents and orders;
- (j) providing that a party's address of record is to be treated as an address for service;
- (k) respecting procedures for preliminary or interim matters;
- (l) respecting amendments to an application or responses to it;
- (m) respecting the addition of parties to an application;
- (n) respecting adjournments;
- (o) respecting the extension or abridgement of time limits provided for in the rules;

- (p) respecting the transcribing or tape recording of its proceedings and the process and fees for reproduction of a tape recording if requested by a party;
- (q) establishing the forms it considers advisable;
- (r) respecting the joining of applications;
- (s) respecting exclusion of witnesses from proceedings;
- (t) respecting the effect of a party's non-compliance with the tribunal's rules;
- (u) respecting access to and restriction of access to tribunal documents by any person;
- (v) respecting witness fees and expenses;
- (w) respecting applications to set aside any summons served by a party.

(3) In an application, the tribunal may waive or modify one or more of its rules in exceptional circumstances.

(4) The tribunal must make accessible to the public any rules of practice and procedure made under this section.

Practice directives tribunal must make

12 (1) The tribunal must issue practice directives respecting

(a) the usual time period for completing an application and for completing the procedural steps within an application, and

(b) the usual time period within which the tribunal's final decision and reasons are to be released after the hearing of the application is completed.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) Practice directives issued under subsection (1) must be consistent with this Act and with the tribunal's enabling Act, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.

(4) The tribunal must make accessible to the public any practice

directives made under this section.

Practice directives tribunal may make

13 (1) The tribunal may issue practice directives consistent with this Act and with the tribunal's enabling Act, the regulations made under those Acts and any rules of practice and procedure made by the tribunal.

(2) The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

(3) The tribunal must make accessible to the public any practice directives made under subsection (1).

General power to make orders

14 In order to facilitate the just and timely resolution of an application the tribunal, if requested by a party or an intervener, or on its own initiative, may make any order

(a) for which a rule is made by the tribunal under section 11,

(b) for which a rule is prescribed under section 60, or

(c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.

Interim orders

15 The tribunal may make an interim order in an application.

Consent orders

16 (1) On the request of the parties to an application, the tribunal may make a consent order if it is satisfied that the order is consistent with its enabling Act.

(2) If the tribunal declines to make a consent order under subsection (1), it must provide the parties with reasons for doing so.

Withdrawal or settlement of application

17 (1) If an applicant withdraws all or part of an application or the

parties advise the tribunal that they have reached a settlement of all or part of an application, the tribunal must order that the application or the part of it is dismissed.

(2) If the parties reach a settlement in respect of all or part of the subject matter of an application, on the request of the parties, the tribunal may make an order that includes the terms of settlement if it is satisfied that the order is consistent with its enabling Act.

(3) If the tribunal declines to make an order under subsection (2), it must provide the parties with reasons.

Failure of party to comply with tribunal orders and rules

18 If a party fails to comply with an order of the tribunal or with the rules of practice and procedure of the tribunal, including any time limits specified for taking any actions, the tribunal, after giving notice to that party, may do one or more the following:

- (a) schedule a written, electronic or oral hearing;
- (b) continue with the application and make a decision based on the information before it, with or without providing an opportunity for submissions;
- (c) dismiss the application.

Service of notice or documents

19 (1) If the tribunal is required to provide a notice or any document to a party or other person in an application, it may do so by personal service of a copy of the notice or document or by sending the copy to the person by any of the following means:

- (a) ordinary mail;
- (b) electronic transmission, including telephone transmission of a facsimile;
- (c) if specified in the tribunal's rules, another method that allows proof of receipt.

(2) If the copy is sent by ordinary mail, it must be sent to the most recent address known to the tribunal and must be considered to be received on the fifth day after the day it is mailed, unless that day is

a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(3) If the copy is sent by electronic transmission it must be considered to be received on the day after it was sent, unless that day is a holiday, in which case the copy must be considered to be received on the next day that is not a holiday.

(4) If the copy is sent by a method referred to in subsection (1) (c), the tribunal's rules govern the day on which the copy must be considered to be received.

(5) If through absence, accident, illness or other cause beyond the party's control a party who acts in good faith does not receive the copy until a later date than the date provided under subsection (2), (3) or (4), that subsection does not apply.

When failure to serve does not invalidate proceeding

20 If a notice or document is not served in accordance with section 19, the proceeding is not invalidated if

- (a) the contents of the notice or document were known by the person to be served within the time allowed for service,
- (b) the person to be served consents, or
- (c) the failure to serve does not result in prejudice to the person, or any resulting prejudice can be satisfactorily addressed by an adjournment or other means.

Notice of hearing by publication

21 If the tribunal is of the opinion that because there are so many parties to an application or for any other reason it is impracticable to give notice of a hearing to a party by a method referred to in section 19 (1) (a) to (c), the tribunal may give notice of a hearing by public advertisement or otherwise as the tribunal directs.

Notice of appeal (inclusive of prescribed fee)

22 (1) A decision may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must

- (a) be in writing or in another form authorized by the tribunal's rules,
- (b) identify the decision that is being appealed,
- (c) state why the decision should be changed,
- (d) state the outcome requested,
- (e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the appellant's behalf in respect of the appeal, the name of the agent and a telephone number at which the agent may be contacted during regular business hours,
- (f) include an address for delivery of any notices in respect of the appeal, and
- (g) be signed by the appellant or the appellant's agent.

(3) A notice of appeal must be accompanied by payment of the prescribed fee.

(4) Despite subsection (3), if a notice of appeal is deficient or if the prescribed fee is outstanding, the chair or the chair's delegate may allow a reasonable period of time within which the notice may be corrected or the fee is to be paid.

Notice of appeal (exclusive of prescribed fee)

23 (1) A decision may be appealed by filing a notice of appeal with the tribunal.

(2) A notice of appeal must

- (a) be in writing or in another form authorized by the tribunal's rules,
- (b) identify the decision that is being appealed,
- (c) state why the decision should be changed,
- (d) state the outcome requested,
- (e) contain the name, address and telephone number of the appellant, and if the appellant has an agent to act on the

appellant's behalf in respect of the appeal, the name of the agent and a telephone number at which the agent may be contacted during regular business hours,

(f) include an address for delivery of any notices in respect of the appeal, and

(g) be signed by the appellant or the appellant's agent.

(3) If a notice of appeal is deficient the chair or the chair's delegate may allow a reasonable period of time within which the notice may be corrected.

Time limit for appeals

24 (1) A notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.

(2) Despite subsection (1), the tribunal may extend the time to file a notice of appeal, even if the time to file has expired, if satisfied that special circumstances exist.

Appeal does not operate as stay

25 The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

Organization of tribunal

26 (1) The chair of the tribunal may organize the tribunal into panels, each comprised of one or more members.

(2) If the chair organizes a panel comprised of more than one member, the chair must designate one of those members as chair of the panel.

(3) The members of the tribunal may sit

(a) as the tribunal, or

(b) as a panel of the tribunal.

(4) Two or more panels may sit at the same time.

- (5) If members of the tribunal sit as a panel,
- (a) the panel has the jurisdiction of, and may exercise and perform the powers and duties of, the tribunal, and
 - (b) a decision of the panel is a decision of the tribunal.
- (6) The decision of a majority of the members of a panel of the tribunal is a decision of the tribunal and, in the case of a tie, the decision of the chair of the panel governs.
- (7) If a member of a panel is unable for any reason to complete the member's duties, the remaining members of that panel, with consent of the chair of the tribunal, may continue to hear and determine the matter, and the vacancy does not invalidate the proceeding.
- (8) If a panel is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the tribunal, with the consent of all parties to the application, may organize a new panel to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.
- (9) The chair or the chair's delegate may hear and decide any interim or preliminary matter in an application, and for that purpose may exercise any of the powers of the tribunal necessary to decide the matter.

Staff of tribunal

- 27** (1) Employees necessary to carry out the powers, functions and duties of the tribunal may be appointed under the *Public Service Act*.
- (2) The chair of the tribunal may engage or retain consultants, investigators, lawyers, expert witnesses or other persons the tribunal considers necessary to exercise its powers and carry out its duties under the tribunal's enabling Act and may determine their remuneration.
- (3) The *Public Service Act* does not apply to a person retained under subsection (2) of this section.

Appointment of person to conduct dispute resolution process

- 28** (1) The chair of the tribunal may appoint a member or staff of the tribunal or other person to conduct a dispute resolution process.
- (2) If a member of the tribunal is appointed under subsection (1), that member, in addition to assisting in a dispute resolution process, may make pre-hearing orders in respect of the application but must not hear the merits of the application unless all parties consent.

Disclosure protection

- 29** (1) In a proceeding, other than a criminal proceeding, unless the parties to an application consent, a person must not disclose or be compelled to disclose
- (a) a document or other record created by a party specifically for the purposes of achieving a settlement of one or more issues through a dispute resolution process, or
 - (b) a statement made by a party in a dispute resolution process specifically for the purpose of achieving a settlement of one or more issues in dispute.
- (2) Subsection (1) does not apply to a settlement agreement.

Tribunal duties

- 30** Tribunal members must faithfully, honestly and impartially perform their duties and must not, except in the proper performance of those duties, disclose to any person any information obtained as a member.

Summary dismissal

- 31** (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:
- (a) the application is not within the jurisdiction of the tribunal;
 - (b) the application was not filed within the applicable time limit;
 - (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;

(d) the application was made in bad faith or filed for an improper purpose or motive;

(e) the applicant failed to diligently pursue the application or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the application will succeed;

(g) the substance of the application has been appropriately dealt with in another proceeding.

(2) Before dismissing all or part of an application under subsection (1), the tribunal must give the applicant an opportunity to make written submissions or otherwise be heard.

(3) If the tribunal dismisses all or part of an application under subsection (1), the tribunal must inform the parties and any interveners of its decision in writing and give reasons for that decision.

Representation of parties to an application

32 A party to an application may be represented by counsel or an agent and may make submissions as to facts, law and jurisdiction.

Interveners

33 (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that

(a) the person can make a valuable contribution or bring a valuable perspective to the application, and

(b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention.

(2) The tribunal may limit the participation of an intervener in one or more of the following ways:

(a) in relation to cross examination of witnesses;

(b) in relation to the right to lead evidence;

(c) to one or more issues raised in the application;

(d) to written submissions;

(e) to time limited oral submissions.

(3) If 2 or more applicants for intervener status have the same or substantially similar views or expertise, the tribunal may require them to file joint submissions.

Power to compel witnesses and order disclosure

34 (1) A party to an application may prepare and serve a summons in the form established by the tribunal, requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in the application, or

(b) to produce for the tribunal, that party or another party a document or other thing in the person's possession or control that is admissible and relevant to an issue in the application.

(2) A party to an application may apply to the court for an order

(a) directing a person to comply with a summons served by a party under subsection (1), or

(b) directing any directors and officers of a person to cause the person to comply with a summons served by a party under subsection (1).

(3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

(a) to attend an oral or electronic hearing to give evidence on oath or affirmation or in any other manner that is admissible and relevant to an issue in an application, or

(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

(4) The tribunal may apply to the court for an order

(a) directing a person to comply with an order made by the tribunal under subsection (3), or

(b) directing any directors and officers of a person to cause the person to comply with an order made by the tribunal under subsection (3).

Recording tribunal proceedings

- 35** (1) The tribunal may transcribe or tape record its proceedings.
- (2) If the tribunal transcribes or tape records a proceeding, the transcription or tape recording must be considered to be correct and to constitute part of the record of the proceeding.
- (3) If, by a mechanical or human failure or other accident, the transcription or tape recording of a proceeding is destroyed, interrupted or incomplete, the validity of the proceeding is not affected.

Form of hearing of application

- 36** In an application or an interim or preliminary matter, the tribunal may hold any combination of written, electronic and oral hearings.

Applications involving similar questions

- 37** (1) If 2 or more applications before the tribunal involve the same or similar questions, the tribunal may
- (a) combine the applications or any part of them,
 - (b) hear the applications at the same time,
 - (c) hear the applications one immediately after the other, or
 - (d) stay one or more of the applications until after the determination of another one of them.
- (2) The tribunal may make additional orders respecting the procedure to be followed with respect to applications under this section.

Examination of witnesses

- 38** (1) Subject to subsection (2), in an oral or electronic hearing a party to an application may call and examine witnesses, present evidence and submissions and conduct cross examination of witnesses as

reasonably required by the tribunal for a full and fair disclosure of all matters relevant to the issues in the application.

(2) The tribunal may reasonably limit further examination or cross examination of a witness if it is satisfied that the examination or cross examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the application.

(3) The tribunal may question any witness who gives oral evidence in an oral or electronic hearing.

Adjournments

39 (1) An application may be adjourned by the tribunal on its own motion or if it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

(2) In considering whether an application should be adjourned, the tribunal must have regard to the following factors:

- (a) the reason for the adjournment;
- (b) whether the adjournment would cause unreasonable delay;
- (c) the impact of refusing the adjournment on the parties;
- (d) the impact of granting the adjournment on the parties;
- (e) the impact of the adjournment on the public interest.

Information admissible in tribunal proceedings

40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

(3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in

evidence.

(5) Notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application are inadmissible in tribunal proceedings.

Hearings open to public

41 (1) An oral hearing must be open to the public.

(2) Despite subsection (1), the tribunal may direct that all or part of the information be received to the exclusion of the public if the tribunal is of the opinion that

(a) the desirability of avoiding disclosure in the interests of any person or party affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public, or

(b) it is not practicable to hold the hearing in a manner that is open to the public.

(3) The tribunal must make a document submitted in a hearing accessible to the public unless the tribunal is of the opinion that subsection (2) (a) or section 42 applies to that document.

Discretion to receive evidence in confidence

42 The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice.

Discretion to refer questions of law to court

43 (1) The tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions.

(2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer

that question to the court in the form of a stated case.

(3) If a constitutional question is raised by a party in an application, on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

(4) The stated case under subsection (2) or (3) must

- (a) be prepared by the tribunal,
- (b) be in writing,
- (c) be filed with the court registry, and
- (d) include a statement of the facts and relevant evidence.

(5) Subject to the direction of the court, the tribunal must

- (a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,
- (b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and
- (c) decide the application in accordance with the opinion.

(6) A stated case must be brought on for hearing as soon as practicable.

(7) Subject to subsection (8), the court must hear and determine the stated case and give its decision as soon as practicable.

(8) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend and return the stated case for the opinion of the court.

Tribunal without jurisdiction over constitutional questions

44 (1) The tribunal does not have jurisdiction over constitutional questions.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Tribunal without jurisdiction over *Canadian Charter of Rights and Freedoms* issues

- 45** (1) The tribunal does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*.
- (1.1) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.
- (2) If a constitutional question, other than one relating to the *Canadian Charter of Rights and Freedoms*, is raised by a party in a tribunal proceeding
- (a) on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case, or
 - (b) on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.
- (3) The stated case must
- (a) be prepared by the tribunal,
 - (b) be in writing,
 - (c) be filed with the court registry, and
 - (d) include a statement of the facts and relevant evidence.
- (4) Subject to the direction of the court, the tribunal must
- (a) to the extent that it is practicable in light of the stated case, proceed to hear and decide all questions except the questions raised in the stated case,
 - (b) suspend the application as it relates to the stated case and reserve its decision until the opinion of the court has been given, and
 - (c) decide the application in accordance with the opinion.
- (5) A stated case must be brought on for hearing as soon as practicable.
- (6) Subject to subsection (7), the court must hear and determine the stated case and give its decision as soon as practicable.
- (7) The court may refer the stated case back to the tribunal for amendment or clarification, and the tribunal must promptly amend

and return the stated case for the opinion of the court.

Notice to Attorney General if constitutional question raised in application

46 If a constitutional question over which the tribunal has jurisdiction is raised in a tribunal proceeding, the party who raises the question must give notice in compliance with section 8 of the *Constitutional Question Act*.

Discretion to decline jurisdiction to apply the *Human Rights Code*

46.1 (1) The tribunal may decline jurisdiction to apply the *Human Rights Code* in any matter before it.

(2) Without limiting the matters the tribunal may consider when determining whether to decline jurisdiction under subsection (1), the tribunal may consider whether, in the circumstances, there is a more appropriate forum in which the *Human Rights Code* may be applied.

(3) If, in an application before the tribunal, a party or an intervener raises the question of whether there is a conflict between the *Human Rights Code* and any other enactment, the party or intervener must serve notice on the Attorney General in accordance with this section.

(4) The notice must contain the following information:

- (a) the names and addresses for delivery of the parties and interveners to the application;
- (b) the name of the tribunal and address of the tribunal's registry;
- (c) any identification numbers assigned by the tribunal to the application;
- (d) the section of the enactment and the section of the *Human Rights Code* that may conflict and the basis on which the question of a conflict arises;
- (e) the date, time and location of any hearing scheduled by the tribunal to consider the question.

(5) The notice must be served on the Attorney General at least 14 days before the date of any hearing scheduled by the tribunal to consider the question, unless the Attorney General, in writing, waives

this requirement.

(6) The tribunal may not hear the question of whether there is a conflict between the *Human Rights Code* and any other enactment until after the Attorney General has been served with notice in accordance with this section.

(7) If the party or intervener required to serve notice on the Attorney General does not provide proof of service satisfactory to the tribunal, the tribunal may

(a) adjourn the hearing of the question until the party or intervener provides proof of service satisfactory to the tribunal, or

(b) decline to consider the question and proceed to hear the remainder of the application.

(8) If the Attorney General has been served with notice in accordance with this section and intends to appear at the hearing scheduled to consider the question, the Attorney General

(a) must give notice to the tribunal and the parties and interveners to the application at least 3 days before the date of the hearing, and

(b) has the same rights as any other party to the hearing.

(9) Subsections (3) to (8) do not apply if the Attorney General is representing a party or intervener in the application before the tribunal.

(10) This section applies to all applications made before, on or after the date that this section applies to a tribunal.

Limited jurisdiction and discretion to decline jurisdiction to apply the *Human Rights Code*

46.2 (1) Subject to subsection (2), the tribunal may decline jurisdiction to apply the *Human Rights Code* in any matter before it.

(2) The tribunal does not have jurisdiction over a question of whether there is a conflict between the *Human Rights Code* and any other enactment.

(3) Without limiting the matters the tribunal may consider when

determining whether to decline jurisdiction under subsection (1), the tribunal may consider whether, in the circumstances, there is a more appropriate forum in which the *Human Rights Code* may be applied.

(4) This section applies to all applications made before, on or after the date that this section applies to a tribunal.

Tribunal without jurisdiction to apply the *Human Rights Code*

46.3 (1) The tribunal does not have jurisdiction to apply the *Human Rights Code*.

(2) Subsection (1) applies to all applications made before, on or after the date that the subsection applies to a tribunal.

Power to award costs

47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;

(b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;

(c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.

(2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

Maintenance of order at hearings

48 (1) At an oral hearing, the tribunal may make orders or give directions that it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the tribunal may call on the assistance of any

peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the tribunal, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a proceeding, and

(b) exclude a person from further participation in or attendance at a proceeding until the tribunal orders otherwise.

Contempt proceeding for uncooperative witness or other person

49 (1) The failure or refusal of a person summoned as a witness to do any of the following makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court:

(a) attend a hearing;

(b) take an oath or affirmation;

(c) answer questions;

(d) produce the records or things in their custody or possession.

(2) The failure or refusal of a person to comply with an order or direction under section 48 makes the person, on application to the court by the tribunal, liable to be committed for contempt as if in breach of an order or judgment of the court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the court in respect of conduct by a person in a proceeding before the tribunal.

Decisions

50 (1) If the tribunal makes an order for the payment of money as part of its decision, it must set out in the order the principal sum, and if the tribunal has power to award interest and interest is payable, the rate of interest and the date from which it is to be calculated.

- (2) The tribunal may attach terms or conditions to a decision.
- (3) The tribunal's decision is effective on the date on which it is issued, unless otherwise specified by the tribunal.
- (4) The tribunal must make its decisions accessible to the public.

Final decision

- 51** The tribunal must make its final decision in writing and give reasons for the decision.

Notice of decision

- 52** (1) Subject to subsection (2), the tribunal must send each party and any interveners in an application a copy of its final decision.
- (2) If the tribunal is of the opinion that because there are so many parties to an application or for any other reason that it is impracticable to send its final decision to each party as provided in subsection (1), the tribunal may give reasonable notice of its decision by public advertisement or otherwise as the tribunal directs.
- (3) A notice of a final decision given by the tribunal under subsection (2) must inform the parties of the place where copies of that decision may be obtained.

Amendment to final decision

- 53** (1) If a party applies or on the tribunal's own initiative, the tribunal may amend a final decision to correct any of the following:
- (a) a clerical or typographical error;
 - (b) an accidental or inadvertent error, omission or other similar mistake;
 - (c) an arithmetical error made in a computation.
- (2) Unless the tribunal determines otherwise, an amendment under subsection (1) must not be made more than 30 days after all parties have been served with the final decision.
- (3) Within 30 days of being served with the final decision, a party may apply to the tribunal for clarification of the final decision and the tribunal may amend the final decision only if the tribunal considers

that the amendment will clarify the final decision.

(4) The tribunal may not amend a final decision other than in those circumstances described in subsections (1) to (3).

(5) This section must not be construed as limiting the tribunal's ability, on request of a party, to reopen an application in order to cure a jurisdictional defect.

Enforcement of tribunal's final decision

54 (1) A party in whose favour the tribunal makes a final decision, or a person designated in the final decision, may file a certified copy of the final decision with the court.

(2) A final decision filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the court.

Compulsion protection

55 (1) A tribunal member, a person acting on behalf of or under the direction of a tribunal member or a person who conducts a dispute resolution process on behalf of or under the direction of the tribunal must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under the tribunal's enabling Act or this Act.

(2) Despite subsection (1), the court may require the tribunal to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

Immunity protection for tribunal and members

56 (1) In this section, "**decision maker**" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) Subject to subsection (3), no legal proceeding for damages lies or may be commenced or maintained against a decision maker, the

tribunal or the government because of anything done or omitted

(a) in the performance or intended performance of any duty under this Act or the tribunal's enabling Act, or

(b) in the exercise or intended exercise of any power under this Act or the tribunal's enabling Act.

(3) Subsection (2) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Time limit for judicial review

57 (1) Unless this Act or the tribunal's enabling Act provides otherwise, an application for judicial review of a final decision of the tribunal must be commenced within 60 days of the date the decision is issued.

(2) Despite subsection (1), either before or after expiration of the time, the court may extend the time for making the application on terms the court considers proper, if it is satisfied that there are serious grounds for relief, there is a reasonable explanation for the delay and no substantial prejudice or hardship will result to a person affected by the delay.

Standard of review if tribunal's enabling Act has privative clause

58 (1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.

(2) In a judicial review proceeding relating to expert tribunals under subsection (1)

(a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

(b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and

(c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors,
or
- (d) fails to take statutory requirements into account.

Standard of review if tribunal's enabling Act has no privative clause

59 (1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

(2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.

(3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.

(4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors,
or
- (d) fails to take statutory requirements into account.

(5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

Power to make regulations

60 The Lieutenant Governor in Council may make regulations as follows:

- (a) prescribing rules of practice and procedure for the tribunal;
- (b) repealing or amending a rule made by the tribunal;
- (c) prescribing tariffs of fees to be paid with respect to the filing of different types of applications, including preliminary and interim applications;
- (d) prescribing the circumstances in which an award of costs may be made by the tribunal;
- (e) prescribing a tariff of costs payable under a tribunal order to pay part of the costs of a party or intervener;
- (f) prescribing limits and rates relating to a tribunal order to pay part of the actual costs and expenses of the tribunal.

Application of *Freedom of Information and Protection of Privacy Act*

61 (1) In this section, "**decision maker**" includes a tribunal member, adjudicator, registrar or other officer who makes a decision in an application or an interim or preliminary matter, or a person who conducts a dispute resolution process.

(2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:

- (a) a personal note, communication or draft decision of a decision maker;
- (b) notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application;
- (c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;
- (d) a transcription or tape recording of a tribunal proceeding;

(e) a document submitted in a hearing for which public access is provided by the tribunal;

(f) a decision of the tribunal for which public access is provided by the tribunal.

(3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

Application of Act to appointments under *Criminal Code*

62 Sections 1 to 5, 8 to 10 and 61 apply to the review board established or designated under section 672.38 of the *Criminal Code*.

Consequential Amendments

[Note: See Table of Legislative Changes for the status of sections 63 to 188.]

Section(s)	Affected Act
63–66	<i>Agricultural Land Commission Act</i>
67–77	<i>Assessment Act</i>
78	<i>Business Practices and Consumer Protection Act</i>
79–82	<i>Community Care and Assisted Living Act</i>
83–87	<i>Employment and Assistance Act</i>
88–93	<i>Employment Standards Act</i>
94–98	<i>Expropriation Act</i>
99–100	<i>Financial Institutions Act</i>
101	<i>Forest and Range Practices Act</i>
102–103	<i>Hospital Act</i>
104–106	<i>Human Rights Code</i>
107–108	<i>Industry Training Authority Act</i>
109–110	<i>Labour Relations Code</i>
111	<i>Local Government Act</i>
112–114	<i>Manufactured Home Park Tenancy Act</i>
115–119	<i>Mental Health Act</i>
120–127	<i>Natural Products Marketing (BC) Act</i>
128–130	<i>Parole Act</i>
131–141	<i>Passenger Transportation Act</i>

142–152	<i>Petroleum and Natural Gas Act</i>
153–155	<i>Residential Tenancy Act</i>
156–160	<i>Safety Standards Act</i>
161–162	<i>Securities Act</i>
163–173	<i>Utilities Commission Act</i>
174–188	<i>Workers Compensation Act</i>

Transitional Provision

Transitional: existing appointments

189 (1) Existing designations, made before February 13, 2004, of members of the British Columbia Securities Commission as the chair and vice chairs of the commission and the appointments of those members are continued as expressed in the orders by which they were appointed.

(2) This section is repealed on a date set by regulation of the Lieutenant Governor in Council.

Repeal

190 The *Administrative Tribunals Appointment and Administration Act*, S.B.C. 2003, c. 47, is repealed.

Commencement

191 The provisions of this Act referred to in column 1 of the following table come into force as set out in column 2 of the table:

Item	Column 1 Provisions of Act	Column 2 Commencement
1	Anything not elsewhere covered by this table	The date of Royal Assent
2	Sections 1 to 176	By regulation of the Lieutenant Governor in Council
3	Section 177	March 3, 2003
4	That part of Section 178 enacting 236 (5) of the <i>Workers Compensation Act</i>	March 3, 2003
5	That part of section 178	By regulation of the Lieutenant Governor in

	enacting Section 236 (1) to (4) of the <i>Workers Compensation Act</i>	Council
6	Sections 179 to 190	By regulation of the Lieutenant Governor in Council

Copyright (c) Queen's Printer, Victoria, British Columbia, Canada

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Apsassin et al v. BC Oil and Gas et al,***
2004 BCSC 92

Date: 20040127
Docket: 03-3211
Registry: Victoria

Between:

**Chief Alan Apsassin
On his own behalf and on behalf of
The members of the Saulteau First Nations**

Petitioner

And

**The British Columbia Oil and Gas Commission
And
Vintage Petroleum Canada, Inc.**

Respondents

Before: The Honourable Mr. Justice Cohen

**Reasons for Judgment
(In Chambers)**

Counsel for the petitioner

R.J.M. Janes
R.C. Freedman

Counsel for the respondent The British
Columbia Oil and Gas Commission

J.E. Gouge, Q.C.

Counsel for the respondent Vintage
Petroleum Canada, Inc.

A.W. Carpenter
K.G. O'Callaghan

Counsel for the Attorney General of
British Columbia

K. Horsman

Date and Place of Hearing:

October 29 - 30,
November 3 - 7
and November 18, 2003
Victoria, B.C.

<u>I.</u>	<u>INTRODUCTION</u>
<u>II.</u>	<u>THE PARTIES</u>
<u>III.</u>	<u>VINTAGE'S APPLICATION, AND THE AUTHORIZATION BY THE COMMISSION</u>
<u>IV.</u>	<u>BACKGROUND TO THE APPLICATION</u>
<u>V.</u>	<u>THE ISSUES</u>
<u>VI.</u>	<u>THE PETITIONER'S POSITION</u>
<u>VII.</u>	<u>THE POSITION OF THE COMMISSION</u>
<u>VIII.</u>	<u>THE POSITION OF VINTAGE</u>
<u>IX.</u>	<u>DECISION</u>

- A. The Commission's duty to consult and accommodate the SFN.
 - 1. The Constitutional Principles
 - 2. The Application of the Constitutional Principles to the Factual Context of the Case at Bar.
 - (i) Has the SFN established an existing aboriginal right?
 - (ii) Has the SFN established a *prima facie* infringement of their treaty rights?
- B. The constitutional challenge to the Act
 - 1. The Commission's Legislative Jurisdiction
 - 2. Legal Principles
- X. CONCLUSION

I. INTRODUCTION

[1] This is an application by the petitioner, made pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*"), to quash the decision made on March 14, 2003, by the respondent British Columbia Oil and Gas Commission (the "Commission"), granting the respondent Vintage Petroleum Canada, Inc. ("Vintage") permission, with conditions, to construct an exploratory well site, with associated roads and other infrastructure, in the Traditional Territory of the Saulneau First Nations (the "SFN").

[2] The petitioner also applies for:

1. A declaration that the Commission has no authority to authorize activities which threaten to infringe on the rights guaranteed to the members of the SFN by Treaty 8 until such a time as the Legislature or Lieutenant Governor-in-Council provides adequate legislative or regulatory guidance in this regard;
2. A declaration that prior to approving Vintage's Application, the Commission is required to engage in good faith consultation with the SFN concerning the effects of Vintage's activities on the treaty rights of the SFN, for the purpose of avoiding the infringement of such treaty rights or, if such infringement cannot be avoided, ensuring that such infringement can be justified in accordance with section 35(1) of the *Constitution Act*, 1982;
3. A declaration that prior to approving Vintage's application the Commission must ensure that its decision accommodates the treaty rights of the SFN;
4. A declaration that, in determining whether or not to approve Vintage's application, the Commission must have regard to the cumulative effects of all existing, proposed and reasonably foreseeable Crown authorized activities on the ability of the SFN to exercise their Treaty Rights, in accordance with the customs, practices and reasonable expectations of the SFN;
5. In the alternative, a declaration that to the extent that the Commission has lawfully delegated the duties described above, or has failed to discharge these duties, Vintage is impressed with an obligation to carry out each of these duties.

[3] At the centre of the petitioner's application is the question of how the rights protected by Treaty 8 are to be considered and accommodated by the Commission when it makes its decisions. Treaty 8 reads, in part, as follows:

And Her Majesty, the Queen, HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of

hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[4] The petitioner's principal argument is that the Commission's constitutional and statutory duties regarding aboriginal and treaty rights require consideration of how the Crown's approval of activities affects those rights. The petitioner submits that this obligation is not limited to local or direct effects, but includes the obligation to consider all relevant effects. The petitioner submits further that this is particularly critical where approvals are given for small incremental steps, rather than for overall development, because, the petitioner contends, if approvals are not considered broadly in context, small incremental infringements may threaten treaty rights by "death by a thousand cuts".

[5] The petitioner also submits that the Commission breached both its constitutional duty (arising out of s. 35 of the **Constitution Act**, 1982) and its statutory duty (arising out of s. 4 of the **Oil and Gas Commission Act**, S.B.C. 1998, c. 39 (the "**Act**"), and the scheme of the **Act** as a whole) to consult in respect of, and to accommodate the rights set out in Treaty 8.

[6] In particular, the petitioner says that Mr. James Gladysz, the Wells Program Manager of the Commission (the "Decision Maker"), who on November 1, 2001, was authorized to exercise the powers of the Commission pursuant to certain specified sections of the **Act**, and of the **Petroleum and Natural Gas Act**, R.S.B.C. 1996, c. 361, improperly excluded relevant matters from his consideration by limiting his consideration to "direct effects" of the proposed project, and by excluding "indirect effects" or "cumulative effects" of the project considered in context. The petitioner also says that the evidence clearly shows that the Commission did not accommodate, and has no intention of accommodating the petitioner's Treaty 8 rights.

[7] Additionally, the petitioner submits that when the Legislature empowered the Commission to undertake a decision making process that threatened to infringe treaty rights, it was also obliged to give direct guidance in regulation or statute as to how those rights were to be accommodated. The petitioner says that the Legislature and Executive Council failed to give such guidance to the Commission. The petitioner submits that, as a result, the **Act** unjustifiably infringes the petitioner's Treaty 8 rights and is of no force and effect to the extent that it authorized the challenged permit.

II. THE PARTIES

[8] The petitioner, Chief Alan Apsassin, is the Elected Chief of the SFN under the **Indian Act**, R.S.C. 1985, c. I-5, and is a member of the SFN. He is also a beneficiary of Treaty 8, and is entitled to exercise the rights and enjoy the benefits provided for in Treaty 8, such as the receipt of annuities.

[9] The SFN is a Band within the meaning of the **Indian Act**, situated in Northeastern British Columbia, approximately 150 km from Fort St. John. More specifically, the SFN's Reserve is located at the east end of Moberly Lake, just over 20 km from Chetwynd, British Columbia. The SFN members consist of persons of Cree, Beaver and Dene descent, and its members are all recognized as being beneficiaries of Treaty 8.

[10] The Commission is the body established by the **Act** to provide a unified approval process for oil and gas development in British Columbia. Most of its activities focus on the development of oil and gas resources in northeastern British Columbia. It is responsible for approving all exploration, development and production plans for oil and gas in British Columbia. To the extent that approving such projects requires issuing permits under other acts, such as the **Heritage Conservation Act**, R.S.B.C. 1996, c. 187, or the **Forest Act**, R.S.B.C. 1996, c. 157, such powers have been delegated to the Commission, and are exercised by the Commission rather than by the Ministers usually responsible for exercising such powers. As such, the Commission provides a comprehensive scheme for managing and developing oil and natural gas resources, and is expressly charged with managing the environmental, social and economic effects of such development. It is also expressly charged by the **Act** with the duty to respect the Crown's obligations to aboriginal peoples.

[11] Vintage is a corporation which explores for and develops oil and natural gas resources in British Columbia and other places. It has acquired the rights to explore for and produce oil and gas in an area to the northwest of the SFN Reserve.

III. VINTAGE'S APPLICATION, AND THE AUTHORIZATION BY THE COMMISSION

[12] On December 16, 2002, Vintage applied (the "Application") to the Commission for a well authorization permit pursuant to s. 85 of the **Petroleum and Natural Gas Act**, for the well identified as Vintage Gates 1-3-81-25W6M, #15861 (the "Well" and the "Well Authorization"). Section 85 provides, inter alia, that an application for a well authorization must be made to the Commission.

[13] The Well is situated in the area north of Moberly Lake (where both the Reserves of the SFN and the West Moberly First Nations ("West Moberly") are located) along the north side of Maurice Creek near Rene Lake. Vintage's undertaking involves building a winter access road, decking site, remote sump (a waste dump for liquids from the Well) and a temporary camp site. The new winter road will be 3.4 km long and will be built by clearing and widening an existing seismic line, upgrading an existing road, and constructing a new detour. Two bridges will be installed across two unnamed creeks. A third creek will be crossed using snow fill.

[14] Section 93 of the **Petroleum and Natural Gas Act** provides, inter alia, that the Commission may grant, subject to conditions, restrictions and stipulations, or refuse to grant a well authorization. The Decision Maker is authorized to exercise the powers of the Commission under this section pursuant to a resolution of the Commission's Board.

[15] On March 14, 2003, the Decision Maker issued his Reasons for Decision on Vintage's Application in which he states, inter alia, as follows:

Application

Vintage Petroleum Canada, Inc. (the "Applicant") applied to the Oil and Gas Commission (the "Commission") on December 16, 2002, for a Well Authorization pursuant to section 85 of the Petroleum and Natural Gas Act, (the "Act") for the well Vintage Gates 1-3-81-25 W6M (WA #15861; OGC File 9611435). The proposal is for a sour gas well with an emergency-planning zone of 1.136 km. The proposed wellsite, winter access road, decking site, remote sump, and temporary campsite includes a total area of 5.93 ha, 2.56 ha being new cut timber area. The proposed well is classified as an

"Exploratory Wildcat" drill as it is more than 7 km away from the nearest designated oil or gas pool.

The 3.84 km of new winter road proposed begins at an abandoned well (11-36-80-25 W6M) restored in the early 1960's. Access to this restored site is via a low-grade road requiring no upgrade or widening for winter use connected to the above titled wellsite project. The new winter road follows existing 8m wide seismic lines with a proposed widening to 10m, corner cut, and small detour around a stream crossing. It also includes two clear span bridges across unnamed creeks. The proposed temporary campsite is located on the 11-36 existing restored well site, while the proposed remote sump is located in an area of new cut along the new winter road. The proposed well is located along the north side of Maurice Creek, near Rene Lakes, on flat ground covered in small Spruce and Tamarack (0.15m in diameter at the base).

The purpose of the proposed well is to locate potential hydrocarbons in a Drilling License, issued under the Act, which expires on October 9, 2005. The Applicant also has ownership interests in a number of subsurface tenures to the immediately adjacent area east of the above-mentioned Drilling License. In order for the Applicant to retain the rights in the offset lands, they must drill a well in this Drilling License prior to the offset lands expiry date of October 20, 2003. There is a substantial total area held under the offset lands that could be developed by the Applicant and its partners if a successful well was drilled. The Applicant proposes to commence the drilling of the subject well as soon as possible to allow for time to drill to total depth, and then transport the drilling rig out of the area prior to the spring freshet. The estimated time required by the Applicant to construct the well location, and complete the drilling of the well is 45 days. The application is for a winter (frozen ground conditions) construction and drill in order to minimize the environmental and social impacts, and to reduce the costs.

[16] The Decision Maker, after giving his Reasons under the headings of "Environmental Review", "First Nation Consultation", and "Discussion", decided, as follows:

The Commission approves the Well Authorization WA# 15861, OGC# 9611435, 1-3-81-25 W6M, subject to the attached conditions, but not to be constructed and drilled prior to the 2003-2004 winter drilling season. In order to meet the objectives in the LRMP, and minimize the impacts to the environment, fish and wildlife habitat, First Nation Treaty Rights and trapping activities, the conclusion is that the subject well shall be constructed and drilled in frozen ground conditions. There is not sufficient time to allow the wellsite project to proceed in the current winter season prior to the spring freshet. The Commission is diligently pursuing the development of an operational plan that will include the subject area in order to provide further guidance to the Commission in any subsequent application decisions.

[17] Under the heading "Additional Conditions of Approval for WA 15861, Vintage Gates 1-3-81-25 W6M", the Decision Maker ordered the following conditions:

1. The Operator shall submit to the Commission prior to the commencement of construction activities associated with the subject well, an access management plan including the proposed pipeline corridor and any all-season access roads anticipated in relation to the subject well.
2. The Operator shall submit to the Commission prior to the commencement of drilling the subject well, a reclamation plan for this well location and the associated disturbances.
3. The wellsites shall be adequately dyked and trenched to contain any escaping formation water, oil, drilling fluid, waste, chemical substances, or refuse to ensure that no hazardous fluid or material leaves the location, and potentially migrates into nearby watercourses.
4. The Operator shall ensure wildlife trails are kept open where possible during the construction and reclamation phases of the well site project in order to minimize the impacts to their travel corridors.
5. The Operator shall temporarily fence the perimeters of all drilling sump sites, on, or off the well site, in order to restrict wildlife access onto those areas during the drilling and completion operations of this well. The sump locations shall be closely monitored throughout the operations and, if necessary, additional fencing may be required to further restrict animal access to these sites.

IV. BACKGROUND TO THE APPLICATION

[18] Over the past several years, the SFN and West Moberly have identified several different geographical areas of interest for the purpose of alerting the Province to their various interests. There is a large area which has been identified to the Commission as the SFN Consultation Area. The Commission consults with the SFN about oil and gas development in this area.

[19] There is a smaller area in closer proximity to the SFN and West Moberly Reserves described as the "Area of Critical Community Interest" (the "ACCI"), which includes areas which have been heavily developed (such as the area around the Del Rio River), and also areas which have not been as heavily developed.

[20] The SFN and West Moberly have also identified an area of particularly significant concern to them, known as the "Peace-Moberly Tract". This location is a region immediately north of Moberly Lake and south of the Peace River. It includes the Reserves of the SFN and West Moberly, and land in the immediate vicinity of these Reserves. It is an area that is relatively undeveloped compared to the other parts of the ACCI, has had relatively little (practically none) oil and gas exploration and development, has restricted forestry development, and is intensely used by the SFN for the exercise of their treaty rights. The Commission and the Ministry of Sustainable Resource Management ("MSRM") have agreed to give this general area priority in developing a resource management plan.

[21] Both prior to and following the Application, the SFN, together with West Moberly, consulted with the Commission concerning oil and gas development in the Peace-Moberly Tract and ACCI. The content of these consultation meetings is largely uncontroversial, save for the question of whether or not the concerns identified by the SFN and West Moberly were

"specific" to the area directly affected by the Application, or were more general in nature.

[22] According to the affidavit of Mr. Stewart Cameron, a former Chief of the SFN, sworn August 13, 2003, from at least 1989 the SFN made it clear to the provincial and federal governments that its biggest concern was that its treaty rights were being negatively affected by oil and gas development. The SFN expressed its concern that it was not being meaningfully consulted in respect of oil and gas development, and that treaty rights were not being taken into account. Both governments were told that there needed to be a program put into place to gather information on the land and resources and to establish a cumulative impact assessment model to be used in approving oil and gas development. In doing so, the SFN made it clear that it was particularly concerned about the effects of such development (as well as other resource development) on its treaty rights and not merely on its "interests" at large.

[23] In the period between 1998 to 1999, the SFN negotiated a Memorandum of Understanding with the Province relating to consultation in respect of oil and gas development. In the course of the negotiations, the SFN raised the issue of the necessity for a cumulative impact assessment. The Province responded that this would not be dealt with in the Memorandum of Understanding process, but would be dealt with as a "set-aside" issue. The petitioner says that in the course of raising these concerns, the SFN emphasized the need for information gathering on a cumulative impact assessment prior to authorizing oil and gas activity. The petitioner claims that this has not been addressed by the provincial government in the context of Treaty 8 rights, despite the SFN raising those issues over several years.

[24] The consultation between the SFN, the Commission and Vintage in respect of the Application included face to face meetings and the exchange of written documents. In his affidavit sworn October 21, 2003, the Decision Maker annexed all of the written materials and information which he considered in reaching his decision (the "Record"). In addition to the Record, he considered comments made to him orally by representatives of the SFN at a meeting he attended on February 21, 2003; the oral comments from Messrs. Bob Purdon and Paul Perkins, members of the Commission's staff, arising out of consultations which they conducted with representatives of the SFN during the period of November 20, 2002, to March 12, 2003; and, an electronic note from Mr. Perkins stating that he had completed his consultation process in relation to the Application. According to the evidence of the Decision Maker, none of the oral comments contradicted or added materially to the written materials that he considered. I turn then to the content of some of those materials.

[25] The minutes of a meeting held on December 5, 2002, attended by representatives of the SFN, West Moberly and Vintage, indicate that Mr. Matthew General, the Director of Treaty, Lands and Resources Protection for the SFN, stated that the First Nations were not saying "no" to the Application, but requesting the Commission and Vintage undertake meaningful consultation and address the First Nations concerns about the long term implications of oil and gas development in their areas, including cumulative effects and the need for adequate baseline data to make an informed decision.

[26] In a memorandum to Commission staff from Mr. General dated January 21, 2003, he states, as follows:

The First Nations have requested that the OGC not approve applications within areas of the ACCI, to allow the parties to conduct this required work. We are distressed by the fact that

the OGC has approved two projects in the ACCI since our discussions have begun. Tomorrow, we will be meeting with representatives of Vintage and the OGC to discuss a well site proposed for the "Peace - Moberly Tract" - the heartland of WMFN and SFN's traditional area. We request that the OGC come prepared to respond in a substantive way, to the issues and concerns that WMFN and SFN have raised and to the draft discussion paper itself. We plead with the OGC, that they not approve the Vintage project until the required assessment, studies, data gathering and planning be completed. Only then, will OGC have sufficient information to determine the true nature and scope of the infringement of WMFN and SFN's rights resulting from the proposed project in conjunction with the ongoing effects/impacts on the lands base.

[27] At a meeting between the Commission, West Moberly, the SFN and Vintage held on January 22, 2003, the First Nations asked Vintage to hold off its activities until a cumulative effects assessment, a First Nations land use plan and an Integrated Resource Management Study could be completed, and that the Commission not approve the Application until the assessment and studies had been completed.

[28] In an email dated January 29, 2003, from the Decision Maker to Mr. Perkins, the Decision Maker says, inter alia, as follows:

The potential impacts to Treaty Rights are also seriously considered and carry substantial weight. Where this single winter access and well location is quite minimal in impact, subsequent development may be substantial. However, this is unpredictable until a successful well is drilled in the area. If this well is successful, then a number of studies may be carried out in order to manage any further development in a sensitive manner.

[29] In an interoffice memo dated January 29, 2003, to Mr. Perkins from Ms. Renate Hambuechen, another member of the Commission's staff, Ms. Hambuechen reports, as follows:

- LRMP - not within the proposed Peace-Beaudrau Protected Area. In South-Peace Enhanced Management area. Energy Objectives: as per general management directions. Access Management plan needed once proven well.
- SWAN NESTING HABITAT: checked available swan nesting info from WLAP and Ducks Unlimited - not within known swan nesting habitat.
- UNGULATE CAPABILITY: Moose, Deer, Elk, Furbearers are widely distributed through the entire area. There are no known winter ranges, [denning] sites, mineral licks, or other wildlife features within the close vicinity of this project.
- BIRDS: there are no known raptor nesting sites. Due to the small disturbance of the project, the impact on songbirds or birds in general is very minor. Raptor nests are protected under the Wildlife Act and cannot be destroyed.
- FISH CAPABILITY OF MAURICE CREEK AND IMPACTED TRIBUTARY:

There is no known fish distribution within Maurice Creek above the falls, which eliminates the tributary from being fish bearing as well.

- RIPARIAN SETBACKS: Maurice Creek is between 1.5 m and 5 m wide, with a total Riparian Management Area of 40 meters.
- BERMING: Petroleum and Natural Gas Act - Drilling and Production Regulation, Part 2(5)(3)(a) outlines the requirement for berms/dykes.

SUMMARY:

Taking the above information in consideration, there is no concern with the proposal from the Land and Habitat point of view.

[30] At a meeting on February 4, 2003, attended by the Commission, the SFN, West Moberly and Vintage, Mr. Perkins told those present that the Commission does not do studies itself, but rather it gathers information from other agencies who have that responsibility. He also said that the Commission relies on the advice of two in-house biologists who make their decisions based on available information and mapping. He said that the Commission could provide the First Nations with the data it had and the information on which the Commission would base its decision. The First Nations reiterated their position that their concerns had to be addressed before the issues could be meaningfully considered, mentioning contamination and effects from oil and gas activity, waterfowl nesting areas and wildlife habitat.

[31] In a letter to the First Nations dated February 21, 2003, Mr. T. Ouellette, Director of the Commission, states, as follows:

This application has been submitted as an 'Exploratory Wildcat' well, and as such is a single entry effort. Every attempt will be made to minimize the impact on the site and to recognize the potential impacts. It is appreciated that both First Nations provided considerable information that will be addressed should a well site be successful. It is also recognized that careful joint planning must take place if the site is approved and further development in the area is anticipated.

[32] In a memorandum to the Commission from the First Nations dated February 21, 2003, Mr. General states, as follows:

The First Nations are concerned that the OGC is about to make a decision on a project in area that is important to wildlife in the absence of adequate baseline biophysical and environmental information. The First Nations have requested that the Crown table studies, databases and surveys on wildlife habitat and wildlife populations that it will base its decision on. To date, nothing has been forthcoming. In August 2002, an OGC biologist informed SFN that in the absence of specific studies and data on a given area, they must utilize existing converted forest cover maps to determine wildlife habitat capability. Further they must utilize their best professional judgement in the absence of specific information and studies. In the First Nations opinion these cannot replace the need for a [rational] science based inquiry into the potential effects and impacts of this project and the introduction of large scale oil and gas development within this unique and important area.

The First Nations concerns are borne out when they reviewed the January 29th memorandum of an OGC resource officer who concludes that there "is no concern with the proposal from the Land and Habitat point of view." The officer notes that "moose, deer, elk and furbearers are widely distributed through the entire area." In general, the officer concludes that no special measures are required. This is of concern given that it contradicts the traditional and local knowledge which elders and community resource users have presented about the area. They have observed that Peace-Moberly Tract acts as an important habitat and refuge for ungulates. The elders and community resource users have observed that this is due to the fact that ungulates have moved to this area from the Carbon, Johnson and Del Rio areas due to industrial activity and hunting pressures. The lack of access into the area and lack of industrial disturbance is comparatively low in this area ... which makes it an ideal wildlife refuge. The First Nations see this as a prime example of why there needs to be an appropriate level of assessment that considers the impacts of this project and the large scale introduction of oil and gas activity on wildlife and their cultural and subsistence needs.

The First Nations are concerned that the proponent and OGC are only prepared to entertain studies after the project is approved. In its January 24, 2003 letter, Vintage makes an undefined commitment to "conduct an appropriate environmental, safety, and wildlife impact study relative to and within the sphere of control of Vintage's oil and gas project." OGC employee James Gladysz states in his memorandum of January 29, 2003; "The potential impacts to Treaty rights are also seriously considered and carry substantial weight ... if the well is successful, then a number of studies may be carried out in order to manage any further development in a sensitive manner".

From the First Nations perspective, requirements for studies and planning once the project is completed appears to be simply wrong headed. By extension, this means that multiple companies could proceed with multiple exploratory projects without having to undertake any form of assessment while creating a substantial impact on the land base. A substantial number of companies have shown interest in exploring the Peace-Moberly Tract/project area within the past 18 months. These loosely defined, after the fact conditions and commitments cannot substitute the need for a reasonable and comprehensive assessment that considers the full nature and scope of the impacts on the rights and interests of the First Nations.

The First Nations concerns about this after the fact approach is warranted. Experience shows that proponents are reluctant to assess anything broader than the scope of their specific application or area of responsibility. The unwillingness to examine the combined or aggregated effects from their project in conjunction with other effects has already been borne out by comments made by the OGC and the proponent. Further the Crown and the proponent will rely on the blanket economic justification/public interest argument (as it has in the Vintage application) to make the case that additional wells must be drilled, pipelines and access roads built as fast possible to get the resource to the market. In this application, the Crown is

relying on the economic justification rationale as a trump card over Treaty rights. Given this, the First Nations expect that the same justification and practice will be employed for subsequent Vintage projects and proposals by other companies. As such, no project will ever be subject to the appropriate level of study or assessment.

...

4) Failure to Account for Cumulative Effects/Impacts. Neither the Crown nor Vintage have given any consideration to the critical issues and concerns raised by the First Nations about cumulative effects/impact. Approval of this project and the introduction of large-scale petroleum exploration and development, in conjunction with other developments and other land-based pressures will result in some level of negative impact on the eco-system. This occurrence is widely acknowledged, accepted and studied as a field within the environmental sciences. Wildlife populations will decline due to direct, indirect and cumulative effects and the First Nations Treaty right to hunt will be rendered meaningless over time. The introduction of large-scale oil and gas development may be the "straw that breaks the camel's back" in the Peace-Moberly Tract/ACCI.

The First Nations have initiated discussions about the need for a cumulative effects assessment, land use planning and integrated resource management for the Peace Moberly Tract/ACCI with the OGC. Both the Crown and the proponent have acknowledged a need to address cumulative effects issues. Based on the request of the OGC and the proponent, the First Nations tabled a discussion paper regarding its willingness to collaborate and expedite such an initiative. On January 7 2003, the OGC provided an update of its follow up activities based on the fall 2002 meetings and the Draft Discussion Paper that the First Nations provided. Further the OGC has retained AXYS Environmental to develop and test a framework for assessing and addressing cumulative effects issues within the Muskwa - Kechika zone and two other pilot areas. If the Crown acknowledges that this is an issue, how can it justify the approval of this project without consideration of cumulative effects on the eco-system and First Nation's rights and interests in relation to this project?

While the First Nations appreciate that this represents a significant undertaking, it does not lessen the requirement of the Crown to factor cumulative effects issues into its decision making on this project or other projects within the ACCI. It is being done now in other jurisdictions and in environmental assessment reviews within BC. The First Nations are unsure of how the Crown can practically meet its obligations to First Nations and meet the requirements of the "Sparrow Test" in the absence of the appropriate assessment, planning and integrated resource management measures.

Given this, the First Nations feel that it is not unreasonable to request that the OGC withhold its approval on this and other applications within Peace-Moberly Tract until an appropriate level of cumulative effects assessment has been undertaken to enable the Crown to make an informed decision.

[33] In a memorandum dated February 26, 2003, to the Decision Maker from Mr. Perkins, Mr. Perkins reports, as follows:

Failure to Account for Cumulative Effects/Impacts: Globally, OGC through consultation with First Nations and Ministry of Water Land and Air Protection and Ministry of Sustainable Resource Management are entering into agreement to produce pilot studies of various wildlife and habitat capability in the area. Workshops are being established to initiate these studies and to produce baseline criteria. Site specific conditions such as access management plans, traffic control, the use of gates or the fencing of the well would be considered to mitigate some of the cumulative effects.

...

Conclusion and Recommendation

As I have outlined above we have attempted to mitigate those concerns identified by the First Nations. Vintage petroleum has completed numerous consultation meetings with the band and has committed to employment opportunities for the First Nation. In addition they have indicated they are willing to participate in the information gathering for the area. For these reasons I do not believe that [there] are any further consultation actions that can be taken that will assist. Given the sensitive nature of the application and the area involved I recommend that we proceed [with] the decision making process using the concerns identified above as guidance for the decision.

[34] Following the Well Authorization, the SFN, together with West Moberly, applied, pursuant to s. 9 of the **Act**, for a review of the Well Authorization by the Advisory Committee. The Advisory Committee is a body provided for in the **Act** to review decisions of the Commission, and to make recommendations concerning the resolution of disputes arising out of decisions of the Commission. The SFN and West Moberly asked that the Advisory Committee recommend that the Well Authorization, together with related matters, be sent to alternative dispute resolution as provided for under the **Act**. On April 25, 2003, the Advisory Committee issued its decision and recommended that the Commission agree to refer the issues raised by the SFN to alternative dispute resolution (which would have had the effect of suspending the Well Authorization). The Commission rejected the recommendation.

V. THE ISSUES

- (i) Did the Commission breach its constitutional duty to consult with and accommodate the interests of the SFN arising out of its Treaty 8 rights by failing to consider the cumulative and indirect effects of the Well?
- (ii) Did the Commission breach its statutory duty under the **Act** on the same basis?
- (iii) Does the **Act** endow the Commission with an unstructured discretion so as to unjustifiably infringe the SFN's Treaty 8 rights?
- (iv) In the event that any of the above questions is answered "yes", what remedy should be granted the petitioner?

VI. THE PETITIONER'S POSITION

[35] The petitioner's challenge to the Commission's decision regarding

issues (i) and (ii) focuses on the following passages from the Decision Maker's Reasons:

The Commission's Oil and Gas Resource Officers reviewed the application and concluded that the direct impacts to the wildlife habitat, environment, and forest base would be minimal. The wildlife component of the review considered known swan nesting habitat, mapped ungulate capability, song bird habitat, known raptor nesting sites, and known winter ranges, denning sites, mineral licks, and other significant wildlife features in the immediate vicinity of the proposed activities associated with the application. The review identified no known fish distribution within Maurice Creek above the falls that are located a substantial distance downstream of the proposed activity. The proposed well is located outside of the Riparian setback required for Maurice Creek.

...

At the current time, the available information for fish and wildlife habitat in this specific area is limited. One objective of the Commission is to manage impacts to critical ungulate habitat to sustain viable, healthy ungulate populations. To effectively carry this out, quality and up-to-date information is required. The LRMP states that the government may undertake to identify and map critical ungulate habitat, and incorporate this at the landscape unit level for the purpose of operational planning. This would provide information to assist the Commission in reviewing and making decisions on oil and gas exploration and development applications in such a manner that sustains the specific wildlife habitat in the area.

...

The Commission is committed to a meaningful consultation process. It has been demonstrated that both the Commission and the SFN have been diligent in the process to resolve the issues regarding the subject well application. The unresolved concerns from this consultative process include issues relating to tenure disposition consultation and outstanding Treaty Land Entitlement that are outside the purview of the Commission. However, the concerns regarding the failure to address environmental impacts, cumulative impacts, and socio-economic impacts on First Nation communities need to be addressed.

DISCUSSION

The Applicant has developed and submitted construction plans that appropriately address the site-specific concerns of the Commission staff carrying out the technical and environmental reviews. However, the Commission acknowledges that the outdated and limited information used in portions of the reviews brings uncertainty to the accuracy of the true impacts of the proposed well to primarily the wildlife habitat in the area. The SFN have stated that the Rene Lakes area has excellent moose habitat in relatively close proximity to their Reserve Lands. Both the SFN and WMFN community members regularly use the area in question for hunting moose and they have a good understanding of the ungulate habitat and their presence. In recent years, the elders and community resource users have observed the migration of ungulates

into the subject area due to the industrial activity and hunting pressure in the surrounding areas. So, it is vital to protect the ungulate habitat in order to sustain both the numbers of animals, and to minimize interference with the Treaty Right to hunt.

...

The potential effects of the subject well to the social and economic considerations of the area, and of the province are of utmost importance. The Province has sold the sub-surface Petroleum & Natural Gas Rights to the Applicant and its partners, and will gain, through royalties, from any production taken through this well and/or any other well. If a discovery is encountered, the economic gain for all people in the province is considerable. This, coupled with the economic gains in the immediate area from short and long term employment and the many support services, is of great value to the all people in the Province. Another social consideration is the improved quality of life of those who will gain potential employment from this new exploration project.

When examining the socio-economic impacts to the trapper, the construction and drilling activities would interfere with the trapping activity during the season of initial development. However, the new access created may benefit the trapper in the long term. Further exploration and development in the immediate area could negate any benefits derived from the initial phase of exploration, and may cause substantial impacts to the trapping activity. To better manage the potential cumulative impacts of incremental increases in activity in the Rene Lakes area on trapping, a long-term plan should be established.

The proposed application falls into an area adjacent to the SFN Indian Reserve Lands, and is an area somewhat unexplored by oil & gas companies in recent years. Oil and Gas development has slowly encroached upon the area from the north and eastward directions, and the Commission recognizes the potential infringement on the Treaty Rights of First Nation communities. While the disturbance associated with the subject application is minimal, it represents an exploration project that, if successful, will most certainly bring further impacts in the short term through the exploitation of the natural gas resource.

The Commission currently addresses the effects of the cumulative impacts as a component of the technical and environmental review of an application. The primary consideration is the coordination of linear disturbances connected to a well. Depending on the application, this refers to the access road, both temporary and permanent, and the pipeline route. Other current practices include the directive of the Commission to locate wellsites, campsites, pipelines, and geophysical disturbances within, or adjacent to existing disturbances. Consideration is also given to access and facility restrictions, along with ongoing reclamation requirements in order to manage cumulative impacts. The subject well uses existing seismic lines for winter access, and any potential future permanent all-season access road and pipeline would follow the existing access corridor where possible. The Commission has initiated and reviewed the results

of studies recently carried out on cumulative effects assessments. The management of oil and gas development within an established cumulative effects framework is an objective of the Commission in the immediate future.

True meaningful consultation is only manifested through the ongoing communication between the parties involved throughout the life of a project. The area in question is currently being used by the SFN and WMFN to carry out their treaty right to hunt. To ensure the continuation of the right to hunt in the area, there is an obligation for the Commission and the First Nation communities to understand and work towards the protection of the ungulate and fur-bearer habitat resource together with the Applicant. The best way to accommodate this is to pursue an operational plan for the Rene Lakes/Maurice Creek area. This will ultimately bring certainty to all parties as oil and gas exploration proceeds in the coming years, and allow the Commission to make better decisions.

[36] The petitioner submits that there is no evidence that the Commission considered either the cumulative or indirect effects of the Well in granting the Well Authorization. Instead, the Commission took the position that the assessment of such effects could be deferred until after it was determined that the Well had commercial significance and further development would occur.

[37] The petitioner says that similarly, there is no evidence that the Commission made any attempt to accommodate or seriously consider Treaty 8 rights. The petitioner submits that indeed, given its absence from the Record, the Decision Maker did not even review or apparently consider the text of Treaty 8, or the substantial volume of background materials provided to the Commission by the First Nations with respect to the Treaty. The petitioner says that this reflects the Commission's view that treaty rights would be accommodated later, and likely in a different process.

[38] The petitioner says that finally, it was conceded by the Decision Maker in his affidavit that the concern expressed by the SFN representatives about the cumulative impacts of commercial and industrial development is a "legitimate concern" and one which the Commission "must consider carefully". The petitioner notes that there was no objection raised to doing such work on a practical, procedural or legal basis. The only ground for not doing such a complete assessment was that it could wait until later stages of development if the Well proved commercially feasible.

[39] The petitioner contends that aside from economic considerations, no real distinction was drawn in type between the effects of an exploratory well and a production well. Both require the building of access roads, construction work, drilling and both generate product. In the case of an exploratory well, the product is stored in a sump (an open toxic waste dump). In the case of a producing well, the product is shipped out (likely through a pipeline). The petitioner insists that the only real reason given for deferring the assessment was economic: that is, doing an assessment would be of no value to either the industry or the Province if the Peace-Moberly tract was ultimately not productive.

[40] The petitioner submits that the problem is that if this approach is considered from the SFN's prospective, it leads to a wholly unsatisfactory and legally unsustainable position. If no production occurs, the cumulative and indirect effects of the exploratory work will never be assessed. Since this logic would apply to all exploratory work, this would mean that there

could be extensive road building, construction work, drilling activity and toxic waste production that is never assessed.

[41] Furthermore, the petitioner submits that even if development does proceed, the assessment will not address the habitat and effects on habitat as it is now. Instead, the assessment would be performed on the already disturbed environment affected by the exploratory work. Thus, just as the present proposal is justifiable in the mind of the Commission because it merely incrementally builds on existing disturbances, further development will build on the now expanded disturbance resulting from the Well Authorization. The petitioner says that indeed, even if an assessment is done and it shows that the exploratory work should not have been done, there will be no turning back.

[42] The petitioner submits that the approach adopted by the Commission is wrong and unreasonable in light of both the constitutional duty and statutory mandate placed on the Commission. The petitioner argues that the constitutional obligation applicable in the instant case is the duty to consult. This obligation encompasses a duty to hear, accommodate and address the legitimate concerns of the aboriginal peoples when the Crown is considering taking or approving actions which may infringe treaty or aboriginal rights. This must entail considering these concerns in the context of all effects, whether direct or indirect.

[43] Furthermore, the petitioner says that s. 4 of the **Act** specifically imposes a duty on the Crown to comply with aboriginal and treaty rights protected by s. 35 of the **Constitution Act**, 1982, so that there is a concurrent statutory duty to consult and accommodate the legitimate interests of the SFN. In the context of the **Act** as a whole, this clearly requires a consideration of all relevant effects, and not merely arbitrarily defined "direct" effects.

[44] The petitioner also says that in determining the applicable standard of review the Court must bear in mind that the question of whether or not there has been adequate consultation goes to the constitutionality of the Commission's decision. Furthermore, the petitioner claims that the decision raises the Crown's fiduciary obligations to aboriginal peoples. Both of these factors point to a low level of deference to the decision made by the Commission.

[45] The petitioner submits that to the extent that the issues require the Court to examine the constitutionality of the decision and the statute, it is inappropriate to speak of a "standard of review" at all. In respect of such issues, the decision is either constitutional or it is not. The petitioner says that the Commission has a statutory mandate to deal with a limited constitutional issue, namely, what must be done to ensure that the Commission's decision and actions conform with s. 35 of the **Constitution Act**, 1982. No deference is given to such a decision and the Decision Maker must be correct: See **Gitksan First Nation v. British Columbia (Minister of Forests)**, [2003] 2 C.N.L.R. 142 (B.C.S.C.), at paras. 65-66; **Paul v. British Columbia (Forest Appeals Commission)**, [2003] S.C.J. No. 34, at para. 31; **Halfway River First Nation v. British Columbia (Ministry of Forests)**, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at para. 55.

[46] The petitioner argues that the courts have held that the duty to consult is not limited to direct effects of the decisions. In this regard, the petitioner says that the duty to consult is triggered when the Crown considers any decision which *potentially* infringes aboriginal or treaty rights. Moreover, the courts have also considered potential indirect infringements beyond the immediate area of the proposed activity. The

petitioner points to the decision of Lambert J.A. in **Haida Nation v. British Columbia (Minister of Forests)** (2002), 99 B.C.L.R. (3d) 209 (C.A.) ("**Haida (No. 1)**"), (leave to appeal to S.C.C. granted) where at para. 42, His Lordship states, as follows:

How could the consultation aspect of the justification test with respect to a *prima facie* infringement be met if the consultation did not take place until after the infringement? By then it is too late for consultation about that particular infringement. By then, perhaps, the test for justification can no longer be met and the only remedies may be a permanent injunction and compensatory damages.

[47] The petitioner also cites Huddart J.A. who, in **Halfway River**, supra, at para. 185, said, as follows:

There was evidence the proposed lumbering activity would preclude hunting in an area considerably larger than the particular cutting blocks during active logging for two years. While mitigating steps were to be taken, there was also evidence of the detrimental effect of road construction on long-term use of the area by Native hunters. Common sense suggests these effects might be sufficiently meaningful, particularly when they are felt in an area near the first nation's reserve, to require justification by the government of its action, depending on the nature of the hunting right. Had the District Manager understood the extent of his obligation to consult, he might have concluded the activities of Canfor authorized by CP212 would result in a meaningful diminution of the Treaty 8 right to hunt...

[48] The petitioner notes that, similarly, in **Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)**, [2002] 1 C.N.L.R. 169 (F.C.T.D.), Hansen J. held that the duty to consult was triggered when the Crown considered a road building proposal which had potential impacts which were both direct and indirect in nature. These included effects such as the fragmentation of moose habitat, the impact of increased access to the area, as well as more general potential adverse economic and cultural consequences. Her Ladyship particularly referred, at para. 98, to the fact that:

Opening up this remote wilderness to vehicle traffic could potentially exacerbate the challenges facing First Nations struggling to maintain their culture.

[49] The petitioner says that it is also notable that Hansen J. considered the ability of the First Nation to exercise their treaty rights throughout the park in question, and not merely in the vicinity of a proposed road.

[50] Thus, the petitioner argues that if indirect and potential effects of this nature trigger the duty to consult, then it logically follows that such effects must also be considered by the Crown during the consultation process. The petitioner says that the Supreme Court of Canada has made it clear that decision makers are always under an obligation to consider all relevant factors. It would be surprising, says the petitioner, if this duty were narrower when considering the protection and accommodation of constitutionally-protected rights. In **Oakwood Development Ltd. v. St. Francois Xavier (Rural Municipality)**, [1985] 2 S.C.R. 164, at para. 15 the Court said, (referring to Lord Denning's point in **Baldwin & Francis Ltd. v. Patents Appeal Tribunal**, [1959] A.C. 663, at p. 693): "the failure of an administrative decision-maker to take into account a highly relevant

consideration is just as erroneous as the improper importation of an extraneous consideration."

[51] The petitioner says that a similar point was made by Curtis J. in *Westbank First Nation v. British Columbia*, [1997] 2 C.N.L.R. 221 (B.C.S.C.), in considering how to approach the analysis of logging plans which left 72.89% of an area un-logged. At para. 10 His Lordship observed, as follows:

The balance of the company's current 5-year plans in the trap line would involve a further 444.61 hectares, resulting in 72.89% of the area being left unlogged. It is important to distinguish however between area that is unlogged and area that is unaffected by logging - if, for example, 50% of the total were clear cut in a checkerboard pattern of 20 hectare blocks, while 50% would remain uncut, arguably 100% would be affected by logging.

[52] The petitioner submits that this is precisely the problem with the choice of the Decision Maker in the instant case to focus narrowly on the Directly Affected Area, defined in the Decision Maker's affidavit as the existing seismic line to provide temporary road access, the remote drilling sump adjacent to the same seismic line, the temporary campsite located on an old restored well site at the beginning of the seismic line access, and the well site itself. The petitioner says that the Decision Maker missed the fact that a much larger area may be affected by the proposed work, by effects such as increased access and fragmentation of habitat. The petitioner submits that though these potential risks were expressly recognized, they were not assessed by the Decision Maker.

[53] The petitioner also submits that the narrowness of the Decision Maker's approach is illustrated by his consideration of the access road. In defining the Directly Affected Area, the Decision Maker excluded the 'existing seismic line' over which the road was to be built. Yet, the petitioner says, the evidence shows that since this is an old seismic line it has re-grown with young deciduous trees. As such, at present, it does not presently constitute an effective means of access. Thus, argues the petitioner, two direct effects of the exploratory works (the loss of re-grown trees and the conversion of the old seismic line to an access road) are not considered by the Decision Maker. The petitioner contends that these unaccounted for effects may be particularly significant if the Well turns out to be productive. In that case, the petitioner says the access will continue to be needed and maintained for several years in order to facilitate construction, maintenance and operation of the Well.

[54] The petitioner also contends that the Crown must have due regard to the reasons for which an action is taken. The petitioner says that the Supreme Court of Canada and the British Columbia Court of Appeal have emphasized that the Crown should only interfere with aboriginal and treaty rights for compelling and substantial reasons. Vague notions of the "public interest" are not sufficient: See *R. v. Sparrow*, (1990), 70 D.L.R. (4th) 385 (S.C.C.), at p. 412.

[55] The petitioner submits that in *Halfway River*, supra, Finch J.A. (as he then was) rejected placing undue emphasis on the economic interests of the Province when engaging in consultation. The petitioner says that similarly, in *Haida (No. 1)*, supra, Lambert J.A., speaking for the Court, held that the Province could not use economic justification alone to evade or short-circuit the consultation obligation.

[56] The petitioner argues that it is significant that the Commission's own review panel, the Advisory Committee, emphasized the same principle applied

to the statutory scheme established under the **Act**. In its review of the Well Authorization, the Advisory Committee expressed concern that undue weight had been given to the Province's economic concerns when compared to other interests, including those of the environment and First Nations concerns.

[57] The petitioner notes that the Decision Maker states in his Reasons that the Commission's staff reviewed the Application and concluded that the potential effects of the Well to the social and economic considerations of the area, and of the Province were of "utmost importance". The petitioner says that similarly, the Decision Maker also suggests that the positive effects of increased access caused by the Well are also to be given weight and considered, but the detrimental effects of road building would not be seriously assessed until the economic value of the Well was known. The petitioner says that in light of this approach to dealing with the issues, the SFN could perhaps be forgiven for thinking that while their interests are being voiced clearly, they are not really being heard by the Commission, much less being dealt with.

[58] The position of the petitioner is that the SFN is not seeking a "veto" or permanent "freeze" over oil and gas development in its Territory, in the ACCI, or even in the Peace-Moberly Tract. Instead, what the SFN seeks is to have the Commission, in the circumstances of this case, give serious consideration to the likely effects - both direct and indirect - of oil and gas exploration and development in a limited area.

[59] The petitioner submits that the Decision Maker's only real answer to the SFN and its legitimate concern that there should be an assessment of the indirect effects of oil and gas exploration on the SFN's Treaty 8 rights is his view that such an assessment should be done at a later stage. The petitioner says that this is unsound and unreasonable both as a matter of practice and when compared to the information contained in the Decision Maker's Record. The petitioner says that the Record shows that the Commission at no point intends to assess the cumulative impact of oil and gas development on the SFN Treaty 8 rights, and that even if it were to do so, practically much of the damage to the environment will have occurred before that stage is reached.

[60] Finally, the petitioner says that if the assessment is deferred to the development/production stage, at that time the assessment will be based on an already disturbed environment: the access road will have been built, the clearings made and all that will need to be done will be further incremental work on an already compromised environment.

[61] In summary, the petitioner submits that this is not a case where there has been a failure on the part of the Commission to consider a single factor or report for consideration. The petitioner submits that this is a case where the Commission fundamentally misconceived its approach to dealing with the Application by excluding a broad range of considerations from its deliberations. Its approach is admittedly premised on incomplete, inaccurate and outdated wildlife information; it did not attempt to accommodate or minimize interference with treaty rights; and it excluded consideration of indirect and cumulative effects. The petitioner says that the Commission has drawn the definition of "direct effects" so narrowly as to exclude consideration of some obvious direct effects (such as the conversion of the seismic line from an area of re-growth to a road).

[62] Furthermore, the petitioner asserts that the decision itself was made in the context of a constitutionally invalid statutory scheme. Given all of these factors, the petitioner claims that there is no feasible manner in which the matter could merely be remitted to the Decision Maker for

consideration in light of a set of directions. As a result, the petitioner argues that the most appropriate treatment of the Well Authorization would be to quash it, which would leave Vintage free to re-apply (or not) and allow the process to start on an appropriate footing.

[63] In respect of the constitutional relief sought, the petitioner claims that the declarations set out in the Petition should be granted, and the **Act** declared inoperative to the extent that it purports to apply to areas subject to Treaty 8 rights.

[64] However, in the interest of balancing the concerns of the Province related to the importance of the oil and gas industry generally against the concerns of the SFN, the petitioner would agree to the declarations sought being stayed outside the Peace-Moberly Tract for a period of one year, subject to other First Nations being at liberty to apply for the stay to be lifted, where appropriate.

VII. THE POSITION OF THE COMMISSION

[65] The Commission concedes that:

- (a) the Commission has an obligation to consult the SFN about pending applications which might affect the SFN's exercise of its treaty rights.
- (b) the scope of the Commission's consultation obligation is described with reasonable accuracy by the declaration sought in the Petition, as follows:

A declaration that prior to approving the Well Authorization the Commission is required to engage in good faith consultation with the Sauteau concerning the effects of the proposed Well Authorization on the Treaty Rights of the Sauteau, for the purpose of avoiding the infringement of such Treaty Rights or, if such infringement cannot be avoided, ensuring that such infringement can be justified in accordance with s. 35 (1) of the **Constitution Act**, 1982.

[66] However, the Commission submits that during the process leading up to the Well Authorization it discharged its obligation to consult by the efforts described in the affidavits of Messrs. Perkins and Purdon, sworn October 21, 2003.

[67] Since June 2002, Mr. Perkins has been the Commission staff member with primary responsibility for consultation with the SFN. In this capacity he has spoken with representatives of the SFN at least once a week, either in person or by telephone, and met in person with them on average about once a week up to the middle of March when he advised the Decision Maker that he had completed his consultation process in relation to the Application.

[68] Mr. Purdon, who is the Senior Aboriginal Program Specialist of the Commission, explains in his affidavit that the Commission and MSRM are presently establishing a sustainable resource management planning process in consultation with the SFN, with the object of incorporating the SFN's interests and values. According to him, cumulative impact assessment and management will be an important part of the planning process.

[69] The Commission agrees with the petitioner's submission that it would have been an error for the Commission to ignore cumulative impacts. The Commission says that if the petitioners had presented evidence to the Commission to the effect that:

- (a) the cumulative impacts of different kinds of commercial and industrial activities had adversely affected the petitioner's ability to exercise its treaty rights; and
- (b) the Well was likely to materially exacerbate those impacts,

it would have been the duty of the Commission to carefully consider that evidence and take it into account in making its decision. However, the Commission says that the petitioner presented no such evidence to the Commission, but rather took the position that the Decision Maker should have deferred the Application until the Commission had performed the assessment and studies requested by the SFN.

[70] The Commission submits that in making its decision on the Application, it owed a duty of procedural fairness to the SFN and Vintage. The Commission says that the phrase "duty of procedural fairness" is often employed to describe the obligations formally embraced in the concept of a *quasi-judicial* function: See "**The Village" Mobile Home Estates Ltd. v. Regina in Right of British Columbia**, (1982) 41 B.C.L.R. 189 (C.A.).

[71] The Commission argues that it is assigned a number of duties by the **Act**, some of which are *quasi-judicial* and others of which are not. It says the point is best illustrated by s. 10 of the **Act**. Section 10(1) requires the Commission to give public policy advice on the request of the Minister. The Commission agrees that this is not a *quasi-judicial* function. However, s. 10(2) exempts the Commission from the obligation to give such advice with respect to a matter presently before the Commission. The Commission says that is because the Commission has a *quasi-judicial* role in relation to applications pending before it. It claims that when fulfilling that role, the Commission (like any other impartial adjudicator) must be free of conflicting obligations.

[72] The Commission submits that the Decision Maker's function in the case at bar was *quasi-judicial*. It says that Vintage was entitled to a fair hearing by an impartial decision maker.

[73] The Commission contends that regulatory tribunals often have multiple roles. For example, the National Energy Board has the obligation to:

- (a) consider applications for certificates for pipelines and international power lines under s. 52 of the **National Energy Board Act**, R.S.C. 1985 c. N-7, and also,
- (b) give public policy advice under s. 26 of the same statute.

[74] The Commission submits that the provisions for appointment and tenure of the members of the Commission are very similar to those for members of the National Energy Board.

[75] Moreover, the Commission submits that the existence of a duty of procedural fairness, which the Commission owes to Vintage, is fundamentally inconsistent with the existence of a fiduciary duty of the kind alleged by the petitioner: See **Attorney-General of Quebec v. Canada (National Energy Board)**, [1994] 1 S.C.R. 159, 112 D.L.R. (4th) 129 at pp. 147 to 149; **Wewaykum Indian Band v. Canada**, [2002] 4 S.C.R. 245, 220 D.L.R. (4th) 1, at pp. 39 to 40.

[76] The Commission contends that the first flaw in the petitioner's case is its assertion that the Commission owed a fiduciary duty to the petitioner to assemble and present the evidence to oppose the Application. The Commission contends that it owed no duty to the petitioner to conduct and present a cumulative impact assessment, and then to consider that assessment in the

context of the Application.

[77] The Commission says that if it had done what the petitioner now says it should have done, the Commission would have failed to provide the requisite degree of procedural fairness to Vintage. A *quasi-judicial* decision maker must not undertake the responsibility of preparing and presenting the case for either party. The Commission says its duty was to hear and consider impartially the evidence and arguments presented by the petitioner and by Vintage, and to render a decision based on that evidence and those arguments.

[78] The Commission contends that the petitioner chose to lead no evidence on the critical point, and now complains that the Decision Maker failed to do it for the petitioner. The Commission says that the critical point is what effects, direct or indirect, isolated or cumulative, will the Well have on the petitioner's exercise of its treaty rights? The Commission argues that there was no evidence of any such effects before the Commission.

[79] The Commission submits that the second flaw in the petitioner's case comes down to a question of standing. The Commission submits that the function of our legal system is to resolve real disputes, where substantial concerns are at stake. It says that a party who alleges no real prejudice or harm has no standing to complain: See **Cheslatta Carrier Nation v. British Columbia** (2002), 80 B.C.L.R. (3rd) 212 (C.A.), at para. 18, where Newbury J.A., for the Court, followed the "usual rule against exercising jurisdiction in the absence of a 'live controversy'". In that case the pleadings did not allege any violation of or threat to the (assumed) right of the Cheslatta to fish in the specified lakes. The Court dismissed the Indian band's appeal from a judgment granting the Crown's application to strike the statement of claim for disclosing no reasonable cause of action.

[80] The Commission argues that the petitioner has been thoroughly consulted and that its action does not lay in the absence of (at least) *prima facie* evidence of an infringement of the petitioner's treaty rights. The Commission says that as there was no such evidence, the petition should be dismissed.

[81] Regarding the "standard of review" the Commission says that in an ordinary administrative law proceeding, the rights of the parties are procedural. They are entitled to a fair process, conducted by an impartial decision maker in which all relevant factors, and no irrelevant factors are considered. The Commission submits that the supervisory role of the Court on judicial review is to ensure such integrity of the process. It also says that provided that an appropriate process was followed, the Court should not review the substantive decision on its merits.

[82] The Commission advances that a different standard of review applies to the constitutional issue. If the Court concludes that there has been an infringement of the petitioner's treaty rights, the Commission says that the Court must then consider whether the Commission was correct in concluding that any possible infringement of the petitioner's rights was justified. Put another way, the Commission says that the question before the Court is this: on the evidence which was before the Commission, was it correct to conclude that any possible infringement was justified?: See **Halfway River**, and **Paul v. British Columbia**, *supra*.

[83] The Commission also submits that the issue in the instant case is not whether a cumulative impact assessment should be done. The issue is whether a permit for the Well should have been refused or deferred pending completion of the assessment and studies. The Commission asserts that as there was no evidence of a reason for such a deferral or refusal, the answer is plainly

"no", and that the Decision Maker was correct in the conclusion he reached.

[84] Regarding the petitioner's criticism of the Decision Maker for acting on information which he described as "...outdated and limited information used in portions of the reviews...", the Commission says that the "reviews" to which the Decision Maker referred were plainly the reviews of environmental data conducted by the Commission staff. The Commission submits that the petitioner's criticism is unwarranted because a *quasi-judicial* decision maker must act on the information put forward by the parties. In this case, the Commission says that the petitioners put forward no environmental data, and sought no adjournment to allow them to assemble and present such data, and that a party who chooses to conduct proceedings in that way cannot be heard to later complain when the Decision Maker acts on the data put before him.

VIII. THE POSITION OF VINTAGE

[85] Vintage submits that:

- (i) the petitioner has not established that the Well Authorization constitutes a *prima facie* infringement of its rights, and therefore the Commission did not owe the petitioner a duty to consult on the Well Authorization;
- (ii) if the Commission owed a duty to the petitioner it satisfied that duty;
- (iii) to the extent that the Commission had separate statutory obligations to the petitioner, these obligations coincide with any constitutional obligations, and the Commission has satisfied these obligations;
- (iv) Vintage does not owe an independent duty to the petitioner;
- (v) the Commission does not exercise a pure unfettered discretion, and therefore the **Act** is constitutional; and
- (vi) if the Commission owed a duty to the petitioner and failed to satisfy this duty, the court should exercise its discretion under the **JRPA** and refuse to grant the relief sought by the petitioner.

[86] Vintage accepts, for the purpose of this proceeding, that the SFN are beneficiaries of Treaty 8 and that they exercise, in general terms, treaty rights to hunt, fish and trap in the areas they have defined as the ACCI and the Peace-Moberly Tract. Vintage also accepts that the SFN are entitled to, and do exercise these rights throughout the area set out in Treaty 8.

[87] By way of background, Vintage explains that it began looking at oil and gas exploration opportunities in the area north of the SFN's Reserve around September 2002. In October 2002, Vintage acquired petroleum and natural gas rights from the Province to a parcel of land northwest of the SFN Reserve. Vintage paid \$1,150,000 for these rights. This amount does not include subsequent application fees for approval to conduct oil and gas-related activities, rentals, the actual cost of conducting activities, or royalties.

[88] Subsequently, Vintage entered into a "farm-in" agreement with Devon Canada Corporation ("Devon"). Devon holds the petroleum and natural gas rights to other lands in the same area. This agreement includes provisions which "pool" or combine a portion of Vintage and Devon's respective interests to form a common ownership in the pooled area.

[89] Based on existing information, including an inspection of the area, Vintage prepared a preliminary plan for an exploratory well and related activities for discussion with the First Nations and other stakeholders.

Vintage says that to minimize the effects of these activities on wildlife and the environment, among other things the plan provided for the access to the proposed well site to be along existing roads and cleared areas, for the activity to take place in the winter when the ground is frozen, to use temporary clear span bridges across creeks, to restrict public access to the area, and to use existing cleared areas whenever possible. The total new clearing associated with Vintage's proposed activity is 2.56 hectares, or 6.4 acres. Vintage says that this is approximately .0026% of the area the SFN have defined as the Peace-Moberly Tract.

[90] To begin the process of getting input into its proposed activity, and before making an application to the Commission, Vintage met with the SFN on November 15, 2002. A further meeting took place between Vintage's senior decision makers, the SFN, and the Commission on December 5, 2002. At the December 5 meeting the SFN expressed concerns with large scale oil and gas activities, in combination with other activities, and asked Vintage to postpone its proposed activities until the cumulative effects of development, including oil and gas development in the ACCI could be studied. The SFN estimated that this process would take 18 months, resulting in at least a two year delay in Vintage's proposed activities.

[91] Vintage submits that at no time during the November or December 2002 meetings were any specific concerns expressed by the SFN with respect to the effect of Vintage's proposed activities on the exercise of the SFN's treaty rights. Nor were suggestions made on how Vintage's proposed activities could be changed or modified to accommodate the exercise of these rights.

[92] Given the outcome of the December meeting, the shortness of the winter drilling season, and the steps taken in preparing the preliminary plan, Vintage decided to file an application with the Commission for permission to conduct its activities, while continuing to attempt to get input from the SFN. The SFN have an agreement with the Province dated January 14, 2002, which sets out how the SFN will be consulted on oil and gas related activities (the "Consultation Agreement"). Vintage's application was subsequently forwarded to the SFN pursuant to the terms of the Consultation Agreement.

[93] Numerous further correspondence, communications and meetings took place between Vintage, the SFN and the Commission. This included further meetings between Vintage's senior officials and the SFN on January 22, 2003, and February 4, 2003. Other meetings took place between the SFN and the Commission that Vintage was not asked to participate in. Ultimately the SFN maintained their position that broad wildlife studies, cumulative effects assessments and the development of integrated resource management processes needed to take place throughout the Peace-Moberly Tract and ACCI before any activities could occur.

[94] Vintage submits that at the same time as Vintage and the Commission were consulting with the SFN seeking input with respect to Vintage's proposed activities, the SFN, the Commission and other provincial agencies were engaged in the "parallel process" described by Mr. Purdon to establish a planning and management framework for the Peace-Moberly Tract.

[95] Vintage submits that the Commission's ongoing efforts to pursue a planning initiative with the SFN are working. Vintage also says that it has remained committed to working with the SFN following the Well Authorization to accommodate any concerns the SFN may have with the effects of Vintage's activities on the exercise of their treaty rights.

IX. DECISION

A. The Commission's duty to consult and accommodate the SFN.

[96] In my opinion, the Commission did not breach its constitutional duty or its statutory duty under the **Act** to consult with and accommodate the SFN.

1. The Constitutional Principles

[97] Section 35(1) of the **Constitution Act**, 1982, provides,

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[98] Although s. 35 of the **Constitution Act**, 1982, gives significant constitutional status to aboriginal and treaty rights, there are other provisions in the Constitution that give the federal and provincial governments the power, and the responsibility, to make laws with respect to various matters, to make decisions, and ultimately to govern. These include the power to restrict the way certain activities are carried out and the power to authorize activities that may affect third parties, including First Nations. These powers include the exclusive powers of provincial legislatures as set out in ss. 92 and 92A.

[99] In order to give effect and meaning to the various provisions of the Constitution, the courts have had to reconcile these provisions and have done so by holding that notwithstanding that s. 35 rights are constitutionally recognized, such rights are not absolute and may be infringed by the federal and provincial governments in the exercise of their powers. For example, in **R. v. Sparrow**, supra, at p. 409, the Court said, as follows:

In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the **Constitution Act**, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

[100] In **R. v. Gladstone**, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648, at para. 20, the Supreme Court of Canada summarized the **Sparrow**, supra, framework for analyzing the potential conflict between s. 35 rights and powers exercised under other sections of the Constitution:

- (i) Is there an existing aboriginal right?
- (ii) Has the right been extinguished?
- (iii) Has there been a *prima facie* infringement of that right?
- (iv) Can the infringement be justified?

[101] In **R. v. Badger**, [1996] 1 S.C.R. 771, at para. 75, the Court held that this framework applies equally to treaty rights and the exercise of provincial powers.

[102] In **R. v. Nikal**, [1996] 1 S.C.R. 1013, at paras. 91 to 93, the Court held that while aboriginal and treaty rights are given significant weight in this framework, as indicated by the Court, these rights are not absolute and there needs to be some balance between other legitimate legislative objectives and the rights of aboriginal peoples:

With respect to licensing, the appellant takes the position that

once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal rights since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.

This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights is necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a **Charter** or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the **Canadian Charter of Rights and Freedoms** is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in **R. v. Agawa** (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:

...Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in s. 1 of the **Canadian Charter of Rights and Freedoms** which provides that limitation of **Charter** rights must be justified as reasonable in a free and democratic society.

This conclusion is consistent with the approach to interpreting s. 35 rights as set out in **Sparrow**, supra, at p. 1110:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise.

[Emphasis in original]

[103] As further indicated in para. 73 of **Gladstone**, supra:

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.

[104] This legal framework was subsequently adopted in the context of prospective government action: See **Taku River Tlingit First Nation v. Tulsequah Chief Mine Project** (2002), 98 B.C.L.R. (3d) 16 (C.A.), (leave to appeal to S.C.C. granted); **Haida (No. 1)**, supra.

2. The Application of the Constitutional Principles to the Factual Context of the Case at Bar.

(i) Has the SFN established an existing aboriginal right?

[105] Vintage accepts, for the purposes of this proceeding, that the SFN have treaty rights to hunt, fish and trap in the Treaty 8 area, and that they exercise these rights in general terms throughout Treaty 8, and the areas the SFN have defined as the ACCI and the Peace-Moberly Tract. Vintage notes that this concession was accepted and acted upon both by Vintage and the Commission in their consultation efforts with the SFN.

(ii) Has the SFN established a *prima facie* infringement of their treaty rights?

[106] If a First Nation is successful in establishing a good *prima facie* aboriginal or treaty right, under the **Sparrow**, supra, analysis, it must then establish that there has been, or will be a *prima facie* infringement of that right under the government action in question.

[107] **Sparrow**, supra, at p. 1112, sets out a number of factors to be considered in determining whether there is a *prima facie* infringement of an aboriginal (or treaty) right: is the limitation unreasonable?; does the regulation impose undue hardship?; does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement of its rights lies on the First Nation.

[108] **Sparrow**, supra, involved a situation where the federal government was attempting to directly regulate the exercise of an aboriginal right. These particular factors are arguably more difficult to apply to a situation where, rather than directly regulating the exercise of an aboriginal right, a government decision authorizes an activity that could interfere with the exercise of that right. The Supreme Court of Canada recognized this in **Gladstone**, supra, indicating, at para. 39, that:

The test as laid out in **Sparrow** is determined to a certain extent by the factual context in which it was articulated; the Court must take into account variations in the factual context of the appeal which affect the application of the test.

[109] In **Heiltsuk Nation v. British Columbia (Minister of Sustainable Resource Management)**, [2003] B.C.J. No. 2169 (S.C.), in circumstances more analogous to the case at bar, the court engaged in a factual enquiry to determine if the authorized activity would constitute a *prima facie* infringement of the exercise of the rights in question. With respect to the required degree of interference, the court indicated at paras. 87 to 88, as follows:

In **Nikal** the Supreme Court of Canada, in the course of finding that the bare requirement for a licence did not constitute an infringement of aboriginal fishing rights, rejected the proposition that any government action which affects or interferes with the exercise of aboriginal rights constitutes a *prima facie* infringement of the right. The Court held that the government must ultimately be able to balance competing interests. (¶ 91 -94)

In *Gladstone*, Lamer C.J. sets out that the threshold requirement for infringement and states that legislation infringes an aboriginal right when it "clearly impinges" upon the rights. (¶ 53 and 151) An infringement has been defined "as any real interference with or diminution of the right." *Mikisew Cree First Nation v. Canada*, [2001] F.C.J. No. 1877, 2001 FCT 1426 at ¶ 104.

[110] In *R. v. Badger*, supra, at para. 90, a *prima facie* infringement was further defined as an erosion of "an important aspect of the Indian hunting rights".

[111] On the basis of the authorities cited above, Vintage submits that it is not sufficient for the SFN, having established their treaty rights, simply to show that the activities associated with the Application will take place in areas important to the exercise of those rights. The SFN bears the further onus of establishing a *prima facie* interference with their treaty rights.

[112] Vintage points out that according to the written and oral information available to the Commission there was no indication during the consultation process that the activities associated with the Application, which were ultimately approved under the Well Authorization, would have any direct or indirect effects on the exercise of the SFN's treaty rights to hunt, fish and trap, let alone constitute an erosion of an important aspect of, clearly impinge, or be a real interference with or diminution of their treaty rights.

[113] Nor, says Vintage, was there any suggestion made by the SFN on how Vintage's proposed activities could be changed or modified to avoid or minimize any direct or indirect effects on the petitioner's treaty rights.

[114] Vintage submits that the SFN's failure to establish that there has been, or will be, a *prima facie* infringement of its treaty rights is fatal to the petitioner's application.

[115] However, Vintage says that even if the SFN has established a *prima facie* infringement of its treaty rights, this does not mean that Vintage's activities cannot proceed. Rather, the onus then switches to the Commission to show that the infringement is justified. If the Commission can establish that the infringement is justified, then the proposed activities may take place.

[116] The justification test involves a further two-part analysis. *R. v. Sparrow*, supra, at pp. 413 to 417, provides:

- (i) Is there a valid legislative objective? And
- (ii) Has the Crown met its "fiduciary" obligation to the First Nation?

[117] On the first part of the test, Vintage submits that the general development of the Province's petroleum and natural gas resources under the *Act*, and its related legislative enactments represents a compelling and substantial legislative objective as defined in *Sparrow, Gladstone* and *Delgamuukw*, supra. Thus, Vintage says that if there has been a *prima facie* infringement of the First Nation's treaty rights, the underlying objectives of the legislative scheme can, in appropriate circumstances, provide justification for such an infringement.

[118] On the second part of the test, whether the Commission has met its fiduciary obligations to the SFN, Vintage refers to *Sparrow*, supra, at pp. 416 to 417, which holds that the answer to this question depends on several

non-exhaustive considerations:

1. Has priority in the allocation of the resource been given to the First Nation?
2. Has there been as little infringement as possible to affect the desired result?
3. Whether, in a situation of expropriation, fair compensation is available?
4. Has the aboriginal group been consulted with respect to the proposed activity?

[119] Vintage submits that given the clear opportunities that the SFN have for continuing to exercise their treaty rights in both the Peace-Moberly Tract and elsewhere, the minimal effects, if any, of Vintage's activities on these rights and the environment, and the extensive efforts that were made, and are being made to consult with the SFN and to accommodate their interests, the Commission has fully satisfied any fiduciary obligations that it had to the SFN with respect to the Well Authorization and has justified any infringement of the SFN's treaty rights.

[120] However, it must be noted here that the petitioner is not asking the Court to find that the Commission's decision constitutes an unjustifiable infringement of the SFN's treaty rights. Relying on *Haida (No. 1)* and *Taku*, supra, the petitioner submits that the Commission's obligation to consult and accommodate the SFN is "a free standing enforceable legal and equitable duty" (*Haida No. 1*, supra, at para. 55) which does not turn on the establishment of a *prima facie* infringement of their treaty rights.

[121] The petitioner says that the duty to consult and accommodate arises prior to any infringement taking place, that is, it arises where it is shown that a *prima facie* infringement will occur as a result of the activities. The petitioner argues further that *Haida (No. 1)* and *Taku*, supra, establish that a duty to consult arises even in the absence of proof of an infringement of treaty rights, that is, where there exists only the mere potential for infringement. The petitioner says that this is precisely the kind of mechanism which the SFN seeks, before their treaty rights have been infringed beyond repair.

[122] In *Haida (No. 1)*, supra, Lambert J.A. said, at paras. 50 to 55, as follows:

In reaching the conclusion that the Haida people had a good *prima facie* case to a claim for aboriginal title and aboriginal rights, I rely on these findings of the chambers judge made following his assessment of the evidence:

[47] In my opinion, there is a reasonable probability that the Haida will be able to establish Aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii, and that these areas will include coastal areas of Block 6. As to inland areas of Block 6, I would describe the Haida's chance of success at this stage, as being a reasonable possibility. Moreover, in my view, there is a substantial probability that the Haida will be able to establish the Aboriginal right to harvest red cedar trees from various old-growth forest areas of Haida Gwaii, including both coastal and inland areas of Block 6, regardless of whether Aboriginal title to those forest

areas is proven.

[48] I am also of the opinion that a reasonable probability exists that the Haida would be able to show a prima facie case of infringement of this last-mentioned right, by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply.

(my emphasis)

The strength of the Haida case gives content to the obligation to consult and the obligation to seek an accommodation. I am not saying that if there is something less than a good *prima facie* case then there is no obligation to consult. I do not have to deal with such a case on this appeal. But certainly the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights.

In my opinion, the obligations to consult and seek an accommodation with the Haida people were enforceable, legal and equitable duties at the relevant times in 1999 and 2000 of the Crown Provincial, MacMillan Bloedel, and its successor, Weyerhaeuser. The chambers judge has found as a fact that the Haida people were not consulted when the replacement of T.F.L. 39 and its transfer to Weyerhaeuser occurred, and that the Haida people objected to the replacement and to the transfer. No accommodation with the Haida people was sought by the Crown, by MacMillan Bloedel, or by Weyerhaeuser. In my opinion, the Crown Provincial and Weyerhaeuser were in breach of these enforceable, legal and equitable duties to the Haida people.

I consider that the courts have considerable discretion in shaping the appropriate remedy in this judicial review proceeding taken before any final determination of the title and rights of the Haida people by a court of competent jurisdiction.

The aim of the remedy should be to protect the interests of all parties pending the final determination of the nature and scope of aboriginal title and aboriginal rights. Once that final decision is made, and perhaps in the same proceedings, a final determination can be made of the quality and extent of any *prima facie* infringement of the aboriginal title and aboriginal rights that may have occurred before that determination, including, particularly, over the period when the Crown and Weyerhaeuser were in possession of sufficient facts that they ought to have known of the probability that infringements were occurring. When the decisions are made about infringement then further decisions about justification can be made. The decisions about justification will surely recognize that, at least until early 2002, no consultation with respect to long term planning for logging on T.F.L. 39, and minimal or no consultation with respect to short term planning, took place between the Crown and Weyerhaeuser, on the one hand, and the Haida people, on the other. And, of course, no accommodations were attempted by the Crown or Weyerhaeuser and no accommodations were reached.

The discharge of the obligation to consult, as expressed in *Sparrow*, *Gladstone*, and *Delgamuukw*, has been framed as an element

among the circumstances which would justify a *prima facie* infringement of the aboriginal title or aboriginal rights. As I have said, the consultation must take place before the infringement. But where there are fiduciary duties of the Crown to Indian peoples it is my opinion that the obligation to consult is a free standing enforceable legal and equitable duty. It is not enough to say that the contemplated infringement is justified by economic forces and will be certain to be justified even if there is no consultation. The duty to consult and seek an accommodation does not arise simply from a *Sparrow* analysis of s. 35. It stands on the broader fiduciary footing of the Crown's relationship with the Indian peoples who are under its protection.

[123] Vintage submits that the petitioner's analysis of the result in *Haida (No. 1)* and *Taku*, supra, overstates the law on this issue. In *Haida (No. 1)*, supra, the Court held that if the First Nation can establish a *prima facie* case for an aboriginal right, and if it can establish a *prima facie* infringement of that right, the Crown's obligation to consult and accommodate can be triggered even before the First Nation has proven the right in court.

[124] Vintage argues that in no way did the Court in *Haida (No. 1)*, supra, change the law that a First Nation must establish a *prima facie* infringement of an aboriginal or treaty right. Vintage says that while the Court in *Haida (No. 1)*, supra, recognized that many aspects including consultation, "must be in place before the infringement occurs" (para. 43), this does not alleviate the onus on the First Nation to establish a *prima facie* infringement.

[125] Vintage submits that while consultation should take place before the infringement occurs, this does not mean that consultation must take place where no infringement, actual or potential, has been established. The onus remains on the First Nation to establish, at the very least, a good *prima facie* case for prospective infringement.

[126] *Haida (No. 1)* and *Taku*, supra, have been considered by this Court in two recent decisions. In *Gitksan First Nation*, supra, the Court applied these authorities in concluding that infringement, or at least a good *prima facie* case for it must be established in any action for infringement. At paras. 77 to 79, Tysoe J. said, as follows:

Prima Facie Infringement

Counsel for the Minister and counsel for Skeena/NWBC each argues that the Petitioners have not established that the Minister's decision constituted a *prima facie* case of infringement. They say that the present circumstances are different from the *Haida* situation because there was no replacement of any forest tenure and there was no transfer of forest tenure from one party to another. They maintain that, as stated in the letter giving the Minister's consent, the change of control was neutral with respect to Aboriginal title and rights. Counsel say that if there was no *prima facie* infringement, there was no requirement for the Minister to consult the petitioning First Nations before consenting to the change of control of Skeena. Counsel further submit that there has been ongoing consultation regarding operation issues and that there will be an opportunity for consultation in connection with the pending decision of the Minister to replace Skeena's tree farm licence pursuant to s. 36 of the Act.

In my view, the **Haida** decisions are binding upon me with respect to this issue. At the trial level, the Haida Nation had alleged numerous instances of infringement but on appeal it confined its claim to two actions (see para. 48 of **Haida No. 1**). Those two actions were a s. 36 replacement of a tree farm licence in 1999 and the transfer of the tree farm licence in 2000 from MacMillan Bloedel Limited to Weyerhaeuser Company Limited. In each of the **Haida** decisions and especially in **Haida No. 2**, it is clear that the Court of Appeal considered both of these actions to constitute a *prima facie* infringement of aboriginal title and rights. There is no practical distinction between a transfer of a tree farm licence from one party to another (as occurred in **Haida**) and a change of control of the holder of tree farm and forest licences such that the holder becomes a wholly owned subsidiary of another corporation (as occurred in this case). In each situation, a different party will, either directly or indirectly, have the ability to make decisions with respect to forest tenure licences. This is why the Legislature included a change of control of the licence holder, as well as a transfer of the licence itself, in s. 54 as a circumstance requiring the consent of the Minister. If a change of control was not included in s. 54, parties could circumvent the requirement for the Minister's consent to a transfer of the licence by maintaining the licence in a shell company and transferring the shares in the shell company rather than the licence itself.

However, it is my view that the **Haida** decisions go further than holding that a transfer of a forest tenure licence (or the equivalent change of control of the licence holder) is a *prima facie* infringement of Aboriginal title or rights. Although the Haida Nation confined their claim on appeal to the 1999 and 2000 actions of the Minister, the Court of Appeal took a broader view of the infringement. At para. 84 of **Haida No. 2**, Lambert J.A. stated that the potential infringements extended to the passing of the Act and the issuance of the tree farm licence. He said the following at para. 91:

The provincial Crown may infringe on the aboriginal title and aboriginal rights of the Haida people if it can justify the infringement. The infringement would consist in establishing a legislative and administrative scheme under the **Forest Act**, granting Weyerhaeuser an exclusive right to harvest timber in the area covered by T.F.L. 39, renewing the issuance of T.F.L. 39, transferring T.F.L. 39 to Weyerhaeuser, approving management plans, and issuing cutting permits, all in furtherance of the same legislative scheme, and all in violation of the aboriginal title and aboriginal rights of the Haida people. The provincial Crown may justify its actions by meeting the tests for justification. Among the tests is a requirement that the Haida people be consulted before the infringement actions are taken. In this case, the Crown provincial did not consult the Haida people in any effective way at any stage of the furtherance of the legislative and administrative scheme, and so is in breach of its obligation of consultation at every stage where a justification test would require effective consultation.

And at para. 64, Lambert J.A. observed that the Crown's fiduciary duty is a continuing and ever present duty which continues unimpaired until the next time it must be observed.

[127] I have also found the review of the authorities by Gerow J. in *Heiltsuk*, supra, at paras. 35 to 46 to be most helpful:

In the cases dealing with the issue of consultation the courts have considered the factual context, including:

- whether there is a general right to occupy lands or whether there is a right to engage in an activity;
- whether there is or has been an infringement; and
- if there is or has been an infringement, whether there is any justification for the infringement.

It is in the final stage of the analysis, i.e., whether there is any justification for the infringement, that the courts have considered whether the Crown has met its fiduciary and constitutional duty of consultation and whether there has been an attempt to accommodate the First Nations. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, ¶ 64 - 72 and ¶81 - 82, *R. v. Adams*, [1996] 3 S.C.R. 101, ¶ 46 and 51 - 52.

In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, Lamer C.J. discussed the issue of consultation in the context of the justification of an infringement of aboriginal title and stated at ¶ 168:

There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*, [1984] 2 S.C.R. 335. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal rights.

In *Haida Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 378, 2002 BCCA 147 (*Haida No. 1*), Lambert J.A. recognized a three stage analysis in determining whether the Crown has breached its duty to consult consisting of:

1. consideration of whether aboriginal title or rights have been established on a balance of probabilities and a decision regarding the nature and scope of the title and

rights;

2. determination of whether the particular title or rights have been infringed by a specific action; and
3. a consideration of whether the Crown has discharged its onus to show justification, including whether it has fulfilled its obligation to consult.

(¶ 46)

Lambert J.A. acknowledged that although both the consultation and the infringement are likely to precede the determination of the aboriginal rights and title, that when determining if there has been a breach of duty the Court must first look at whether the First Nation has proved the title and then whether there has been an infringement of the right. Once those elements are established the onus shifts to the Crown to establish that there was justification for the infringement both before and at the time the infringement occurred. (¶ 46)

In ***Haida No. 1*** the Court of Appeal held that due to the circumstances surrounding the Minister's consent to the transfer of tenure from MacMillan Bloedel to Weyerhaeuser, the Minister had a legally enforceable duty to consult with respect to the transfer. The main issue in ***Haida No. 1*** was whether any consultation had taken place in the face of a good *prima facie* case of infringement of aboriginal rights to red cedar.

In ***TransCanada Pipelines Ltd. v. Beardmore (Township)*** (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), the Court held that it was only after a First Nation has established an infringement of an existing aboriginal or treaty right that the duty of the Crown to consult with the First Nation was a factor for the Court to consider in the justificatory phase of the proceeding. Borins J.A. stated at ¶ 120:

As the decisions of the Supreme Court illustrate, what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35 (1) of the ***Constitution Act***, 1982. It is at this stage of the proceeding that the Crown is required to address whether it has fulfilled its duty to consult with a First Nation if it intends to justify the constitutionality of its action.

In ***Taku River Tlingit First Nation v. Tulsequah Chief Mine Project***, [2002] B.C.J. No. 155, 2002 BCCA 59, it was argued that aboriginal right or title had to be established before there was duty to consult with the aboriginal peoples. In rejecting the argument, Rowles J.A. held that while the onus of proving a *prima facie* infringement of an aboriginal right or title is on the group challenging the legislation (or in this case the decisions of the statutory decision makers), it did not follow that until there was court ruling the right did not exist. (¶ 183)

In ***Taku***, the court accepted as findings of fact that the proposed road would impose serious impacts on the resources used by the Tlingit, that the Tlingits were not adequately prepared to handle the predicted impacts and that there was no plausible mitigation

or compensation possible. The project had not been commenced and it was found that the proposed road would have a profound impact on the Tlingit's aboriginal way of life and their ability to sustain it. The Tlingit's were willing to participate in the environmental review process to have their needs accommodated but the project approval certificate had been issued without their concerns being met.

(¶ 132 and 202)

In the circumstances, the court felt it was appropriate to dismiss the appeal of the order quashing the certificate and remit the matter to the Ministers to consider afresh the issuance of the project approval certificate. In her dissent, Southin J.A. referred to the fact that the right to be consulted is not a right of veto and was of the view that to remit the matter back to the Ministers would prolong the agony for both the proponent of the project and the Tlingit. (¶100 and 101)

Although the Court in *Haida No. 1* agreed that the requirement to consult could arise prior to the aboriginal right or title having been established in court proceedings, and that the Crown and Weyerhaeuser were in breach of an enforceable duty to consult and to seek accommodation with the Haida, it did not necessarily follow that the replacement of the licence was invalid. The Court was not prepared to make a finding regarding the validity, invalidity or partial validity of the transfer of the license but was of the view that it was a matter that could be more readily determined after the extent of the infringement of title and rights had been determined. (¶ 58 and 59)

Lambert J.A. stated that the courts have considerable discretion in shaping the appropriate remedy in a judicial review proceeding before the final determination of the title and rights of the aboriginal people and that the aim of the remedy should be to protect the parties pending the final determination of the nature and scope of title and rights. At the time of the final determination of rights and title the issues of the nature and extent of the infringement and the issue of justification could be dealt with. (¶ 53 and 54)

[128] While I am inclined to agree with Vintage's analysis of the law, it is not necessary for me to settle the debate between counsel on this issue. In my view, the Commission's concession that it has an obligation to consult the SFN on the Application renders moot which approach correctly reflects the current state of the law.

[129] However, the Commission takes the position that it met its duty to consult the SFN through the efforts of Messrs. Perkins and Purdon, but that in his exercise of the powers of the Commission the Decision Maker did not owe any constitutional or fiduciary duties to the SFN. The Commission submits that a consideration of *Attorney-General of Quebec v. Canada*, supra, at pp. 147 to 148, which held that the National Energy Board performs a quasi-judicial role, supports this position:

C. Fiduciary duty

The appellants claim that, by virtue of their status as aboriginal peoples, the Board owes them a fiduciary duty extending to the decision-making process used in considering

applications for export licences. The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown, as recognized by this court in *R. v. Sparrow*, *supra*, extends to the Board, as an agent of government and creation of Parliament, in the exercise of its delegated powers. The duty applies whenever the decision made pursuant to a federal regulatory process is likely to affect aboriginal rights.

The appellants characterize the scope of this duty as twofold. They argue that it includes the duty to ensure the full and fair participation of the appellants in the hearing process, as well as the duty to take into account their best interests when making decisions. The appellants argue that such an obligation imports with it rights that go beyond those created by the dictates of natural justice, and that in this case, at a minimum, the Board should have required disclosure to the appellants of all information necessary to the making of their case against the applications. The respondents to this appeal, on the other hand, dispute both the existence of a duty, and, if it does exist, that the Board failed to meet it.

It is now well-settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. Canada* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, 20 E.T.R. 6. None the less, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14, 26 C.P.R. (3d) 97, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial: *Committee for Justice and Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 at p. 728, [1978] 1 S.C.R. 369, 9 N.R. 115. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

It is for this reasons that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludahl v. Minister of Forests*, B.C.S.C., August 13, 1992, Vancouver Registry No. A922935, unreported; and *Dick v. The Queen*, F.C.T.D., June 3, 1992, Ottawa Court File No. T-951-89, unreported [now reported at [1993] 1 C.N.L.R. 50, 33 A.C.W.S. (3d) 1029 *sub nom. Wewaiikai Indian Band v. Canada*]. Those cases

were concerned respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.

[130] The Commission submits that, like the National Energy Board, at the decision stage of the Application process, it too performs a *quasi-judicial* role. With respect, I must disagree. In my opinion, the workings of the Commission when compared to the National Energy Board are so dissimilar as to prevent any analogy. Moreover, in my view, the dissimilarities all point to the conclusion that the Commission does not perform a *quasi-judicial* role.

[131] Apart from the important fact that the process before the Decision Maker does not involve formal hearings or a formal record, it must also be noted that s. 2(5) of the **Act** provides that the Commission is "an agent of the Government", and that pursuant to s. 17(1) of the **Act** it is bound to discharge all of the administrative and ministerial duties attached to the various specified enactments.

[132] In the **Attorney-General of Quebec v. Canada**, supra, the National Energy Board is characterized, at para. 36, as an "independent decision-making body acting at arm's length from government" (that is, not a Crown agent), and is engaged in a process that differs little from the courts.

[133] Moreover, the decision-making process undertaken by the Commission does not involve formal hearings or a formal record. However, pursuant to the **National Energy Board Act** the National Energy Board is a court of record; it has the power of a superior court of record in relation to procedural matters; it has full jurisdiction to hear and determine all matters, whether of law or of fact; it may make mandatory orders to do matters provided for in the **National Energy Board Act**; its orders are final and conclusive, although subject to appeal on a question of law or jurisdiction to the Federal Court of Appeal; and its hearings in respect of the matters at issue in the case shall be public.

[134] Another distinguishing feature of the two legislative regimes is the security of tenure of the members of the respective bodies. The **National Energy Board Act** expressly provides that members of the National Energy Board shall hold office for seven year terms and shall hold office during "good behaviour". They can only be removed from office by joint address of the Senate and House of Commons.

[135] There are no equivalent provisions relating to the Commission. Section 2(1) of the **Act** provides that the commissioners are appointed for a term not exceeding 5 years. Section 12 provides that the commissioner may appoint officers and employees necessary to carry on the business and operations of the Commission. Section 12 also provides that the **Public Service Act**, R.S.B.C. 1996, c. 385, applies to the Commission.

[136] The **Interpretation Act**, R.S.B.C. 1996, c. 238, provides first that a "public officer" includes a person in the public service of British Columbia, which no doubt includes the commissioners. Second, the **Interpretation Act** provides that the power to appoint a public officer includes the power to terminate, remove or suspend the public officer and that such appointments are "during pleasure".

[137] Accordingly, I find that the statutory framework of the Commission is significantly different from that of the National Energy Board. The Commission has none of the independence of the National Energy Board, since it is a Crown agent exercising ministerial or executive statutory policies.

[138] In the result, I agree with the petitioner's analysis that the foundation of the Commission's argument must fail as the Decision Maker is not a *quasi-judicial* decision maker but is, instead, an administrative decision maker such as those dealt with in cases including **Haida (No. 1)**, **Taku** and **Halfway River**, supra. Moreover, in my opinion, the roles of Messrs. Perkins, Purdon and the Decision Maker with respect to the Commission's duty to consult the SFN cannot be so neatly compartmentalized as contended by the Commission. I am satisfied that throughout the decision making process the Commission (including the Decision Maker) has fiduciary and constitutional obligations to engage in good faith consultation with the SFN.

[139] I turn then to my consideration of whether the Commission in arriving at its decision on the Application discharged its duties to the SFN. The key to my conclusion turns on whether I accept the petitioner's position that the Commission had a legal obligation to accommodate the SFN's request to complete a cumulative effects assessment before granting the Well Authorization.

[140] The balancing of the interests at stake in an application before the Commission is a complex feature of the duty to consult and accommodate. In **Delgamuukw**, supra, at para. 168, Lamer C.J. set out that the duty to consult can range from a duty to discuss important decisions that will be taken in respect of lands held pursuant to aboriginal title, to a requirement for the full consent of the First Nation depending on the circumstances.

Consultation must be in good faith and with the intention to substantially address the concerns of the First Nation whose lands are in issue.

Furthermore, the Crown's duty to consult imposes on it a positive obligation to reasonably ensure that the First Nation is provided with all necessary information in a timely way so that the first Nation has the opportunity to express their concerns, ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.

[141] According to Finch J.A. in **Halfway River**, supra, at para. 160:

The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action....

[142] In **Haida (No. 1)**, supra, at para. 51, Lambert J.A. held that "the scope of the consultation and the strength of the obligation to seek an accommodation will be proportional to the potential soundness of the claim for aboriginal title and aboriginal rights."

[143] Furthermore, as stated in *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 (C.A.), at para. 81, the right of a First Nation to be consulted is not a veto:

[W]e do not agree ... that the consultation between the DFO and the Band required that the DFO reach agreement with the Band on all conservation measures. To so interpret the consultation discussed in *Sparrow* would be to conclude that the Band was entitled to veto any conservation measure which the DFO wished to implement between the DFO and the Band. We do not consider that the court in *Sparrow* intended that result.

[144] And, as Vintage's counsel points out, consultation is a two-way street. A reciprocal duty exists on the part of the First Nation to participate and consult in good faith and to not frustrate the process by refusing to meet or participate or by imposing unreasonable conditions.

[145] As held in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 43, ultimately the nature and scope of the duty of consultation will vary with the circumstances:

The Court has emphasized the importance in the justification context of consultations with aboriginal peoples... The special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights, although, as stated in *Delgamuukw*, supra, at para. 168:

The nature and scope of the duty of consultation will vary with the circumstances.

This variation may reflect such factors as the seriousness and duration of the proposed restriction, and whether or not the Minister is required to act in response to unforeseen or urgent circumstances. As stated, if the consultation does not produce an agreement, the adequacy of the justification of the government's initiative will have to be litigated in the courts.

[146] Finally, as held in *Nikal*, supra, at para. 110, the concept of reasonableness forms an integral part of the justification aspect of the *Sparrow* test:

It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. For instance, in considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement. So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and consult, such efforts would suffice to meet the justification requirement.

[147] The thrust of the petitioner's argument, as I understand it, is whether

the effects of approving the Application were properly considered by the Commission. The petitioner points to several phrases in the decision where the Decision Maker uses the words "direct impacts to the wildlife habitat", "fish and wildlife habitat in this specific area", "site-specific concerns", "wildlife features in the immediate vicinity of the proposed activities" and submits that the Decision Maker too narrowly construed what he had to consider as factors relevant to his decision.

[148] The petitioner also says that the Decision Maker had inadequate information to fully consider all of the factors relating to the activities associated with the Application, pointing to the Commission's acknowledgment in the Decision Maker's Reasons "that the outdated and limited information used in portions of the reviews brings uncertainty to the accuracy of the true impacts of the proposed well to primarily the wildlife habitat in the area."

[149] Although the SFN does not assert that the Commission failed to consult, the SFN contends that a consultative process without a built-in assurance that the First Nation's concerns will be listened to and dealt with before a decision is made is not consultation that meets the Commission's fiduciary obligation to consult in good faith.

[150] The SFN argues that the decision to approve the Application without first accommodating the SFN's acknowledged legitimate concerns about assessing the cumulative effects of Vintage's activities amounts to an error of law on the part of the Commission. In what the petitioner characterized as a "catch 22", the petitioner says that, in fact, neither the SFN nor the Commission can state with precision what the impact of Vintage's activities will be on the SFN's treaty rights until the assessment and studies sought by the SFN have been completed. In this regard, the petitioner queries how the Decision Maker was able to conclude in his Reasons that the direct impacts to wildlife, environment and forest base would be "minimal" in light of the Commission's acknowledgment that it was working with "outdated and limited information."

[151] The petitioner also contends that the regime created by the **Act** was intended to create a coherent, rational management process that comprises exploration to reclamation, and that it was not designed to narrowly focus on specifics. The petitioner submits that the failure by the Commission to do more than mention the concerns raised by the SFN about cumulative effects is a ground for the Court to quash the decision.

[152] Moreover, the petitioner says that the Decision Maker's focus on the "utmost importance" of the social and economic considerations trivialized the interests of the SFN in the balancing of the interests at stake.

[153] The petitioner notes that in his Reasons, the Decision Maker concluded that the best way to accommodate the protection of the ungulate and fur-bearer habitat resource was to pursue an operational plan for the Rene Lakes/Maurice Creek area, stating that this would ultimately bring certainty to all parties as oil and gas exploration proceeds in the coming years. The petitioner suggests that this statement goes to the heart of the Commission's position on the Application. The Decision Maker does not take issue with carrying out a cumulative effects assessment, but simply decides to put it off for future consideration. The petitioner insists that the Decision Maker's failure to consider the results of a cumulative effects assessment at the decision-making stage of the process was wrong in law.

[154] In my review of the Commission's decision, I am satisfied that the test to be applied to the decision is that of "correctness": See **Halfway River**

and *Gitxsan v. First Nation*, supra. In my opinion, upon an application of this test to the Commission's decision I am satisfied that the Commission was correct in law by granting the Well Authorization.

[155] First, I am mindful that the SFN did not categorically object to the Application. Their objection was based on the ground that the Application should not be granted until the Commission had first undertaken a cumulative effects assessment. However, I am also mindful of the principle that the duty on the Crown to consult and accommodate is informed by the level of interference with the First Nation's treaty rights. In the instant case, the factual context in which the Decision Maker concluded that, notwithstanding the SFN's concerns, the Commission should grant the Application is, as follows:

1. At no time during the consultation process leading up to the Well Authorization did the SFN identify to the Commission any direct or indirect impacts that the activities associated with the Application would or might have upon plants, fish, birds or wildlife.
2. Commission staff reported that there was no concern with the activities associated with the Application from the land and habitat point of view.
3. Commission staff reported that the Commission, through consultation with the SFN, the Ministry of Water Land and Air Protection and the MSRM, was entering into an agreement to produce pilot studies of wildlife and habitat capability in the area, and that site specific conditions would be considered to mitigate some of the cumulative effects.
4. Many of the SFN's concerns expressed throughout the consultation process leading up to the Well Authorization were about the potential effects of large scale oil and gas development on the exercise of their treaty rights. The purpose of the Well is to locate potential hydrocarbons. Thus, activities associated with the development of Vintage's oil and gas holdings in the area if a successful well is drilled will necessarily engage a further approval process with the Commission, including a process of consultation with the SFN.

[156] In my opinion, to accept the petitioner's position on this issue, in light of the above circumstances, would be contrary to the fundamental principles reflected in the authorities. I am satisfied that faced with the evidence available to him, in the absence of any contradictory information from the SFN, the Decision Maker took into account all of the relevant factors: he considered the consultation process; he clearly set his mind to the direct and indirect environmental, cumulative and socio-economic effects flowing from the Application; he recognized the importance of the ongoing ability of the SFN to undertake and practice their Treaty 8 rights; he recognized that it was vital to protect the SFN's treaty rights through the establishment of a planning process; and, finally, he imposed conditions on the Well Authorization.

[157] In my opinion, the SFN's insistence that the Commission did not listen to or try to seriously accommodate their legitimate concerns is unfounded. I find that the Commission met its constitutional and fiduciary obligations to the SFN in its consideration of the Application and the Petition must be dismissed on this issue.

B. The constitutional challenge to the Act

[158] I accept and adopt the submission of counsel for the Attorney General that the petitioner's constitutional challenge to the **Act** must be dismissed.

[159] In an Amended Notice of Constitutional Question, the Petitioner provided notice of its intent to question:

- (i) the "constitutional applicability" of the decision of the Commission to grant pursuant to the **Act**, the application of Vintage for a well authorization.
- (ii) the "constitutional applicability" of any authorization given by the Commission pursuant to the **Act** which threatens to infringe Treaty 8 rights in the absence of "adequate legislative or regulatory guidance" with respect to how "treaty rights are to be dealt with" in making such authorizations.

[160] In setting out the basis for the constitutional challenge, the petitioner states in the Amended Notice that:

Any statute which purports to give a decision maker an unstructured discretion to infringe aboriginal or treaty rights protected by s. 35(1) of the **Constitution Act**, 1982 necessarily infringes such aboriginal or treaty rights.

[161] The petitioner's constitutional challenge is premised on the assertion that the Province has a constitutional obligation to impose "explicit legislative guidelines" on statutory decision makers where the exercise of a discretionary power may impact aboriginal or treaty rights. The petitioner characterizes the legislative regime under which the Commission operates as a grant to the Commission of an "unstructured discretion" which risks infringing Treaty 8 rights.

1. The Commission's Legislative Jurisdiction

[162] The petitioner's assertion that the Commission exercises an "unstructured discretion" that fails to meet constitutional standards must be measured in the context of the governing legislative scheme.

[163] The Commission exercises broad regulatory powers under a variety of statutes in overseeing the development of provincially owned oil and gas resources in British Columbia. The Commission exercises both adjudicative powers in issuing authorizations for various oil and gas activities (primarily under the **Petroleum and Natural Gas Act**, and **Pipeline Act**, R.S.B.C. 1996, c. 364) as well as powers of inquiry and investigation under the **Act**. The **Act** provides a general framework for the Commission's establishment, structure and functioning, and a set of unifying principles to guide the Commission's exercise of discretion in a diverse array of statutory settings.

[164] The Commission is established pursuant to s. 2 the **Act**. The purposes of the Commission are set out in s. 3 of the **Act**, as follows:

3. The purposes of the commission are to
 - (a) regulate oil and gas activities and pipelines in British Columbia in a manner that
 - (i) provides for the sound development of the oil and gas sector, by fostering a healthy environment, a sound economy and social well being,
 - (ii) conserves oil and gas resources in British Columbia,

- (iii) ensures safe and efficient practices, and assists owners of oil and gas resources to participate equitably in the production of shared pools of oil and gas,
- (b) provide for effective and efficient processes for the review of applications related to oil and gas activities or pipelines, and to ensure that applications that are approved are in the public interest having regard to environmental, economic and social effects,
- (c) encourage the participation of First Nations and aboriginal persons in processes affecting them,
- (d) participate in planning processes, and
- (e) undertake programs of education and communication in order to advance safe and efficient practices and the other purposes of the commission.

[165] Section 4 of the **Act** provides that the provisions of the **Act** are "intended to respect aboriginal and treaty rights in a manner consistent with section 35 of the **Constitution Act**, 1982".

[166] The Consultation Agreement provides for the SFN to review and have input into pre-tenure planning, general development plans, and every application for oil and gas activity on Crown land within the SFN consultation area. The "Purpose" section of the Consultation Agreement states:

1.2 This Agreement will set out a process for the Province to communicate with or consult with the SFN in respect of the stages of oil and gas development outlined in section 2.0 on Crown Lands located in the Treaty 8 area of Northeastern British Columbia, so as to provide the SFN with an opportunity to identify concerns or issues the SFN may have in respect of those oil and gas activities, with the intent of avoiding or mitigating any potential infringements of the treaty rights of the SFN.

[167] Under the Consultation Agreement, the Commission provides funding to the SFN to support its consultation efforts.

[168] With the exception of general development permits, which the Commission is authorized to issue pursuant to s. 17.1 of the **Act**, oil and gas activities are authorized by the Commission under other statutes.

[169] The **Petroleum and Natural Gas Act** gives the Commission discretion to issue a variety of permits or authorizations for activities relating to oil and gas development. These include the designation of Crown land as a development road (s. 8), the issuance of a geophysical licence (s. 32), and the issuance of well and test hole authorizations (s. 93). The authorization at issue in this Petition was issued pursuant to discretionary powers granted to the Commission under the **Petroleum and Natural Gas Act**, a statute that is not challenged by the petitioner in its Amended Notice of Constitutional Question.

[170] The Commission also exercises discretionary powers under the **Pipeline Act**, including the power to issue a certificate to authorize the construction of a pipeline (s. 10), the diversion or relocation of the pipeline (s. 14), the opening of a pipeline for transportation purposes (s. 36), and order measures to contain or eliminate spillage (s. 39).

[171] Section 17 of the **Act** additionally provides the Commission with the

power to exercise a "discretion, function or duty" contained in a number of specified enactments for the purpose of regulating oil and gas activities. The specified enactments are defined in s. 1 of the **Act**. They include the power to issue various permits and authorizations under the provisions of the **Forest Act**, supra, **Forest Practices Code**, R.S.B.C. 1996, c. 159, **Heritage Conservation Act**, supra, **Land Act**, R.S.B.C. 1996, c. 245, **Waste Management Act**, R.S.B.C. 1996, c. 482 and **Water Act**, R.S.B.C. 1996, c. 483. Section 17 (2) of the **Act** provides:

The exercise of the powers conferred on the commission by subsection (1), the carrying out of each discretion, function and duty referred to in a specified enactment and the responsibilities with which the commission is charged under this section remain subject in all respects to the Act that contains the specified enactment, and that Act continues to apply.

[172] In addition to its adjudicative powers with respect to the issuance of authorizations and permits relating to oil and gas development, the Commission also has discretionary authority under s. 10 of the **Act** to "make inquiries and investigations and prepare studies and reports" on any matter within the scope of the **Act**. Section 10(1)(b) provides that the Commission may recommend to the Lieutenant Governor in Council "any measures the commission considers necessary or advisable in the public interest related to oil and gas activities or pipelines".

2. Legal Principles

[173] The petitioner's constitutional challenge is grounded on the decision of the Supreme Court of Canada in **R. v. Adams**, [1996] 3 S.C.R. 101, dealing with the effect of "unstructured discretion" in regulations prohibiting the exercise of aboriginal and treaty rights to fish.

[174] In **Adams**, supra, the appellant (a Mohawk) was charged with the offence of fishing for perch without a licence, contrary to s. 4(1) of the **Quebec Fishery Regulations**, C.R.C., c. 852. Pursuant to s. 5(9) of the **Regulations**, the appellant could have applied for an exercise of ministerial discretion to permit him to fish for food. The appellant had not applied for such permission. The relevant provisions of the **Regulations** were as follows:

4.(1) Subject to subsections (2), (3), (7.1), (18), and (20), no person shall fish unless he is the holder of a licence described in Schedule III.

5.(9) The Minister may issue to an Indian or Inuk, to a band of Indians or to an Inuit group, a special licence permitting, subject to the conditions set out therein, the catching of fish for food.

[175] The **Regulations** were silent as to the basis upon which this Ministerial discretion could be exercised, or how aboriginal rights were to be given priority in the licensing scheme. The evidence at trial indicated that there were no permits available at the time which would have allowed fishing for food with a seine net, the traditional manner of fishing for the Mohawks. The Crown failed to adduce evidence of justification of the infringement under either leg of the **Sparrow** test, supra. The evidence (as characterized by the Court) suggested that fishing for food was not prohibited on the grounds of conservation, but rather on the basis of a policy that favoured sports fishing. This was not found to be a compelling and substantial legislative objective. The scheme also failed to accord the requisite

priority to aboriginal fishing rights.

[176] In these circumstances, the Court in *Adams*, at paras. 53 to 54, held that the licensing scheme itself constituted an infringement of the appellant's aboriginal right by subjecting the exercise of the right to a "pure act of Ministerial discretion":

In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the *Charter* and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the *Charter*.

I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act*, 1982. In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.

[177] The infringement was particularly apparent in light of the evidence that ministerial discretion would not have been exercised in the appellant's favour in any event. The remedy granted by the Court was a declaration that s. 4(1) of the *Quebec Fishery Regulations* was of no force and effect with respect to the appellant by virtue of s. 52 of the *Constitution Act*, 1982.

[178] The "unstructured discretion" aspect of the reasoning in *Adams*, supra, has been applied by the Supreme Court of Canada in two other cases, both in the context of fishing regulations: see *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Marshall*, supra.

[179] In *R. v. Côté*, supra, the appellants (Algonquins) were convicted of entering a controlled harvesting zone without paying the required fee for motor vehicle access contrary to a provincial regulation respecting controlled zones. The appellants entered the area for the purpose of teaching young aboriginal students traditional hunting and fishing practices. The appellant Côté was additionally convicted of the offence of fishing without a licence within the zone contrary to the same federal fishery regulation that was at issue in *Adams*, supra. The appellants all sought to challenge their convictions on the grounds that they were exercising aboriginal and treaty rights.

[180] On the question of infringement, the Court followed *Adams*, supra, in concluding that s. 4(1) of the *Quebec Fishery Regulations* were

constitutionally inapplicable to the appellant Côté. Section 4(1) enacted what the Court characterized as a "blanket prohibition" on fishing in the absence of a licence, subject only to the absolute discretion of the Minister to issue a licence to permit food fishing. As in *Adams*, supra, the remedy in *Côté* was a declaration that s. 4(1) was unenforceable against the appellant.

[181] The Court reached the opposite conclusion in applying the test of infringement to the provincial regulation respecting access to controlled zones. The regulation placed no impediment (financial or otherwise) on aboriginal persons who entered the controlled zones in any manner other than by motor vehicle. The fee requirement where access was by motor vehicle did not "arbitrarily burden" the exercise of an aboriginal right:

The Regulation does not create a blanket prohibition against access by motor vehicle nor does it subject such access to an unstructured administrative discretion. (para. 77)

[182] In *R. v. Marshall*, supra, the Court again held that a licensing scheme that subjected the appellant's treaty right to fish to an exercise of Ministerial discretion constituted an infringement of the appellant's s. 35(1) rights. The *Aboriginal Communal Fishing Licences Regulation*, SOR/93-332 [am. SOR/94-390] provided that the Minister "may issue" a communal licence to an aboriginal organization to carry on food fishing, but gave no guidance as to how Mi'kmaq treaty rights would be accommodated in the regulatory process:

To paraphrase *Adams*, at para. 51, under the applicable regulatory regime, the appellant's exercise of treaty right to fish and trade for sustenance was exercisable only at the absolute discretion of the Minister. Mi'kmaq treaty rights were not accommodated in the Regulations because, presumably, the Crown's position was, and continues to be, that no such treaty rights existed. (para. 64)

[183] Counsel for the Attorney General notes that the effect of the holdings in *Adams*, *Côté* and *Marshall*, supra, is that a discretionary licensing scheme which purports to directly regulate the exercise of an aboriginal right to fish may not meet the requirements of s. 35(1) of the *Constitution Act*, 1982 if it:

- (i) creates an absolute prohibition on the exercise of an aboriginal right;
- (ii) subjects the right to a pure exercise of ministerial discretion;
- (iii) contains no guidance as to how aboriginal rights are to be accommodated within the regulatory scheme; and
- (iv) cannot be justified in accordance with the *Sparrow* test, supra.

[184] As counsel contends, there is nothing in *Adams*, supra, or its subsequent application, to support the broad interpretation urged by the petitioner in the case at bar. *Adams*, supra, does not suggest that the existence of administrative discretion in itself constitutes an infringement of s. 35(1) of the *Constitution Act*, 1982. As counsel submits, the question of whether the exercise of an administrative discretion sufficiently accommodates aboriginal and treaty rights is dependent on the specific factual and legislative context.

[185] The importance of legislative context in applying the "unstructured discretion" analysis of *Adams*, supra, is illustrated in the decision of *Liidlii Kue First Nation v. Canada*, [2000] 4 C.N.L.R. 123 (F.C.T.D.), an unsuccessful attempt to apply *Adams*, supra, to a statute that did not

directly regulate the exercise of an aboriginal or treaty right.

[186] In *Liidlii Kue*, supra, the applicant sought judicial review of the issuance of a land use permit under the *Territorial Land Use Regulations*, C.R.C. c. 1524. The permit allowed the respondent to conduct test drilling in an area over which she held mining claims. The claims were within the area of Treaty 11, to which the applicant was a signatory. Among the arguments raised by the applicant was that the *Regulations* were *ultra vires* because they did not (in accordance with *Adams*, supra) contain explicit guidance as to how treaty rights were to be accommodated. The Federal Court concluded at para. 25 that the *Adams* analysis was not relevant to the legislative provisions at issue:

In [*Adams*], the Court held that the regulatory regime was not adequate to curtail the aboriginal right to fish. The regulation was not declared invalid. It was simply inoperative vis á vis the appellant. The quotation set out above does not mean that all provincial and federal legislation of general application that might impinge on Aboriginal rights has to have included in it provisions respecting the accommodation of aboriginal rights. The *Adams* case does not assist the applicant.

[187] The Court did accept that the government was under a constitutional duty to consult with the applicant in circumstances where the discretionary land use decision itself might constitute an infringement of treaty rights. The scope and nature of that consultation depended on the circumstances of each particular case, including the degree of the prospective infringement.

[188] In applying the "unstructured discretion" analysis from *Adams*, supra, there is a critical distinction to be drawn between a legislative regime that directly prohibits the exercise of aboriginal and treaty rights, and laws of general application which in some circumstances have the potential to impact the exercise of such rights. In the former case, it is the legislative regime itself that necessarily derogates from the right, and must be justified in accordance with *Sparrow*, supra, criteria. The primary finding of the Court in both *Adams* and *Marshall*, supra, was that the Crown had failed to offer justification of the direct infringement of the appellants' rights in the form of the legislative prohibition.

[189] The statutory discretion exercisable by the Commission is different in nature from the "unstructured discretion" that was found to infringe s. 35(1) rights in *Adams*, supra. The *Act* provides a set of unifying principles to guide the Commission's exercise of discretion in a diverse array of factual and statutory settings. The existence of discretion is necessary to the effective functioning of the legislative scheme. The Commission is granted broad regulatory authority to oversee the development of provincial oil and gas resources by third parties in a manner that balances economic, social and environmental considerations. How that balance is to be struck depends on the factual context within which the Commission is called upon to exercise discretion - the nature of the proposed activity, its potential impact on community stakeholders and First Nations, and its importance to legislative objectives.

[190] In *Adams*, supra, it was the absolute prohibition on the appellant's fishing rights, subject only to a pure exercise of Ministerial discretion, which constituted the unjustifiable infringement. Neither the legislation itself, nor the evidence adduced by the Crown provided any indication of how aboriginal and treaty rights were accommodated in the regulatory process.

[191] The differences in the legislative regimes can be illustrated by

applying the four factors outlined in para. 183 above, to the **Act**:

- (i) the **Act** does not create an absolute prohibition on the exercise of the aboriginal or treaty rights. The Commission may authorize various activities relating to oil and gas development under a number of statutes. The exercise of discretion to permit such activity could (in some cases) impact treaty rights. If so, the discretion must be exercised in conformity with s. 35(1) of the **Constitution Act**, 1982.
- (ii) The **Act** does not subject the petitioner's treaty rights to a "pure act of discretion". The **Act** in fact provides the Commission with criteria to guide discretion in the area of oil and gas development. The express objectives include encouraging the participation of First Nations and aboriginal peoples in processes that may affect their interests, and respecting aboriginal and treaty rights. The legislation is sufficiently "structured" to ensure that discretion is carried out in accordance with constitutional standards.
- (iii) The legislation and policy of the Commission does indicate how aboriginal and treaty rights are to be accommodated in the oil and gas development process. Section 4 of the **Act** expressly affirms that the provisions of the **Act** are intended to respect aboriginal and treaty rights in a manner consistent with s. 35 (1). The Consultation Agreement provides for the SFN to review and have input into every proposed oil and gas activity that could impact treaty rights. Given the diverse nature of the oil and gas activity that might be authorized by the Commission, and the varying impact such activity might have, the process of accommodation necessarily takes place on a case-by-case basis.
- (iv) An exercise of discretion by the Commission may be subject to judicial review on the basis that it constitutes an unjustifiable infringement of aboriginal and treaty rights. Once again, the question of whether the issuance of an authorization unjustifiably infringes an aboriginal or treaty right, and in particular the content of the duty to consult, must be resolved on a case-by-case basis.

[192] I agree with the Attorney General's submission that the applicable legislative framework provides the Commission with a level of discretion that is both constitutionally permissible and necessary to the Commission's mandate. The petitioner has not established that the existence of such discretion infringes its treaty rights. To the contrary, a legislatively imposed structure fettering the Commission's ability to consider treaty rights on a case-by-case basis would be less responsive to the particular interests and goals of First Nations in respect of oil and gas activity.

[193] In the result, the petitioner's constitutional challenge to the Commission's governing legislation is dismissed.

X. CONCLUSION

[194] The Petition is dismissed.

"B.I. Cohen, J."

The Honourable Mr. Justice B.I. Cohen

March 26, 2004 - **Corrigendum to the Reasons for Judgment** issued by Mr. Justice B.I. Cohen advising that the name of the respondent Vintage Energy

Canada Ltd. is changed to Vintage Petroleum Canada, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

**In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, Chap. 241
and in the Matter of the decision of Celia Francis, in her capacity as a
delegate of the Information and Privacy Commissioner of British Columbia,
dated March 31, 2003 (Order No. 03-14), made under the *Freedom of Information
and Protection of Privacy Act*, R.S.B.C. 1996, Chap. 165**

Citation: ***British Columbia (Attorney General) v. British
Columbia (Information and Privacy Commissioner) et
al.***,
2004 BCSC 1597

Date: 20041203
Docket: L031378
Registry: Vancouver

Between:

The Attorney General of British Columbia

Petitioner

And:

**Information and Privacy Commissioner of British Columbia,
Ted Hayes, Robert C. Simson, Cary Corbeil, Steven Greenaway,
Brian Smith, Barry Kelsey, Thomas Venner, E.H. Hintz**

Respondents

Docket: L031340, L031346,
L031349, L031350, L031353,
L031355, L031356, L031388
Registry: Vancouver

Between:

**Robert C. Simson, Richard Macintosh, Steven Greenaway,
Brian Smith, Barry W. Kelsey, Thomas S. Venner,
Carey Corbeil and Al Hintz**

Petitioners

And:

**Information and Privacy Commissioner,
Minister of Management Services
and Royal British Columbia Museum**

Respondents

Before: The Honourable Mr. Justice Paris

Reasons for Judgment

Counsel for the Attorney General:

G.H. Copley, Q.C.
and J. Tuck

Counsel for the Petitioners, Macintosh,
Venner, Kelsey and Hintz:

G.K. Macintosh, Q.C.
and S. Hern

Counsel for the Petitioner, Corbeil:

P.C.M. Freeman, Q.C.
and D. Nouvet

Counsel for the Petitioner, Simson: F. Falzon

Counsel for the Petitioner Smith and Greenaway: D.N. Lyon

Counsel for the Information and Privacy Commissioner of British Columbia: A.R. Westmacott

Date and Place of Trial/Hearing: October 12-15 and 19, 2004
Vancouver, B.C.

Introduction:

[1] In these proceedings there are applications by several persons (including the Attorney General of British Columbia) for an order pursuant to the **Judicial Review Procedure Act**, R.S.B.C. 1996, c. 241 to set aside an order made March 31, 2003 by a delegate of the Information and Privacy Commissioner for British Columbia. The delegate ordered the British Columbia Archives to process a request made pursuant to the **Freedom of Information and Protection of Privacy Act** R.S.B.C. 1996, c. 165 (FIPP Act) by a member of the public, Mr. Ted Hayes, for production of the incomplete draft report of the Smith Commission of Inquiry into the affairs of the Nanaimo Commonwealth Holding Society (NCHS). Mr. Hayes' request had been denied by the BC Archives and the delegate made the order pursuant to a review of that denial launched by Mr. Hayes pursuant to s. 52(1) of the **Act**.

[2] The petitioners (apart from the Attorney General) are persons referred to in various ways in the draft report and to whom "Notices of Adverse Interest Finding" had been delivered by the Commission, giving them an opportunity to respond to the proposed conclusions about them set out in the Notices and contained in the draft report. However, before that could be accomplished, the Commission was rescinded by Order-in-Council on June 22, 2001.

The History of the Smith Commission of Inquiry:

[3] The Smith Commission was created by provincial Order-in-Council on April 24, 1996. It came about as a result of information that had come to the attention of provincial government authorities that a society called the Nanaimo Commonwealth Holding Society had over the course of many years diverted proceeds from bingo games which it conducted to legally non-permitted uses. By the combination of the provisions of the **Criminal Code** related to gaming and provincial government regulations in British Columbia, 25 percent of the gross proceeds of such gaming had to be paid out for charitable purposes. A forensic audit conducted at the instance of the provincial government by Mr. Ron Parks disclosed that, during the 1980s in particular, over 80 percent of the funds that should have been paid out to charities were diverted back to NCHS and used mainly to pay off debts arising from two real estate ventures, as well as for some other non-legitimate purposes.

[4] The terms of reference of the Commission were as follows:

1. To inquire into and report on the adequacy of past and present rules and restrictions governing the use of proceeds from licensed gaming and without restricting the generality of the foregoing to examine the use of proceeds from gaming for political purposes.
2. To inquire into and report on existing legislation

including the **Society Act**, R.S.B.C. 1979, c. 390 and other rules and regulations governing the use of assets of societies and to make recommendations concerning any inadequacies found to exist so as to improve the supervision of directors and officers and the transparency of financial dealings of those societies.

3. To give particular attention under sections 1 and 2 above to the activities of the Nanaimo Commonwealth Holding Society and related entities and any other politically-linked organization in the Province of British Columbia.
4. To inquire into and report generally on the handling of matters related to the Nanaimo Commonwealth Holding Society and related entities by public bodies or officials since bingo licences were first issued in 1970.
5. To make recommendations for the better regulation of the matters referred to above including the form and content of legislation and administrative measures that may be necessary to implement these recommendations.
6. To ensure that the Inquiry is conducted in a manner that, in the opinion of the Commissioner, does not compromise any criminal investigation or the prosecution of any organization or individual.
7. To deliver a final written report of the Commissioner on or before March 31, 1997.

[5] In early 1997 because of ill health, the original Commissioner, Nathan T. Nemetz (previously the Chief Justice of British Columbia) was replaced by Mr. Murray Smith, who had been legal counsel to the Commission. The original due date for the filing of the report of the Commission (March 31, 1997) was extended a total of six times, the last extension being to August 31, 2001. The Commission commenced public hearings in 1999. As mentioned, the Order-in-Council rescinding the Commission was issued on June 22, 2001 and on the same day, the Attorney General issued a statement which said in part the following:

This has been a long process, and it's time to bring the Smith Commission of Inquiry to an end. I don't think we'll learn anything more about gaming in B.C. by giving the commission more time and money.

The cost of the commission to date is about \$6 million, and another \$2 million could well be spent by year's end, including publicly funded legal fees for some of the people who received adverse findings from the commission. I do not believe the taxpayers would be well served by this additional expenditure and delay.

It's simply not in the interests of the public, or the public purse, to continue with this inquiry. It's time to close the book on the long nightmare of the Nanaimo Commonwealth Holding Society and move forward.

[6] In the following year, substantial changes were made to the legal framework of the gaming industry in British Columbia.

[7] The Order-in-Council establishing the Commission recites that it was established pursuant to s. 8 of the **Inquiry Act** R.S.B.C. 1996, c. 224, the

relevant part of which reads:

- 8 Whenever the Lieutenant Governor in Council thinks it expedient, the Lieutenant Governor in Council may by commission titled in the matter of this Act, and issued under the Great Seal, appoint commissioners to inquire into the following:

...

- (b) any matter connected with the good government of British Columbia, or the conduct of any part of the public business of it, including all matters municipal, or the administration of justice in British Columbia.

[8] The **Act** is an amalgamation of two older **Acts** and has been criticized as being obsolete. Section 8 is contained in Part 2 of the **Act**. Part 1 contains the following provisions:

- 1 The minister presiding over any ministry of the public service of British Columbia may at any time, under authority of an order of the Lieutenant Governor in Council, appoint one or more commissioners to inquire into and to report on

- (a) the state and management of the business, or any part of the business, of that ministry, or of any branch or institution of the executive government of British Columbia named in the order, whether inside or outside that ministry, and

- (b) the conduct of any person in the service of that ministry or of the branch or institution named, so far as it relates to the person's official duties.

...

- 4 (1) The commissioner or commissioners may allow a person whose conduct is being investigated under this Part, and must allow a person against whom any charge is made in the course of an inquiry, to be represented by counsel.

- (2) A report must not be made under this Part against a person until the person

- (a) has been given reasonable notice of the charge of misconduct alleged against the person, and

- (b) has been allowed full opportunity to be heard in person or by counsel.

[9] It can be seen that investigations into conduct and charges of misconduct are specifically mentioned in s. 4 of Part 1 of the **Act**. No specific such language appears in Part 2. In **Rigaux v. British Columbia (Commission of Inquiry into the death of Vaudreuil-Gove Inquiry)** (1998) 155 D.L.R. (4th) 716 (B.C.S.C.), Allan J. of this Court, having found that the terms of reference of that Commission did not authorize findings of misconduct, said at para. 36:

Part II, which governed the Gove Inquiry, does not contemplate findings of misconduct and provides no procedural protections in the event that such findings are made. One important question, which was argued but must remain unanswered in these reasons, is whether it is open to a Commissioner to make findings of misconduct in a Part II inquiry; if so, do the statutory

protections of notice, counsel and the right to be heard contained in Part I apply or, in the alternative, are common law principles or Charter rights available? A revision of the Act would eliminate these foreseeable difficulties.

[Emphasis mine]

[10] However the case of *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)* [1998] 3 S.C.R. 3 should be noted. On November 23, 1992 the council of Sarnia, Ontario passed a resolution pursuant to s. 100(1) of the *Municipal Act*, R.S.O. 1990 c. M45 asking for a judicial inquiry into certain real estate transactions involving the municipality. Section 100(1) as reproduced in part at page 12 of the Judgment of the Supreme Court of Canada reads as follows:

100. - (1) Where the council of a municipality passes a resolution requesting a judge of the Ontario Court (General Division) to investigate [*the first branch*] any matter relating to a supposed malfeasance, breach of trust or other misconduct on the part of a member of the council, or an officer or employee of the corporation, or of any person having a contract with it, in regard to the duties or obligations of the member, officer, employee or other person to the corporation, or [*the second branch*] to inquire into or concerning any matter connected with the good government of the municipality or the conduct of any part of its public business, including any business conducted by a commission appointed by the municipal council or elected by the electors

In that passage the bracketed words "the first branch" and "the second branch" are the words of the Supreme Court itself.

[11] In dealing with concerns about procedural protections, the Court said at paragraph 29:

That having been said, the s. 100 Resolution is not a pleading, much less is it a bill of indictment. It creates a jurisdiction, but in the exercise of that jurisdiction the Commissioner is limited by the principles of procedural fairness, irrespective of whether or not these limits are spelled out in the s. 100 Resolution. The application of these principles will, of course, depend upon the subject matter of the inquiry and the varying interests of those who appear to give evidence or who are otherwise caught up in the proceedings. The need for flexibility in the application of procedural fairness is evident in the spectrum of matters which are referred to in s. 100 itself.

Witnesses who appear at a general policy inquiry to give expert evidence about, for example, municipal finances will likely have little need of procedural protection. An inquiry into a particular item of "public business", such as a tendering mishap, is more likely to impact on individual rights, and the procedure will be more strictly controlled in consequence. At the most sensitive end of the spectrum, where misconduct is alleged that may have the potential of civil or criminal liability (irrespective of whether the inquiry is a first branch inquiry or a second branch inquiry), the full strictures of natural justice will protect those who are reasonably seen as potential targets.

[Emphasis Mine]

[12] In the last sentence of that passage the Supreme Court seems to acknowledge virtually explicitly that findings of misconduct are permitted even under a general inquiry under s. 100(1) and that in such circumstances "the full strictures of natural justice" will be called for.

[13] In any event, it is clear what the view of Commissioner Smith was as to these questions. In September 1999, he published Rules of Procedure for the Commission hearings, paragraph 1 of which was as follows:

The Commissioner will inquire into those matters set out in the terms of reference. On the basis of oral and documentary evidence tendered during the hearings, the Commissioner will make findings of fact and may draw appropriate conclusions as to whether there has been misconduct and who appears to be responsible for it. The Commissioner's findings of fact and conclusions they contain cannot be taken as findings of criminal or civil liability.

[14] Presumably he relied on the third and especially the fourth terms of reference of the Order-in-Council establishing the Commission.

[15] In August 2000, counsel for the Commission issued "Notices of Adverse Interest Finding" to 22 persons. The petitioners in these proceedings (apart from the Attorney General) are persons who were government officials in various capacities during the period with which the Commission was concerned. Each Notice set out proposed findings of fact and misconduct about that person and each person was invited to address the Commission with respect thereto by way of evidence and submissions. By a subsequent ruling on December 8, 2000, the Commissioner agreed that the contents of the Notices should be kept private until his final report was published (which remains the case to the present) and that he would hear such evidence and submissions under a publication ban. He also said:

The Commission of Inquiry's final report will be divided into two sections. The first section will contain a thorough chronology of events respecting NCHS since it received its first gaming licences in 1970. Based on the evidentiary record, I will make findings of fact. Where the evidence on a particular matter is in dispute I intend to resolve the controversy by making findings of fact or I will state it is not possible on the evidence available to resolve the fact in issue. Where I conclude that an individual has misconducted himself or herself, and that misconduct is directly related to the Terms of Reference, I intend to draw conclusions about that conduct. These conclusions may adversely affect the individual involved.

[16] And further:

I am intensely aware that some of my findings and conclusions may adversely affect the reputation of individuals and that for most people their reputation is their most highly prized attribute.

[17] And further:

It seems clear to me that it would be unfair, at this stage in the Inquiry's proceedings, to the Commission to say or do anything publicly that would imply that I have made a determination that an identified individual misconducted himself in the execution of public duties. In other words, I should not prejudge any individual's conduct, before all the evidence and submissions have been received and carefully considered.

[18] On May 4, 2001, in a ruling refusing a request for adjournment of the rebuttal hearings the Commissioner said:

On April 20, 2001 I released a 41 page set of written Reasons, addressing numerous jurisdictional arguments raised by counsel for eight present or former public servants ("the Applicants"), who received Notices of Adverse Interest Finding. I concluded that I have jurisdiction to make adverse findings, when required to carry out the mandate of the Inquiry, provided that the procedures adopted are fair to the individual involved. I also concluded that no action taken by the Inquiry has resulted in loss of jurisdiction to make adverse findings.

[19] At the time that the Commission was rescinded and its work brought to an end it had produced a substantial but incomplete draft report of its findings. The draft report, including the "Notices of Adverse Interest Finding", were subsequently transferred to the British Columbia Archives.

[20] On October 12, 2001, the Archives received the above-mentioned request of Mr. Hayes for access to the draft report. By letter to Mr. Hayes dated December 12, 2001, the Ministry of Management Services refused the request advising him that the draft report was outside the scope of the **FIPP Act** by virtue of s. 3(1)(b) thereof which reads as follows:

Scope of this Act

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(b) a personal note, communication or draft decision of a person acting in a judicial or quasi-judicial capacity.

[21] As mentioned, Mr. Hayes asked for a review of that decision and pursuant to the **Act**, the Information and Privacy Commissioner (IPC) delegated the conduct of the review to Ms. Celia Francis.

The Delegate's Decision:

[22] The delegate was provided with a copy of the draft report which she described as "clearly an unfinished product, a draft". Mr. Hayes, who was not represented by counsel, and counsel on behalf of the B.C. Archives made their submissions in writing to the delegate in May 2002. Counsel had a copy of the report. Mr. Hayes, of course, did not. It is, incidentally, 670 pages in length including the Notices of Adverse Interest Finding, although a number of those pages are copies of emails, heading pages, lists of names and the like. The parties to whom the Notices had been delivered were not given the opportunity to make submissions to the delegate, either personally or by counsel. The delegate delivered her order by way of written Reasons on March 31, 2003.

[23] The principal thrust of the delegate's Reasons was to find that in the conduct of the Inquiry the Commissioner had not been "acting in a judicial or quasi-judicial capacity" nor was the draft report a "draft decision" for the purposes of s. 3(1)(b) of the **FIPP Act**. It, therefore, did come within the scope of the **Act** and she ordered the B.C. Archives to process the applicant's request. This meant that the IPC would then have had to proceed to consider the request and determine whether, considering all the other provisions of the **Act**, the applicant was entitled to a copy of the report.

[24] I shall return later to the delegate's Reasons in more detail.

The History of these Proceedings:

[25] As mentioned, the petitioners seek an order pursuant to the **Judicial Review Procedure Act** quashing the delegate's order requiring the B.C. Archives to process Mr. Hayes' request for the production of the draft report. I have received a copy of the report and of the Notices of Adverse Interest Finding. On February 26, 2004 I ordered that counsel for the petitioners also be provided with copies thereof upon giving their undertakings to the Court that they would not disclose the contents of the report to anyone, including their own clients. The courts in Ontario have made such orders in similar circumstances. Mr. Hayes is still not represented by counsel and I observed that if he had been, his counsel would also have been given copies of the draft report and Notices upon giving the same undertaking. I was advised by counsel that Mr. Hayes did not wish to appear before me on the hearing of these applications, although he did appear on the hearing of the application in February 2004. Counsel for the IPC appeared on these applications and defended the delegate's order.

Standard of Review of the Delegate's Order

[26] The jurisprudence from the Supreme Court of Canada has established that there is a spectrum of standards which the Courts must apply in exercising their review or appellate functions. It ranges from correctness of the decision in question, through reasonableness *simpliciter* to patent unreasonableness, depending on the legislative framework applicable. The position of the Attorney General and the other petitioners is that the strictest standard, i.e. correctness, is the standard that should be applied by the court in reviewing the delegate's interpretation of s. 3(1)(b) of the **FIPP Act**. Counsel for the IPC submitted that reasonableness applies in this case.

[27] I note parenthetically that the recently proclaimed **Administrative Tribunals Act**, S.B.C. 2004, c. 45, which evidently is intended as a codification of standards of review with respect to certain tribunals, does not apply in the circumstances of this case and does not affect the following analysis.

[28] Starting with **U.E.S. 298 v. Bibeault** [1988] 2 S.C.R. 1048, a series of judgments of the Supreme Court of Canada has established that to determine the appropriate standard of review in any given case a pragmatic and functional approach must be used. That approach has been defined by the Supreme Court as the weighing by the reviewing court of four factors:

- (a) the existence or non existence of a privative clause or a statutory right of appeal;
- (b) the expertise of the administrative body or decision maker;
- (c) the purpose of the legislation pursuant to which the latter operates; and in particular, the specific provision involved; and
- (d) the nature of the problem, that is, whether law or fact.

[29] The principal focus of the delegate's decision involved her interpretation of the words in s. 3(1)(b) cited above which limit the scope of the statute's operation. The heading of section 3, although of course not part of the operative words of the **Act**, is "Scope of this Act". Such an interpretation, it is submitted by the petitioners, involves a determination of law alone (given that the facts are not in dispute) and in this case the determination of law goes to the issue of the jurisdiction of the IPC

himself.

[30] When such tribunals or bodies are called upon to interpret the words of a statute defining their own jurisdiction the reviewing courts have applied the standard of correctness. The most recent case in that regard referred to me by counsel is **Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) et al.** (2004) 242 D.L.R. (4th) 193 (S.C.C.). Furthermore it was pointed out that previous cases in this province reviewing decisions under this **Act** and s. 3 in particular, have always applied the standard of correctness, although admittedly sometimes the issue of standard of review was conceded by counsel. (**Neilsen v. British Columbia (Information and Privacy Commissioner)** [1998] B.C.J. No. 1640 (B.C.S.C.); **Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)** [1999] B.C.J. No. 198 (B.C.S.C.); **British Columbia (Ministry of Small Business, Tourism and Culture) v. British Columbia (Information and Privacy Commissioner)** [2000] B.C.J. No. 1494 (B.C.S.C.); and **Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)** (1998) 58 B.C.L.R. (3d) 61 (C.A.)).

[31] Counsel for the IPC submits, however, that that approach to jurisdictional questions and the last cited cases must be re-evaluated in the light of more recent judgments of the Supreme Court of Canada. It is said that they establish the "primacy" of the pragmatic and functional approach and make its use mandatory in all cases of judicial review. (**Pushpanathan v. Canada (Minister of Employment and Immigration)** [1998] 1 S.C.R. 982; **Law Society of New Brunswick v. Ryan** [2003] 1 S.C.R. 247; and **Dr. Q. v. College of Physicians and Surgeons of British Columbia** [2003] 1 S.C.R. 226.)

[32] The older "categorical" approach is to be eschewed. At paragraph 22 of **Dr. Q.** the Court said:

To determine standard of review on the pragmatic and functional approach, it is not enough for a reviewing court to interpret an isolated statutory provision relating to judicial review. Nor is it sufficient merely to identify a categorical or nominate error, such as bad faith, error on collateral or preliminary matters, ulterior or improper purpose, no evidence, or the consideration of an irrelevant factor. Rather, the pragmatic and functional approach calls upon the court to weigh a series of factors in an effort to discern whether a particular issue before the administrative body should receive exacting review by a court, undergo "significant searching or testing" (**Southam, supra**, at para. 57), or be left to the near exclusive determination of the decision-maker. These various postures of deference correspond, respectively, to the standards of correctness, reasonableness *simpliciter*, and patent unreasonableness.

[33] And at paragraph 24:

The nominate grounds, language of jurisdiction, and ossified interpretations of statutory formulae, while still useful as familiar landmarks, no longer dictate the journey.

[34] And at paragraph 25:

For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker.

[35] Counsel for the IPC submits that when the four factors of the pragmatic and functional approach (to which I shall return) are considered

with respect to the circumstances in this case, particularly with respect to the somewhat amorphous concept of "quasi-judicial" action, a greater degree of deference by the court is called for and that the correct standard of review to be applied is reasonableness. Applying that standard, it cannot be said that the delegate's Reasons and order were unreasonable and they must therefore be sustained.

[36] It is countered by the petitioners, however, that the ascendancy of the pragmatic and functional approach does not mean that considerations of proper statutory interpretation and jurisdiction *per se* are now entirely irrelevant. In *Pushpanathan*, the Court said at page 1005:

Although the language and approach of the "preliminary", "collateral" or "jurisdictional" question has been replaced by this pragmatic and functional approach, the focus of the inquiry is still on the particular, individual provision being invoked and interpreted by the tribunal. Some provisions within the same Act may require greater curial deference than others, depending on the factors which will be described in more detail below. To this extent, it is still appropriate and helpful to speak of "jurisdictional questions" which must be answered correctly by the tribunal in order to be acting *intra vires*. But it should be understood that a question which "goes to jurisdiction" is simply descriptive of a provision for which the proper standard of review is correctness, based upon the outcome of the pragmatic and functional analysis. In other words, "jurisdictional error" is simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown.

[37] In subsequent decisions the Supreme Court of Canada has reinforced the position that on questions of pure law and the jurisdiction of municipal bodies, at least, correctness is the appropriate standard of review without need to engage in the pragmatic and functional analysis: (*Nanaimo*) *City v. Rascal Trucking Ltd.* [2000] 1 S.C.R. 342; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary* [2004] 1 S.C.R. 484)

[38] It is fundamental that, to use the words of counsel, "statutory bodies cannot incorrectly assume jurisdiction they do not have".

[39] I note also that the Supreme Court of Canada in *Dr. Q.*, while clearly putting paid to the pure categorical approach, did observe at paragraph 24:

Just as the categorical exceptions to the hearsay rule may converge with the result reached by the Smith analysis, the categorical and nominate approaches to judicial review may conform to the result of a pragmatic and functional analysis. For this reason, the wisdom of past administrative law jurisprudence need not be wholly discarded.

[40] In my view, whether jurisdictional issues are an exception to the pragmatic and functional approach, or whether it is that when the pragmatic and functional approach has been applied heretofore to jurisdictional questions the resulting standard of review has always been correctness, is academic in this case. That is so because the fundamental issue that had to be resolved in this case by the delegate was jurisdictional and I conclude that if the pragmatic and functional approach is followed the appropriate standard of review of her decision is correctness.

[41] I must note at this point that as to the process I must follow in that regard the decision of the Court of Appeal in the **Aguasource** case seems almost entirely on point and is extremely helpful, if not binding. In that case the standard of review of a decision of the IPC was determined to be correctness. The only difference is that in that case it was the application of s. 12 of the **Act** which was in issue rather than that of s. 3(1)(b). That difference, if anything, only serves to make the case more persuasive because the application of s. 3(1)(b) is even more clearly a jurisdictional issue than is that of s. 12 (which is in the part of the **Act** setting out exceptions to the right of access to public records).

1. Privative Clause:

[42] That there is no privative clause is now generally considered to be a neutral factor. However, at the very least, it can be said in this regard that there is no explicit direction from the legislature that a high degree of deference must be given as to the interpretation of s. 3(1)(b).

2. Expertise of the Decision Maker:

[43] A relatively greater degree of curial deference will be afforded to a tribunal of special expertise as the question involved approaches more closely to the heart of that expertise. What is involved here is not the specialized expertise required of and accumulated by the IPC in the operation of the **Act** generally. What is involved is a threshold question, namely the interpretation of terms defining his jurisdiction ("quasi-judicial" and "decision"). Ascertaining their meaning requires considerable legal analysis (cf. the delegate's reasons) and there is nothing to indicate that the IPC is better equipped to do that than the Court.

3. The Purpose of the **Act** as a Whole, the Provision in Particular:

[44] The IPC's delegate was required to resolve a dispute between the applicant and the public body concerning the proper interpretation of the **Act**. The Court of Appeal said in **Aguasource** that that "conflict resolution" was much more "bipolar" (between parties) than "polycentric" (resolving policy issues) and, therefore, the greater degree of deference called for by the latter is not appropriate here.

4. The Nature of the Problem: Law or Fact?

[45] The issue here involves one of virtually pure law. There is no dispute as to the terms of reference, what the Commission did or the contents of the draft report and Notices of Adverse Interest Finding. Again I note, as with regard to the second factor above, the terms required to be interpreted by the delegate did not relate to any special expertise of the IPC. The Court is in as good a position to resolve the legal questions at stake as was the IPC. Furthermore, that the terms "quasi-judicial" and "decision" may be somewhat vague does not make the process of determining their meaning in the context of this case any less an issue of law.

[46] I think that I should also take into account that the decision of this Court or of appellate courts in this case as to whether commissions of inquiry can be quasi-judicial in function could have significant precedential impact and entrain significant implications as to the conduct of future commissions of inquiry. Again, in my view, it is better that such decisions be left to the courts.

[47] In sum, considering the nature of the questions the delegate had to resolve, the directions of the Supreme Court of Canada as to the primacy of the pragmatic and functional approach in matters of curial deference to

decision making bodies, and that according to the Supreme Court of Canada "the central inquiry in determining the standard of review is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (*Pushpanathan*, page 1004), I am completely satisfied that the standard of review that must be applied in this case is correctness.

"Acting in a Judicial or Quasi-Judicial Capacity"

[48] The delegate's task, as mentioned, was to determine whether pursuant to s. 3(1)(b) of the *FIPP Act*, the draft report of the Commission was excluded from the scope of the *Act* because it was: (a) "a draft decision"; (b) "of a person acting in a ... quasi-judicial capacity". I shall deal firstly with the second issue set out because that is the order in which the delegate dealt with them and that is how all the submissions of counsel were made to me.

[49] The difficulty that is manifest immediately is the determination of the meaning of, giving content to, the term "quasi-judicial" and to measure the activities of the Smith Commission against that definition. Evidently the term has a difficult history but it is generally used to describe administrative bodies and decision makers, as opposed to courts, from which the law will require some measure of judicial procedural conduct. But what determines whether such bodies or their activities can be characterized as "quasi-judicial" and can that characterization (or when does it, if ever) apply to the activities of a public inquiry?

[50] In the case of *Canada (M.N.R.) v. Coopers and Lybrand Ltd.*, [1979] 1 S.C.R. 495, the Supreme Court of Canada established certain guidelines for this analysis. The core of the decision in this regard is, it seems to me, a "spectrum" analysis. At page 505 the Court says:

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis.

[51] The Court also formulated certain criteria at page 504 which have often been referred to since to assist courts in this determination:

It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

- (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (3) Is the adversary process involved?

- (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

These are all factors to be weighed and evaluated, no one of which is necessarily determinative.

[52] It is essential to note that the Court stated that the list is not exhaustive nor is the presence or absence of any of the criteria in any particular case necessarily determinative.

[53] In her analysis of this issue the delegate first concluded, considering the provisions of the *Inquiry Act* and the *Rigaux* case, that the Commission was not empowered to inquire into the conduct of individuals. She then reviewed the four criteria of *Coopers and Lybrand* and considered whether, in her view, they apply to the circumstances in this case. As to whether hearings were "contemplated" she held that the Commissioner was not "required" to hold hearings and "could have received submissions only in writing, had he chosen" and therefore "Commissioner Smith did not ... necessarily hold hearings within the sense intended in *Coopers and Lybrand*". She next found that no rights would be affected by the publication of the findings of misconduct reflected in the draft report because reputation is not a right in the sense contemplated by *Coopers and Lybrand*. "One's reputation is an aspect of one character or how one is perceived", not a "legal right". She held that the adversarial process was not involved because "the Smith Commission was acting in an investigative capacity. There were no allegations or charges to answer or prove". The fourth criterion did not apply because even if the Commission had "an obligation to be procedurally fair, its role was 'to inquire and report' but not to apply substantive rules to individual cases." Finally, she reiterated her view that the Commission was of the second of the "two major categories of Commissions of Inquiry" that is, one whose function is "to research and to formulate ... policy" rather than examine the conduct of public officials. She concluded:

In my view, a person acting in a judicial or quasi-judicial capacity is someone who is acting in a capacity to hear and decide legal rights, most frequently by issuing an adjudicative determination that resolves the legal interests of opposing parties. Commissioner Smith was not, for the above reasons, acting in either of these capacities.

[54] At this point it is useful to consider a later decision of the Supreme Court of Canada in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919. In that case the court said at paragraphs 22 and 23:

That being the case, it is now necessary to identify the tests for distinguishing functions that are quasi-judicial from those that are not. The debate surrounding this distinction was for a long time of great importance in administrative law and resulted in numerous judicial decisions. Thus, the superior courts, owing inter alia to enactments requiring them to do so, relied on the distinction in order to determine what acts were subject to judicial review. The scope of the rules of natural justice then depended to a large extent on the characterization of the process by which the agency in question made its decision. However, this Court gradually abandoned that rigid classification by establishing that the content of the rules a tribunal must follow depends on all the circumstances in which it operates, and not on

a characterization of its functions... As Sopinka J. noted in *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96:

Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

The distinction, which was often a source of confusion, is thus now less relevant. It is no longer applied unless a statute so requires. That was the case for a long time with the *Federal Court Act*, R.S.C., 1985, c. F-7, and is still the case with s. 56 of the *Charter*. The judgments of this Court based on the *Federal Court Act* thus continue to be important, as do the more general considerations relating to the quasi-judicial process put forward in other contexts.

[Emphasis Mine]

[55] And further at paragraph 25:

... a restrictive enumeration of the characteristics of a quasi-judicial decision is risky. As a general rule, no factor considered in isolation can lead to a conclusion that a quasi-judicial process is involved. Such a finding will instead be justified by the conjunction of a series of relevant factors in light of all the circumstances.

[56] It seems to me that Gonthier J. is there saying (as well as was alluded to in the "spectrum" analysis in *Coopers and Lybrand*) that to attempt a strict characterization as "quasi-judicial" in the abstract is not as important as deciding if in the given circumstances the rules of natural justice should apply. This approach of course blurs the boundaries between what is quasi-judicial and what is not, and may even make such a characterization unnecessary. But the fact remains that I have to determine what the word means in the *FIPP Act*. If I cannot fix upon a definition that is universally applicable then I must at least determine what it means for the purposes of this case.

[57] Firstly, I am afraid I must disagree in good measure with the delegate's analysis of the applicability of the *Coopers and Lybrand* criteria.

Hearings:

[58] Commissioner Smith held 87 days of public hearings wherein 70 witnesses testified under oath. Such hearings are common at inquiries and, at the very least, "contemplated" by the *Inquiry Act* even if not absolutely

required in every instance. If something closer to an adjudicative hearing was what the delegate meant was required, I note that the Commissioner did give the persons to whom Notices had been sent the right to be heard, to call rebuttal evidence and to cross-examine witnesses. I am satisfied that there were and would have been further hearings within the meaning of **Coopers and Lybrand**.

Rights Affected Directly or Indirectly

[59] One does have the legal right to a good reputation, assuming, of course, that it is merited. It is enforceable, as witness the common law action of defamation. If what the delegate had in mind was that there is no remedy for its breach against judges and inquiry commissioners for what they express in the course of their duties, my analysis would be that the right subsists, but, exceptionally, it is not enforceable against those specific individuals with respect to those specific statements. Furthermore, given that all the jurisprudence establishes that public inquiries engaged in fault-finding must afford the benefit of the rules of procedural fairness to those involved, it must be that substantive legal rights as contemplated by the **Coopers and Lybrand** test are engaged in some way, most obviously, of course, the right to reputation.

Adversarial Process:

[60] Certainly the procedure of the Commission as a whole was not of the traditional common law model where opposing parties present their versions of the truth to an arbiter who then decides accordingly. But when it arrived at the stage with which we are concerned, of specific allegations of misconduct being delivered by Commission counsel to persons who were then invited to respond, it did develop an adversarial character or (if I may be forgiven) a quasi-adversarial character.

Substantive Rules to Individual Cases:

[61] The process of a public inquiry generally does not involve the usual judicial intellectual process of applying rules of general application to particular facts. But once embarked upon his review of the conduct of individuals, it is apparent from a perusal of the report that the Commissioner drew certain conclusions of legal misconduct as well as conclusions of violations of more general norms of behaviour.

[62] Next I observe that even if the enabling Order-in-Council recited that the Commission was constituted pursuant to Part 2 (s. 8) of the **Inquiry Act**, the fourth term of reference explicitly authorizes it to "inquire into ... the handling of matters related to the NCHS and related entities by public bodies or officials ...". In my view that is a quite explicit mandate to inquire into the conduct of such persons with respect to the execution of their duties. So I must find, contrary to the delegate, that the Commissioner was not acting only "in an investigative or inquisitorial capacity" with respect to general policy matters, but also had the authority pursuant to the terms of reference to make findings and judgements of misconduct. Certainly he thought so, as is evident from his various rulings. I see no reason why an inquiry, this one in particular, cannot with respect to certain of its functions be policy oriented or "poly-centric", but with respect to others be something closer to or similar to a judicial body.

[63] I note here that in the **Rigaux** case, which concerned an inquiry into the policies and practices of the provincial Ministry of Social Services, but without any terms of reference authorizing findings of misconduct such as exist in this case, Allan J. nevertheless remarked that the Inquiry had a

"quasi-judicial flavour", noting the Commissioner's own view that he was in fact conducting a quasi-judicial proceeding.

[64] I deal next with what is in my view probably the most compelling factor as to this issue. All counsel for the petitioners urged that I must consider, as well as what the Commissioner may or may not have been by law authorized or empowered to do pursuant to his terms of reference and the provisions of the *Inquiry Act*, but also the actions he actually took. It is said that given the consequences to the petitioners (and others) of the course which the Commissioner pursued, the words "acting in a ... quasi-judicial capacity" must be interpreted so as to require the court to take into account the manner in which he acted. I agree.

[65] From the passages from his various rulings which I have cited above it is obvious that the Commissioner intended to act in a judicial-like capacity. Presumably acting pursuant to the third and fourth terms of reference he explicitly set out to pass judgments on the conduct of individuals and in fact proceeded to weigh evidence, make findings of credibility and to pass such judgment on a good number of people. Twenty-two Notices of Adverse Interest Finding were sent out drawing conclusions and making statements—sometimes in forceful language—as to unlawful and unethical conduct. Undoubtedly alive to the consequences of such proposed findings to those concerned, he very fairly established extensive procedural safeguards—the right to cross-examine, to respond, to legal representation and publication bans. Some procedures he adopted and rulings he made were similar to those in court proceedings, including various rulings of law. Under the *Inquiry Act* he had most of the powers and legal privileges of a Supreme Court judge.

[66] In a word, with respect to the issue of findings of misconduct, the Commissioner certainly acted and proposed to act "like" or "similarly" to a judge.

[67] Section 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 reads:

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.

[68] The Supreme Court of Canada has reiterated the established approach to statutory interpretation in the *Monsanto* case at page 205, citing Driedger:

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.

[69] Counsel for the IPC submits that a purposive approach to statutory interpretation cannot override plain language read in context. I agree. However the problem here, as all acknowledged, is the vagueness of the term "quasi-judicial".

[70] All are agreed that the purpose of s. 3(1)(b) is the protection of deliberative secrecy. One aspect of that is the need to protect the ability of those exercising judicial or quasi-judicial functions to express preliminary and tentative remarks and conclusions that might later have to be changed. The risk of their being published could have a constraining effect on the creative process. That consideration would apply to commissions of inquiry reviewing the propriety of conduct of individuals.

[71] However, deliberative secrecy is meant also to protect individuals who

could be affected by the publication of such preliminary and tentative remarks. I am sure that any judge would acknowledge having made notes, comments or observations in memoranda, bench books or similar such places which subsequently turn out to be unsupportable and which should not be published, not just to avoid embarrassment to the judge, but also because of the unfairness to third parties involved. That too would apply to commissions of inquiry engaged in judging the conduct of individuals. It seems to me to be especially so of the Smith Commission draft report which contains extensive but not final judgments of misconduct of many individuals who did not have, as the Commissioner intended, a full opportunity to defend themselves.

[72] For the above reasons, therefore, I conclude that in paragraph 61 of her reasons cited above the delegate ascribed too narrow a meaning to the words "acting in a ... quasi-judicial capacity" in s. 3(1)(b) of the **FIPP Act** and I conclude that the actions of the Commissioner in this case do come within the ambit of those words.

Draft Decision:

[73] The word "decision" on its face seems to be broad in scope, having different meanings in different contexts. The sixth edition of Black's Law Dictionary defines it as follows:

Decision. A determination arrived at after consideration of facts, and, in legal context, law. A popular rather than technical or legal word; a comprehensive term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character.

[74] The eighth edition of Black's, however, defines it somewhat more narrowly:

Decision, 1. A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case. See JUDGMENT (1); OPINION (1). - **decisional**, adj.

[75] The delegate gave the word a fairly strict or narrow interpretation. Following is her conclusion in that regard:

I consider that a "decision" in the context of s. 3(1)(b) means a decision affecting someone's legal rights. It must actually decide or resolve something and *includes*, in my view, a decision, order, adjudication or judgement in which, after hearing from the parties to a dispute, a decision-maker disposes of or adjudicates the matter by deciding the matter in favour of or against someone. The record in dispute in this case is not, in my view, a decision so understood and is not otherwise a "decision". Commissioner Smith's draft report was not deciding or determining anything to which the principle of deliberative secrecy would apply and which is the purpose behind the exclusion in s. 3(1)(b) of the Act. It is, in my view, a draft report following Commissioner Smith's investigation and hearings.

[76] Although she used the word "includes" in the second sentence of that passage (the italics are hers) the net effect of the language and her decision on the subject was to virtually identify the word with a purely adjudicative decision.

[77] The submission of counsel for the IPC was essentially that the report of the Commission would not be a decision as contemplated by s. 3(1)(b) because it would have no civil or legal consequences and therefore would effect no one's legal rights. The case of *Morneault v. Canada (Attorney General)* (2000) 189 D.L.R. (4th) 96 (S.C.R.) was referred to in which the Federal Court of Appeal expressed "difficulty" in viewing the findings of misconduct of the Somalia Inquiry as "decisions" for the purposes of s. 18.1(4)(d) of the *Federal Court Act* (powers of review). The trial court judge was firmly of the opinion that they were. The Court of Appeal's view in this regard is essentially *obiter dicta* because it found another section of the *Act* which provided for curial review. Furthermore the relevant passage must be considered in full:

I must confess to some difficulty in viewing the findings in issue as "decisions" within the meaning of the section. The decision in *Krever, supra*, suggests that the contrary may be true for, as has been seen, the findings of a commissioner under the *Inquiries Act* are simply findings of fact and statements of opinion" that carry "no legal consequences", are "not enforceable" and "do not bind courts considering the same subject matter". In an earlier case, *R. v. Nenn*, [1981] 1 S.C.R. 631 at 636, 122 D.L.R. (3d) 577, it was held that the "opinion" required of the Public Service Commission under paragraph 21(b) of the *Public Service Employment Act*, R.S.C. 1970, c. P-32, was not a "decision or order" that was amenable to judicial review by this Court under section 28 [*Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.)]. I must, however, acknowledge the force of the argument the other way, that the review of findings like those in issue is available on the ground afforded by paragraph 18.1(4)(d) despite their nature as non-binding opinions, because of the serious harm that might be caused to reputation by findings that lack support in the record.

(Emphasis Mine]

[78] I find that the considerations concerning the meaning of "quasi-judicial" in s. 3(1)(b) apply very much to the determination of the meaning of the words "draft decision".

[79] I note again the course which the Commissioner took. He was firmly of the opinion (apparently correctly) that he was empowered to make findings of misconduct. He did in fact draw conclusions and make judgments—legal and moral—about people's conduct. To publish those findings would affect the reputations of those involved. Again, a purposive approach to legislative intention is called for to resolve any ambiguity which may exist (and which does exist in this instance). Contrary to what the delegate concluded, my view is that the contents of the draft report as to its findings of misconduct fall within the type of decision and decision-making process that the principle of deliberate secrecy as reflected in s. 3(1)(b) was meant to apply.

[80] The draft report was a draft decision for the purposes of s. 3(1)(b).

Conclusion:

[81] If one asks the question whether it was the purpose of s. (3)(1)(b) to exclude from the scope of the *FIPP Act*, the unfinished work of a rescinded public inquiry which was in the course of making findings of misconduct against various individuals as to serious matters, such individuals not having had the opportunity to respond fully, the answer, in my view, must be

in the affirmative. One could ask, if the Commissioner had been persuaded that some or any of his preliminary opinions as to misconduct were wrong and if the Commission had proceeded to its conclusion and he had deleted those preliminary findings from his final report, could they nevertheless be the subject of an application for access under the **Act**. That would not seem right.

[82] To summarize, I am completely satisfied that the incomplete draft report of the Smith Commission is excluded from the scope of the **Freedom of Information and Protection of Privacy Act** by virtue of s. 3(1)(b) because it is a draft decision of a person acting in a quasi-judicial capacity.

[83] Given my Reasons, I do not have to rule on the argument made by counsel that because the Commission has been "rescinded" and therefore must be considered as never having existed, it is not a public body for the purposes of the **Act**, and records emanating from it do not come within its ambit.

[84] The delegate's order is set aside. The BC Archives need act no further on the applicant's request for access to the draft report.

[85] I order that the *in camera* affidavit of Maria Dupuis to which are annexed the draft report and Notices of Adverse Interest Findings be sealed and it is to be unsealed only by order of a judge of this Court or a judge of the Court of Appeal.

"R.M.P. Paris, J."
The Honourable Mr. Justice R.M.P. Paris

Black's Law Dictionary®

Eighth Edition

Bryan A. Garner
Editor in Chief

Fasken Martineau DuMoulin LLP
2100 - 1075 West Georgia Street
Vancouver, B.C. V6E 3G2

JUL 05 2004

LIBRARY

THOMSON


WEST

MA # 10231642
MA # 10231008 deluxe

The Minister of National Revenue *Appellant*;

and

Coopers and Lybrand *Respondent*.

1978: June 23; 1978: November 21.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Income tax — Jurisdiction — Authorization for entry, search and seizure approved by judge of a superior or a county court — Review by Federal Court of Appeal — Income Tax Act, s. 231(4)(5) — Federal Court Act, R.S.C. 1970, 2nd Supp., c. 10 — B.N.A. Act, 1867, s. 96.

Coopers and Lybrand, chartered accountants, brought a s. 28 application to the Federal Court of Appeal for an order reviewing and setting aside the decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and Carl Zalev, Co. Ct. J., authorizing the entry and search of the Coopers and Lybrand offices and the seizure of certain documents in their possession. Section 231 of the *Income Tax Act* in subs. (4) and (5), prescribes two prerequisites for authorization of any such entry, search or seizure, namely (i) belief by the Minister of National Revenue on reasonable and probable grounds that a violation of the *Income Tax Act*, or a regulation thereunder, has been committed, or is likely to be committed; and (ii) approval by a judge of a superior or county court upon an application (which may be *ex parte*), supported by evidence on oath establishing the facts on which the application is based. The supporting affidavits indicated that a client company of Coopers and Lybrand, Collavino, had built a private residence for B the President of K.M. Ltd. at a cost of \$90,397 but charged B, pursuant to a written contract, only \$43,000, allegedly adding the shortfall of \$47,397 to the cost of a plant addition being constructed for K.M. Ltd. The result of this was to confer on B an undeclared benefit while enabling K.M. Ltd. to claim capital cost allowance on an amount greater than that to which it would have been otherwise entitled. There was no suggestion that Coopers and Lybrand were in any way implicated in any violation of the *Income Tax Act*, if indeed there was such a violation. Further the respondent did not dispute that the affidavits filed gave the Minister reasonable and probable grounds for belief that a violation of the Act had been committed by B and by K.M. Ltd. The contention was that the authorization was unduly broad

Le ministre du Revenu national *Appelant*;

et

Coopers and Lybrand *Intimée*.

1978: 23 juin; 1978: 21 novembre.

Présents: Les juges Martland, Ritchie, Pigeon, Dickson, Beetz, Estey et Pratte.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Impôt sur le revenu — Compétence — Autorisation d'entrer, de chercher et de saisir accordée par un juge d'une cour supérieure ou de comté — Examen par la Cour d'appel fédérale — Loi de l'impôt sur le revenu, par. 231(4) et (5) — Loi sur la Cour fédérale, S.R.C. 1970, 2^e Supp., chap. 10 — A.A.N.B., 1867, art. 96.

Coopers and Lybrand, des experts-comptables, ont présenté à la Cour d'appel fédérale une demande en vertu de l'art. 28 en vue d'obtenir l'examen et l'annulation de la décision ou ordonnance du Directeur général de la Division des enquêtes spéciales du ministère du Revenu national, Impôt, et du juge Carl Zalev de la Cour de comté, permettant d'entrer dans les bureaux de Coopers and Lybrand, d'y faire une perquisition et de saisir des documents en leur possession. Les paragraphes 231(4) et (5) de la *Loi de l'impôt sur le revenu* subordonnent l'autorisation d'entrer, de chercher et de saisir à deux conditions préalables, soit (i) que le ministre du Revenu national ait des motifs raisonnables pour croire qu'une infraction à la *Loi de l'impôt sur le revenu* ou à un règlement a été commise ou sera probablement commise et (ii) qu'un juge d'une cour supérieure ou d'une cour de comté donne son agrément sur présentation d'une demande (qui peut être *ex parte*) appuyée d'une preuve fournie sous serment et établissant la véracité des faits sur lesquels est fondée la demande. Les affidavits présentés à l'appui de la demande indiquent qu'un client de Coopers and Lybrand, Collavino, a construit, au coût de \$90,397, une résidence pour B, président de K.M. Ltd., mais, aux termes d'un contrat écrit, ne lui a facturé que \$43,000; il est allégué que la différence de \$47,397 a été ajoutée au coût de l'agrandissement de l'usine de K.M. Ltd. Par suite de ces transactions, B a touché un bénéfice non déclaré et K.M. Ltd. était ainsi en mesure de réclamer une allocation du coût en capital sur un montant plus élevé que celui auquel elle aurait eu droit. Il n'est aucunement suggéré que Coopers and Lybrand est impliquée de quelque façon dans une infraction à la *Loi de l'impôt sur le revenu*, si tant est qu'il y en ait une. L'intimée ne conteste pas que, compte tenu des affidavits déposés, le Ministre pouvait avoir des

and should have been limited to seizure of documents relating to the dealings of respondent's client Collavino with B and K.M. Ltd. concerning the construction of B's residence and the addition to the K.M. Ltd. plant. The Federal Court of Appeal agreed and referred the matter back to the Director-General and Judge Zalev for the issuance of a limited authorization. In the Supreme Court of Canada the prime consideration was not the breadth of the authorization but whether the Federal Court of Appeal had jurisdiction to entertain the application.

Held: The appeal should be allowed.

The actions of the Minister under s. 231(4) of the *Income Tax Act* are actions of an administrative nature. No obligation rested on him to act either on a judicial or quasi-judicial basis. The ministerial decision was not therefore within s. 28 of the *Federal Court Act* and was not subject to review by the Federal Court of Appeal.

The judicial function envisaged by s. 231(4) of the *Income Tax Act* serves as the control on the Minister's decision and any further recourse to the courts is in review of the judge's decision. The judge in this situation exercises a normal judicial function and he should not be regarded as acting *persona designata* merely through the exercise of powers conferred by a statute other than the provincial *Judicature Act* or its counterpart. The definition of federal board, commission or other tribunal in s. 2 of the *Federal Court Act* expressly excludes persons appointed under s. 96 of the *B.N.A. Act*, i.e. judges of a superior or county court. Section 28 of the *Federal Court Act* cannot therefore apply to the case at bar in which the Federal Court of Appeal did not have a right of review.

The questions of whether an appeal lies to the provincial courts or whether recourse lies to replevin or to one of the prerogative writs should be reserved for another occasion.

Guay v. Lafleur, [1965] S.C.R. 12; *R. v. Randolph* (1966), 56 D.L.R. (2d) 283; *Wiseman v. Borneman*, [1971] A.C. 297 (H.L.); *Pearlberg v. Varty (Inspector of Taxes)*, [1972] 1 W.L.R. 534 (H.L.); *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.); *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453; *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118;

motifs raisonnables de croire que B et K.M. Ltd. avaient violé cette loi. Elle prétend que l'autorisation est trop générale et aurait dû être limitée à la saisie des documents relatifs aux opérations entre Collavino, B et K.M. Ltd. quant à la construction de la résidence de B et aux travaux d'agrandissement de l'usine de K.M. Ltd. La Cour d'appel fédérale a accueilli cette prétention et renvoyé le dossier au Directeur général et au juge Zalev pour qu'ils accordent une autorisation limitée. En Cour suprême du Canada, la considération principale n'était pas l'étendue de l'autorisation mais plutôt la question de savoir si la Cour d'appel fédérale avait le pouvoir de connaître de la demande.

Arrêt: Le pourvoi doit être accueilli.

La décision du Ministre en vertu du par. 231(4) de la *Loi de l'impôt sur le revenu* est de nature administrative. Il n'a aucune obligation d'agir de façon judiciaire ou quasi judiciaire. En conséquence, la décision du Ministre ne tombe pas sous le coup de l'art. 28 de la *Loi sur la Cour fédérale* et n'est pas sujette à examen par la Cour d'appel fédérale.

La fonction judiciaire envisagée au par. 231(4) de la *Loi de l'impôt sur le revenu* est un moyen de contrôle de la décision du Ministre et tout autre recours devant un tribunal permet d'examiner celle du juge. Dans ce cas, le juge exerce une fonction judiciaire normale et ne doit pas être considéré comme une *persona designata* du simple fait qu'il exerce des pouvoirs conférés par une loi autre que la loi provinciale régissant la magistrature ou son équivalent. La définition de office, commission ou autre tribunal fédéral à l'art. 2 de la *Loi sur la Cour fédérale* exclut expressément les personnes nommées en vertu de l'art. 96 de l'*A.A.N.B.*, c.-à-d. les juges d'une cour supérieure ou de comté. L'article 28 de la *Loi sur la Cour fédérale* ne s'applique donc pas en l'espèce et, en conséquence, la Cour d'appel fédérale n'avait pas de droit d'examen.

Les questions de savoir si un appel peut être interjeté devant les cours provinciales ou si l'on peut recourir à une demande de mainlevée ou à l'un des brefs de prérogative devront être tranchées en une autre occasion.

Jurisprudence: *Guay c. Lafleur*, [1965] R.C.S. 12; *R. v. Randolph* (1966), 56 D.L.R. (2d) 283; *Wiseman v. Borneman*, [1971] A.C. 297 (H.L.); *Pearlberg v. Varty (Inspector of Taxes)*, [1972] 1 W.L.R. 534 (H.L.); *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.); *Howarth c. Commission des libérations conditionnelles*, [1976] 1 R.C.S. 453; *Martineau et Butters c. Comité de discipline des détenus de l'Insti-*

Durayappah v. Fernando, [1967] 2 A.C. 337 (P.C.); *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Herman v. Dep. A.G. (Can.)*, [1979] 1 S.C.R. 729 referred to.

APPEAL from a judgment of the Federal Court of Appeal, allowing an application for review under s. 28 of the Federal Court Act, from a decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and Judge Carl Zalev. Appeal allowed, judgment of the Federal Court of Appeal set aside for lack of jurisdiction.

G. W. Ainslie, Q.C., and *March Jewett*, for the appellant.

Robert E. Barnes, Q.C., and *K. W. Cheung*, for the respondent.

The judgment of the Court was delivered by

DICKSON J.—Coopers and Lybrand, chartered accountants, brought a s. 28 application to the Federal Court of Appeal for an order reviewing and setting aside the decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and His Honour Judge Carl Zalev, Judge of the County Court of the County of Essex. The impugned decision or order authorized the entry and search of offices of Coopers and Lybrand and seizure of certain documents in possession of that firm. The authorization was issued pursuant to s. 231(4) and (5) of the *Income Tax Act, 1970-71-72 (Can.)*, c. 63, as amended, which read as follows:

(4) Where the Minister has reasonable and probable grounds to believe that a violation of this Act or a regulation has been committed or is likely to be committed, he may, with the approval of a judge of a superior or county court, which approval the judge is hereby empowered to give on *ex parte* application, authorize in writing any officer of the Department of National Revenue, together with such members of the Royal Canadian Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books,

tution de Matsqui, [1978] 1 R.C.S. 118; *Durayappah v. Fernando*, [1967] 2 A.C. 337 (P.C.); *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Herman c. Sous-procureur général du Canada*, [1979] 1 R.C.S. 729.

POURVOI à l'encontre d'un arrêt de la Cour d'appel fédérale qui a accueilli une demande d'examen présentée en vertu de l'art. 28 de la *Loi sur la Cour fédérale* d'une décision ou ordonnance du Directeur général de la Division des enquêtes spéciales du ministère du Revenu national, Impôt, et du juge Carl Zalev. Pourvoi accueilli, l'arrêt de la Cour d'appel fédérale est infirmé pour défaut de compétence.

G. W. Ainslie, c.r., et *March Jewett*, pour l'appellant.

Robert E. Barnes, c.r., et *K. W. Cheung*, pour l'intimée.

Le jugement de la Cour a été rendu par

LE JUGE DICKSON—Coopers and Lybrand, des experts-comptables, ont présenté à la Cour d'appel fédérale une demande en vertu de l'art. 28 en vue d'obtenir l'examen et l'annulation de la décision ou ordonnance du Directeur général de la Division des enquêtes spéciales du ministère du Revenu national, Impôt, et de M. le juge Carl Zalev de la Cour de comté d'Essex. La décision ou ordonnance contestée permet d'entrer dans les bureaux de Coopers and Lybrand, d'y faire une perquisition et de saisir des documents en leur possession. L'autorisation a été accordée conformément aux par. 231(4) et (5) de la *Loi de l'impôt sur le revenu, 1970-71-72 (Can.)*, chap. 63, et ses modifications, qui se lisent ainsi:

(4) Lorsque le Ministre a des motifs raisonnables pour croire qu'une infraction à cette loi ou à un règlement a été commise ou sera probablement commise, il peut, avec l'agrément d'un juge d'une cour supérieure ou d'une cour de comté, agrément que le juge est investi par ce paragraphe du pouvoir de donner sur la présentation d'une demande *ex parte*, autoriser par écrit tout fonctionnaire du ministère du Revenu national ainsi que tout membre de la Gendarmerie royale du Canada ou tout autre agent de la paix à l'assistance desquels il fait appel et toute autre personne qui peut y être nommée, à entrer et à chercher, usant de la force s'il le faut, dans tout

records, papers or things that may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

(5) An application to a judge under subsection (4) shall be supported by evidence on oath establishing the facts upon which the application is based.

It will be noted that in enacting s. 231(4) and (5) Parliament prescribed two conditions which must be satisfied prior to authorization of any entry, search or seizure, namely: (i) belief by the Minister of National Revenue on reasonable and probable grounds that a violation of the *Income Tax Act*, or a regulation thereunder, has been committed, or is likely to be committed; and (ii) approval by a judge of a superior or county court upon an application (which may be *ex parte*), supported by evidence on oath establishing the facts upon which the application is based.

According to the supporting affidavits, Collavino Brothers Construction Company Limited built a private residence for one Dan Bryan at a cost of \$90,397, but charged Bryan, pursuant to a written contract, only \$43,000. It is alleged that the shortfall of \$47,397 was added to the cost of a plant addition which Collavino was constructing for Kendan Manufacturing Limited, a company of which Mr. Bryan was President and substantial shareholder. The position of the Minister is that as a result of the undercharge and overcharge, an undeclared benefit was conferred by Kendan on a shareholder, Bryan, and, at the same time, Kendan was placed in the position of being able to claim capital cost allowance on an amount greater than that to which Kendan would otherwise have been entitled.

Two points should be noted here. Firstly, Coopers and Lybrand is a well-known and reputable firm of chartered accountants, and there is no suggestion that the firm is in any way implicated in a violation of the *Income Tax Act* if, indeed, there was a violation. Secondly, Coopers and Lybrand do not dispute that, upon the evidence

bâtiment, contenant ou endroit en vue de découvrir les documents, livres, registres, pièces ou choses qui peuvent servir de preuve au sujet de l'infraction de toute disposition de la présente loi ou d'un règlement et à saisir et à emporter ces documents, livres, registres, pièces ou choses et à les retenir jusqu'à ce qu'ils soient produits devant la cour.

(5) Une demande faite à un juge en vertu du paragraphe (4) sera appuyée d'une preuve fournie sous serment et établissant la véracité des faits sur lesquels est fondée la demande.

On notera qu'en édictant les par. 231(4) et (5), le Parlement subordonne l'autorisation d'entrer, de chercher et de saisir à deux conditions préalables, soit (i) que le ministre du Revenu national ait des motifs raisonnables pour croire qu'une infraction à la *Loi de l'impôt sur le revenu* ou à un règlement a été commise ou sera probablement commise et (ii) qu'un juge d'une cour supérieure ou d'une cour de comté donne son agrément sur présentation d'une demande (qui peut être *ex parte*) appuyée d'une preuve fournie sous serment et établissant la véracité des faits sur lesquels est fondée la demande.

Selon les affidavits présentés à l'appui de la demande, Collavino Brothers Construction Company Limited a construit, au coût de \$90,397, une résidence pour un nommé Dan Bryan, mais, aux termes d'un contrat écrit, ne lui a facturé que \$43,000. Il est allégué que la différence de \$47,397 a été ajoutée au coût de l'agrandissement que Collavino a construit à l'usine de Kendan Manufacturing Limited, une compagnie dont M. Bryan était le président et le principal actionnaire. Le Ministre soutient que, par suite du rabais ou de la majoration, Kendan a accordé à un actionnaire, Bryan, un bénéfice non déclaré et était en même temps en mesure de réclamer une allocation du coût en capital sur un montant plus élevé que celui auquel elle aurait eu droit.

Il convient, à ce stade, de souligner deux points. Premièrement, Coopers and Lybrand est une société d'experts-comptables bien connue et de bonne réputation et il n'est aucunement suggéré qu'elle est impliquée de quelque façon dans une infraction à la *Loi de l'impôt sur le revenu*, si tant est qu'il y en ait une. Deuxièmement, Coopers and

disclosed in the affidavits filed in support of the application to Judge Zalev, there were reasonable and probable grounds for belief on the part of the Minister that a violation of the *Income Tax Act* had been committed by Bryan and by Kendan. The complaint is that the form of authorization, although conforming precisely to the wording of the latter part of s. 231(4), was so broad as to authorize seizure of *all* documents, of whatever nature, in the possession of Coopers and Lybrand, related to the affairs of their client, Collavino. It is urged that the form of authorization should have been limited to seizure of documents which might afford evidence as to the violation which formed the basis of the application for approval of the authorization, *viz.* documents related to the dealings between Collavino, Dan Bryan, and Kendan concerning the construction of the Bryan residence and the construction of the addition to the plant of Kendan. That contention was accepted by a majority of the Federal Court of Appeal, who set aside the authorization, and referred the matter back to the Director-General and to Judge Zalev for the issuance of a limited authorization.

In this Court argument centred, not upon whether the authorization should have been so limited, but upon the more fundamental question of Federal Court jurisdiction and whether the Federal Court of Appeal was empowered to entertain the s. 28 application brought by Coopers and Lybrand.

Section 28 jurisdiction to hear and determine an application to review and set aside extends only to:

... a decision or order other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made in the course of proceedings before a federal board, commission or other tribunal.

The convoluted language of s. 28 of the *Federal Court Act* has presented many difficulties, as the cases attest, but it would seem clear that jurisdiction of the Federal Court of Appeal under that section depends upon an affirmative answer to each of four questions:

Lybrand ne conteste pas que, compte tenu de la preuve faite par les affidavits déposés à l'appui de la demande présentée au juge Zalev, le Ministre pouvait avoir des motifs raisonnables de croire que Bryan et Kendan avaient violé cette loi. L'attaque découle de ce que l'autorisation, bien que conforme à la dernière partie du par. 231(4), est si générale qu'elle permet la saisie de *tous* les documents, quels qu'ils soient, qui se rattachent aux affaires de son client Collavino et en sa possession. On fait valoir que l'autorisation aurait dû être limitée à la saisie des documents qui pouvaient fournir une preuve de l'infraction à l'origine de la demande d'approbation de l'autorisation, c'est-à-dire les documents relatifs aux opérations entre Collavino, Dan Bryan et Kendan quant à la construction de la résidence de Bryan et aux travaux d'agrandissement de l'usine de Kendan. La Cour d'appel fédérale a accueilli cette prétention à la majorité, a annulé l'autorisation et renvoyé le dossier au Directeur général et au juge Zalev pour qu'ils accordent une autorisation limitée.

Devant cette Cour, l'argumentation a porté non pas sur la question de savoir si l'autorisation aurait dû être limitée mais sur la question plus fondamentale de la compétence de la Cour fédérale et sur celle de savoir si la Cour d'appel fédérale avait le pouvoir de connaître de la demande présentée en vertu de l'art. 28 par Coopers and Lybrand.

La compétence conférée par l'art. 28 à l'égard d'une demande d'examen et d'annulation ne vaut que dans le cas:

... d'une décision ou ordonnance, autre qu'une décision ou ordonnance de nature administrative qui n'est pas légalement soumis à un processus judiciaire ou quasi judiciaire, rendue par un office, une commission ou un autre tribunal fédéral ou à l'occasion de procédures devant un office, une commission ou un autre tribunal fédéral...

Le texte compliqué de l'art. 28 de la *Loi sur la Cour fédérale* a soulevé de nombreuses difficultés, comme en témoigne la jurisprudence, mais il semble clair que la Cour d'appel fédérale est compétente en vertu de cet article si l'on peut répondre affirmativement à chacune de ces quatre questions:

- | | |
|--|---|
| <p>(1) Is that which is under attack a “decision or order” in the relevant sense?</p> <p>(2) If so, does it fit outside the excluded class, i.e. is it “<i>other than</i> a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis”?</p> <p>(3) Was the decision or order made in the course of “proceedings”?</p> <p>(4) Was the person or body whose decision or order is challenged a “federal board, commission or other tribunal” as broadly defined in s. 2 of the <i>Federal Court Act</i>?</p> | <p>(1) Est-ce que l’objet de la contestation est une «décision ou ordonnance» au sens pertinent?</p> <p>(2) Si c’est le cas, tombe-t-elle à l’extérieur de la catégorie exclue, c’est-à-dire s’agit-il d’une décision ou d’une ordonnance «<i>autre qu’une</i> décision ou ordonnance de nature administrative qui n’est pas légalement soumise à un processus judiciaire ou quasi judiciaire»?</p> <p>(3) La décision ou ordonnance a-t-elle été rendue à l’occasion de «procédures»?</p> <p>(4) L’organisme, ou la personne, dont la décision ou ordonnance est contestée est-il un «office, commission ou autre tribunal fédéral» au sens de l’art. 2 de la <i>Loi sur la Cour fédérale</i>?</p> |
|--|---|

In determining jurisdiction in the case at bar, one must consider separately the decision of the Minister and the order of the judge. In respect of the Minister’s decision, the crucial question is question (2) and, in respect of the judge’s order, question (4).

Traditionally, decisions of a judicial nature and decisions of an administrative nature have been seen as antithetic, judicial decisions being those made by the courts, and administrative decisions being those made by other than courts, such as government departments and officials. Traditionally, the courts have taken the position that decisions were reviewable if they were made by judicial persons or bodies, or by quasi-judicial boards or tribunals, *i.e.* analogous to courts. The growth of *certiorari* led naturally from control of inferior courts to control of administrative agencies.

Government ministries and agencies carry out a different form of work than that done by the courts. They do not simply take on closely analogous functions. Their primary concern is with policy objectives, rather than adjudication *inter partes*, in regulating relations between individuals and government in the distribution of benefits. The dichotomy between judicial and administrative is still reasonably easy to discern but the great growth of government at all levels, the proliferation of government agencies, and increased govern-

Pour statuer sur la compétence en l’espèce, il faut examiner séparément la décision du Ministre et l’ordonnance du juge. Pour la décision du Ministre, la 2^e question est cruciale et pour l’ordonnance du juge, c’est la 4^e.

Traditionnellement, les décisions de nature judiciaire et celles de nature administrative ont été considérées comme des catégories opposées; les décisions judiciaires sont celles des tribunaux et les décisions administratives, celles qui sont rendues par d’autres corps, comme, par exemple, les ministères et les fonctionnaires. Traditionnellement, les tribunaux ont adopté le principe que les décisions rendues par des juges ou des organismes judiciaires ou par des offices ou des tribunaux quasi judiciaires, c’est-à-dire assimilables à des tribunaux, peuvent donner lieu à révision. L’évolution du *certiorari* a naturellement mené du contrôle des tribunaux inférieurs au contrôle des organismes administratifs.

La tâche des ministères et des organismes gouvernementaux diffère de celle des tribunaux. Ils ne remplissent pas simplement des fonctions analogues. Leur principal souci est de régler les relations entre les individus et le gouvernement en matière de répartition des avantages en fonction d’objectifs gouvernementaux plutôt que de juger des litiges entre parties. La dichotomie entre les décisions judiciaires et administratives est encore assez facile à percevoir, mais l’expansion considérable de l’activité du gouvernement à tous les

ment involvement in social and economic affairs have all tended to render classification more difficult. There is much overlap. Administrative decisions and orders frequently subsume the judicial and quasi-judicial. Section 28 of the *Federal Court Act* expressly recognizes that some decisions or orders of an administrative nature are required by law to be made on a judicial or quasi-judicial basis; superimposed upon the administrative and institutional decision-making process of an official may be the duty to act judicially.

Accordingly, administrative decisions must be divided between those which are reviewable, by *certiorari* or by s. 28 application or otherwise, and those which are nonreviewable. The former are conveniently labelled "decisions or orders of an administrative nature required by law to be made on a judicial or quasi-judicial basis", the latter "decisions or orders not required by law to be made on a judicial or quasi-judicial basis." It is not only the decision to which attention must be directed, but also the process by which the decision is reached.

Before considering the criteria which, in my view, serve to identify a judicial or quasi-judicial act, reference may be made to two cases decided in this Court and to one case decided in the English courts. The first is *Guay v. Lafleur*¹, in which an officer of the Department of National Revenue was authorized by the Deputy Minister, pursuant to s. 126(4) of the *Income Tax Act*, R.S.C. 1952, c. 148, to make an inquiry into the affairs of the respondent and others. The respondent was denied the right to be present and represented by counsel during the examination of persons summoned by the investigator. The refusal was upheld in this Court. The Court, in effect, held that no judicial power was being exercised against those under investigation. Mr. Justice Abbott, who delivered the judgment of six members of the Court, held that the investigation was a purely administrative

¹ [1965] S.C.R. 12.

niveaux, la prolifération des organismes gouvernementaux et l'intervention accrue du gouvernement dans les affaires sociales et économiques ont contribué à rendre la classification plus difficile. Les deux domaines chevauchent. Des décisions et ordonnances administratives prennent fréquemment des caractéristiques judiciaires et quasi judiciaires. L'article 28 de la *Loi sur la Cour fédérale* reconnaît expressément que certaines décisions ou ordonnances de nature administrative sont légalement soumises à un processus judiciaire ou quasi judiciaire; le devoir d'agir judiciairement peut s'ajouter au processus de décision administrative d'un fonctionnaire.

En conséquence, il y a deux sortes de décisions administratives, celles qui peuvent être contrôlées, par *certiorari* ou à la suite d'une demande en vertu de l'art. 28 ou autrement, et celles qui ne le peuvent pas. Les premières sont commodément désignées comme «décisions ou ordonnances de nature administrative qui sont légalement soumises à un processus judiciaire ou quasi judiciaire» et les dernières comme «décisions ou ordonnances de nature administrative qui ne sont pas légalement soumises à un processus judiciaire ou quasi judiciaire». Il ne faut pas uniquement scruter la décision mais également le processus qui y conduit.

Avant d'examiner les critères qui, selon moi, servent à identifier un acte judiciaire ou quasi judiciaire, il convient de citer deux arrêts de cette Cour et une décision des tribunaux anglais. Le premier est *Guay c. Lafleur*¹, où le sous-ministre, conformément au par. 126(4) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, chap. 148, avait autorisé un fonctionnaire du ministère du Revenu national à tenir une enquête sur les affaires de l'intimé et d'autres personnes. L'intimé s'est vu refuser le droit d'être présent et d'être représenté par un avocat au cours de l'interrogatoire des personnes citées par l'enquêteur. Cette Cour a confirmé ce refus. La Cour a en effet statué qu'aucun pouvoir judiciaire n'était exercé contre ceux sur qui on enquêtait. Le juge Abbott, qui a rendu le jugement au nom de six membres de la Cour, a jugé que l'enquête était de nature pure-

¹ [1965] R.C.S. 12.

matter which could neither decide nor adjudicate upon anything. He further held that it was not a judicial or quasi-judicial inquiry, but a private investigation at which the respondent was not entitled to be present or represented by counsel. He had this to say, at pp. 16-17:

The power given to the Minister under s. 126(4) to authorize an enquiry to be made on his behalf, is only one of a number of similar powers of enquiry granted to the Minister under the *Act*. These powers are granted to enable the Minister to obtain the facts which he considers necessary to enable him to discharge the duty imposed on him of assessing and collecting the taxes payable under the *Act*. The taxpayer's right is not affected until an assessment is made. Then all the appeal provisions mentioned in the *Act* are open to him.

Mr. Justice Cartwright said, at p. 17:

The function of the appellant under the terms of his appointment is simply to gather information; his duties are administrative, they are neither judicial nor quasi-judicial.

There are, of course, many administrative bodies which are bound by the maxim "*audi alteram partem*" but the condition of their being so bound is that they have power to give a decision which affects the rights of, or imposes liabilities upon, others.

Mr. Justice Hall, although in dissent, agreed (at p. 19) that the investigator was not acting in a judicial capacity, or performing a judicial function.

In *R. v. Randolph*², this Court held that the power to suspend mail services, exercisable upon suspicion of criminal activity, pending a final determination, did not attract the rules of natural justice.

In *Wiseman v. Borneman*³, it was decided that a tribunal established for the purposes of s. 28 of the *Finance Act, 1960*, was not bound to observe the rules of natural justice, nor to give the taxpayer the right to see and comment upon material adverse to the taxpayer placed before the tribunal by the Commissioners of Inland Revenue. In the course of his speech, Lord Reid had this to say, at p. 308:

ment administrative et ne pouvait trancher ni décider quoi que ce soit. Il a en outre conclu qu'il ne s'agissait pas d'une enquête judiciaire ou quasi judiciaire mais d'une enquête privée à laquelle l'intimé n'avait pas le droit d'être présent ni d'être représenté par un avocat. Il a dit (aux pp. 16 et 17):

[TRADUCTION] Le pouvoir, conféré au Ministre par le par. 126(4), de permettre une enquête en son nom n'est qu'un des nombreux pouvoirs d'enquête accordés au Ministre par la *Loi*. Ces pouvoirs lui sont accordés pour lui permettre de recueillir des données susceptibles de l'aider à remplir le devoir qui lui est imposé d'établir et de percevoir les impôts payables en vertu de la *Loi*. Le droit du contribuable n'est en cause que lorsqu'une cotisation est établie. Alors, il peut se prévaloir de tous les recours mentionnés dans la *Loi*.

Le juge Cartwright a dit (à la p. 17):

[TRADUCTION] Aux termes de son mandat, l'appelant doit simplement recueillir des renseignements; ses fonctions sont administratives, elles ne sont ni judiciaires, ni quasi judiciaires.

De nombreux organismes administratifs sont liés par la maxime "*audi alteram partem*" mais, s'ils le sont, c'est seulement dans le cas où ils ont le pouvoir de prendre une décision qui porte atteinte aux droits des autres ou qui leur impose des obligations.

Le juge Hall, bien que dissident, a convenu (à la p. 19) que l'enquêteur n'agissait pas à titre judiciaire et ne remplissait pas de fonction judiciaire.

Dans l'arrêt *R. v. Randolph*², cette Cour a jugé que le pouvoir de suspendre le service postal en attendant une décision finale, pouvoir qui peut être exercé lorsqu'il y a lieu de croire que le service est utilisé à une fin criminelle, n'entraîne pas l'application des règles de justice naturelle.

Dans l'arrêt *Wiseman v. Borneman*³, on a jugé qu'un tribunal établi aux fins de l'art. 28 de la *Finance Act, 1960*, n'est pas tenu d'observer les règles de justice naturelle ni de permettre au contribuable de voir et de commenter les documents incriminants déposés par les représentants du fisc devant le tribunal. Dans ses motifs, lord Reid a dit (à la p. 308):

² (1966), 56 D.L.R. (2d) 283.

³ [1971] A.C. 297 (H.L.)

² (1966), 56 D.L.R. (2d) 283.

³ [1971] A.C. 297 (H.L.)

It is, I think, not entirely irrelevant to have in mind that it is very unusual for there to be a judicial determination of the question whether there is a *prima facie* case. Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.

The quoted passage was adopted in the later income tax case of *Pearlberg v. Varty (Inspector of Taxes)*⁴, at p. 539. In neither case was the function of the official classed as judicial. It was administrative to the extent that the taxpayer had no right to be present or to be heard.

Whether an administrative decision or order is one required by law to be made on a judicial or non-judicial basis will depend in large measure upon the legislative intention. If Parliament has made it clear that the person or body is required to act judicially, in the sense of being required to afford an opportunity to be heard, the courts must give effect to that intention. But silence in this respect is not conclusive. At common law the courts have supplied the legislative omission—see Byles J. in *Cooper v. Wandsworth Board of Works*⁵, at p. 194—in order to give such procedural protection as will achieve justice and equity without frustrating parliamentary will as reflected in the legislation.

As Tucker L.J. observed in *Russell v. Duke of Norfolk*⁶, at p. 118:

There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

⁴ [1972] 1 W.L.R. 534 (H.L.).

⁵ (1863), 14 C.B. (N.S.) 180.

⁶ [1949] 1 All E.R. 109 (C.A.).

[TRANSLATION] Je crois qu'il peut être bon de rappeler qu'il est très inhabituel de décider judiciairement s'il y a, à première vue, matière à procès. Tout fonctionnaire public qui doit décider d'engager des poursuites ou d'intenter des procédures doit d'abord décider s'il y a, à première vue, matière à procès, mais cela ne signifie pas que la justice exige qu'il doive d'abord solliciter les observations de l'accusé ou défendeur sur les documents en main. Il n'y a donc rien d'intrinsèquement injuste à prendre une telle décision en l'absence de l'autre partie.

Le passage cité a été adopté dans une affaire fiscale plus récente, *Pearlberg v. Varty (Inspector of Taxes)*⁴, à la p. 539. Dans aucun de ces cas, le rôle du fonctionnaire n'a été qualifié de judiciaire. Il est de nature administrative dans la mesure où le contribuable n'a pas le droit d'être présent ou entendu.

La question de savoir si une décision ou ordonnance de nature administrative est légalement soumise à un processus judiciaire ou quasi judiciaire dépend dans une large mesure de l'intention du législateur. Si le Parlement énonce clairement que la personne ou l'organisme est tenu d'agir judiciairement, c'est-à-dire de fournir une occasion d'être entendu, les tribunaux doivent donner effet à cette intention. Mais le silence sur ce point n'est pas concluant. En *common law*, les tribunaux ont suppléé à cette omission du législateur—voir le juge Byles dans *Cooper v. Wandsworth Board of Works*⁵, à la p. 194—afin d'accorder dans la procédure les garanties voulues pour assurer la justice et l'équité sans aller à l'encontre de la volonté du Parlement exprimée dans la législation.

Comme l'a fait remarquer le lord juge Tucker dans l'arrêt *Russell v. Duke of Norfolk*⁶, à la p. 118:

[TRANSLATION] Il n'existe pas à mon avis un principe qui s'applique universellement à tous les genres d'enquêtes et de tribunaux internes. Les exigences de la justice naturelle doivent varier selon les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.

⁴ [1972] 1 W.L.R. 534 (H.L.).

⁵ (1863), 14 C.B. (N.S.) 180.

⁶ [1949] 1 All E.R. 109 (C.A.).

It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In *Howarth v. National Parole Board*⁷, a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*⁸.

In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah v. Fernando*⁹. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.

⁷ [1976] 1 S.C.R. 453.

⁸ [1978] 1 S.C.R. 118.

⁹ [1967] 2 A.C. 337 (P.C.).

J'estime qu'il est possible de formuler plusieurs critères pour déterminer si une décision ou ordonnance est légalement soumise à un processus judiciaire ou quasi judiciaire. Il ne s'agit pas d'une liste exhaustive.

(1) Les termes utilisés pour conférer la fonction ou le contexte général dans lequel cette fonction est exercée donnent-ils à entendre que l'on envisage la tenue d'une audience avant qu'une décision soit prise?

(2) La décision ou l'ordonnance porte-t-elle directement ou indirectement atteinte aux droits et obligations de quelqu'un?

(3) S'agit-il d'une procédure contradictoire?

(4) S'agit-il d'une obligation d'appliquer les règles de fond à plusieurs cas individuels plutôt que, par exemple, de l'obligation d'appliquer une politique sociale et économique au sens large?

Tous ces facteurs doivent être soupesés et évalués et aucun d'entre eux n'est nécessairement déterminant. Ainsi, au par. (1), l'absence de termes exprès prescrivant la tenue d'une audience n'exclut pas nécessairement l'obligation en *common law* d'en tenir une. Quant au par. (2), la nature et la gravité, le cas échéant, de l'atteinte aux droits individuels, et la question de savoir si la décision ou ordonnance est finale sont importantes, mais le fait que des droits soient touchés n'entraîne pas nécessairement l'obligation d'agir judiciairement. Dans l'arrêt *Howarth c. Commission des libérations conditionnelles*⁷, la majorité de cette Cour a rejeté l'idée d'un droit à la justice naturelle dans le cas d'une suspension ou d'une révocation de libération conditionnelle. Voir également l'arrêt *Martineau et Butters c. Comité de discipline des détenus de l'Institution de Matsqui*⁸.

En termes plus généraux, il faut tenir compte de l'objet du pouvoir, de la nature de la question à trancher et de l'importance de la décision sur ceux qui sont directement ou indirectement touchés par elle: voir l'arrêt *Durayappah v. Fernando*⁹. Plus la question est importante et les sanctions sérieuses, plus on est justifié de demander que l'exercice du pouvoir soit soumis au processus judiciaire ou quasi judiciaire.

⁷ [1976] 1 R.C.S. 453.

⁸ [1978] 1 R.C.S. 118.

⁹ [1967] 2 A.C. 337 (P.C.).

The existence of something in the nature of a *lis inter partes* and the presence of procedures, functions and happenings approximating those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.

Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis. Reasonable men balancing the same factors may differ, but this does not connote uncertainty or *ad hoc* adjudication; it merely reflects the myriad administrative decision-making situations which may be encountered to which the reasonably well-defined principles must be applied.

Professor D. J. Mullan expressed the matter in the following language in a thoughtful article "Fairness: the New Natural Justice?" (1975), 25 U.T.L.J. 280, 300:

Why not deal with problems of fairness and natural justice simply on the basis that, the nearer one is to the type of function requiring straight law/fact determinations and resulting in serious consequences to individuals, the greater is the legitimacy of the demand for procedural protection but as one moves through the spectrum of decision-making functions to the broad, policy-oriented decisions exercised typically by a minister of the crown, the content of procedural fairness gradually disappears into nothingness, the emphasis being on a gradual disappearance not one punctuated by the unrealistic impression of clear cut divisions presented by the classification process?

L'existence d'un élément assimilable à un *lis inter partes* et la présence de procédures, fonctions et actes équivalents à ceux d'un tribunal ajoutent du poids au par. (3). Mais encore une fois, l'absence de règles de procédure analogues à celles des tribunaux ne sera pas fatale à l'existence d'une obligation d'agir judiciairement.

La décision de nature administrative ne se prête pas à une classification rigide de fonctions. Au contraire, on découvre en réalité un continuum. En paradigmes, à un bout du spectre, se trouvent les régies des loyers, commissions des relations du travail et autres dont les décisions sont susceptibles d'examen judiciaire. A l'autre bout, on trouve des choses comme la nomination du président d'une société de la Couronne ou la décision d'acheter un cuirassé qui ne peuvent faire l'objet d'une intervention judiciaire. Les cas qui se situent à l'une ou l'autre extrémité du spectre sont faciles à résoudre mais à mesure qu'on s'approche du centre, la tâche se complique. Il faut soupeser ce qui prêche pour ou contre la conclusion que la décision doit être soumise à un processus judiciaire. Des hommes raisonnables pesant les mêmes facteurs peuvent différer d'opinion, ce qui ne traduit pas l'incertitude ou le jugement *ad hoc*; cela reflète simplement la multitude de situations qui donnent ouverture aux décisions de nature administrative auxquelles doivent s'appliquer des principes raisonnablement bien définis.

Le professeur D. J. Mullan s'est exprimé sur ce point dans un article fouillé «*Fairness: the New Natural Justice?*» (1975), 25 U.T.L.J. 280, 300:

[TRADUCTION] Pourquoi ne pas traiter les problèmes d'impartialité et de justice naturelle de la façon suivante: plus l'on se rapproche du type de fonction qui exige de simples déterminations droit/fait et qui a de lourdes conséquences pour les personnes, plus l'exigence de protection par la procédure est justifiée, mais à mesure que l'on s'en éloigne pour s'approcher de décisions d'ordre général visant l'application de politiques, ordinairement du ressort d'un ministre du gouvernement, l'accent sur la procédure impartiale vient graduellement à disparaître. Cette disparition n'est toutefois pas marquée de frontières précises auxquelles pourrait aboutir un processus de classification irréaliste.

I should like now to evaluate each of the four criteria, which I have outlined, in relation to the decision of the Minister of National Revenue to authorize search and seizure pursuant to s. 231(4) of the *Income Tax Act*:

(1) There is nothing in the language in which the Minister's functions are conferred or in the general context which indicates a duty to notify the taxpayer or any other person, or to hold a hearing, before seeking approval of authorization to enter, search and seize. On the contrary, Parliament substituted for the rules of natural justice the objective test that the Minister, before acting, have reasonable cause to believe that a violation of the *Act* or regulation had been committed or was likely to be committed. See Lord Reid in *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), 78.

Recognizing that a right of search is in derogation of the principles of the common law, and open to abuse, Parliament also built into the legislation an immediate review of the ministerial decision by interposing a judge between the revenue and the taxpayer. The judge sits to scrutinize [with utmost care] the intended exercise of ministerial discretion. Lacking judicial approval the ministerial decision is without effect. Indication of parliamentary intention to deny the taxpayer the right to be heard at this stage, is the statement in s. 231 (4) that the judge is empowered to give approval on an *ex parte* application.

I take it that Parliament concluded, perhaps not unreasonably, that the imposition of procedural steps additional to those spelled out in s. 231(4) would frustrate the object of the section conferring the power and obstruct the taking of effective investigatory action. It obviously considered the public interest entailed in enforcement and the private interest affected by search and seizure, and concluded that procedural fairness was achieved by the section as drafted. For myself, I do not know what additional procedural protection could be given without frustrating parliamentary intent.

(2) The ministerial decision does affect rights even though such decision requires confirmation. It is wrong in my opinion to say that because a decision requires confirmation, rights therefore are not affected. Rights are affected when premises are entered and documents seized even though the Minister does not make any final determination of rights or duties.

(3) The decision of the Minister does not involve the adversary process. It is not the "triangular" case of A

J'aimerais maintenant procéder à l'évaluation de chacun des quatre critères que j'ai énoncés par rapport à la décision du ministre du Revenu national d'autoriser la perquisition et la saisie conformément au par. 231(4) de la *Loi de l'impôt sur le revenu*:

(1) Rien dans les termes utilisés dans la définition des fonctions du Ministre ou dans le contexte général n'indique une obligation d'informer le contribuable ou une autre personne ou de tenir une audience avant de faire approuver l'autorisation d'entrer, de chercher et de saisir. Au contraire, le Parlement a substitué aux règles de justice naturelle le critère objectif selon lequel le Ministre, avant d'agir, doit avoir des motifs raisonnables pour croire qu'une infraction à la *Loi* ou à un règlement a été commise ou sera probablement commise. Voir lord Reid dans l'arrêt *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), 78.

Reconnaissant qu'un droit de perquisition déroge aux principes de la *common law* et donne ouverture à des abus, le Parlement a également introduit dans la loi un examen immédiat de la décision du Ministre en faisant intervenir un juge entre le fisc et le contribuable. Le juge doit scruter [avec le plus grand soin] l'exercice envisagé du pouvoir discrétionnaire ministériel. A défaut d'approbation judiciaire, la décision ministérielle n'a aucun effet. Le texte du par. 231(4), selon lequel le juge a le pouvoir de donner son agrément sur présentation d'une demande *ex parte*, indique bien l'intention du Parlement de ne pas accorder au contribuable le droit d'être entendu à ce stade des procédures.

Selon moi, le Parlement a conclu, peut-être non sans raison, que l'imposition de procédures en sus de celles énoncées au par. 231(4) aurait pour effet de frustrer l'objectif de l'article qui accorde le pouvoir et d'empêcher une enquête efficace. Il a évidemment tenu compte de l'intérêt public qui requiert les sanctions et des intérêts privés touchés par la perquisition et la saisie et il a conclu que par sa rédaction, l'article assure la justice des procédures. Pour ma part, je ne vois pas comment une protection procédurale supplémentaire pourrait être ajoutée sans frustrer l'intention du Parlement.

(2) La décision du Ministre touche effectivement à des droits même si elle doit être confirmée. A mon avis, il est erroné de dire qu'aucun droit n'est touché parce qu'une telle décision exige une confirmation. Il y a atteinte à des droits dès que quelqu'un entre dans les lieux et saisit les documents même si le Ministre ne rend aucune décision finale sur des droits ou obligations.

(3) La décision du Ministre n'implique pas de procédure contradictoire. Il ne s'agit pas de la situation

being called upon to resolve a dispute between B and C. There is a dispute but not in an adversarial sense. The analogy of a court is entirely inappropriate. There are no curial procedural rules imposed by the legislation.

(4) The governing legislation is silent as to substantive rules to be observed in individual cases.

When one places in the balance the responses to the four questions, the result is a modified "yes" to question (2) and a "nil" return to each of the other three criteria, leading to the conclusion that the Minister's administrative and executive decision is not required to be made on a judicial or quasi-judicial basis.

Viewed from the broader perspectives of power, issue, and sanctions, it is difficult to conceive that the conclusion could be otherwise. The Minister is not exercising judicial power. I did not understand counsel for Coopers and Lybrand to argue for more procedural protection than that provided by s. 236(4), or to urge that the affected taxpayers should have been consulted before the Minister sought judicial approval of the authorization to enter. The argument was made that the ministerial decision, and the judicial approval, were based upon the same material, the latter being a judicial act, so also the former. Superficially, this argument is attractive, but I do not think it can prevail.

The functions and powers of the Minister, and those of the judge, are entirely different. In carrying out the responsibilities with which he is entrusted under the *Income Tax Act*, the Minister discharges duties which are fundamentally administrative. He is invested with investigatory powers, including the right to audit, to request information and production of documents, and the right to authorize the conduct of an inquiry. Additional to these rights is the right conferred by s. 231(4) to authorize the entry and search of buildings. The power he exercises under s. 231(4) is properly characterized as investigatory, rather than adjudicatory. He will collect material and advice from many sources. In deciding whether to exercise the right last mentioned, he will be gov-

«triangulaire», où A est appelé à résoudre un différend entre B et C. Il y a un différend mais pas au sens de débat contradictoire. On ne peut faire aucune analogie avec un tribunal. La Loi n'impose aucune règle de procédure judiciaire.

(4) La loi applicable ne contient aucune règle de fond qui doit être observée dans les cas individuels.

Lorsqu'on met en regard les réponses aux quatre questions, on obtient un «oui» mitigé à la 2^e question et un «non» aux trois autres critères, ce qui amène à conclure que la décision de nature administrative du Ministre n'est pas soumise à un processus judiciaire ou quasi judiciaire.

Dans la perspective plus large du pouvoir, du litige et des sanctions, il est difficile de concevoir que la conclusion puisse être différente. Le Ministre n'exerce pas un pouvoir judiciaire. Je ne m'explique pas pourquoi l'avocat de Coopers and Lybrand plaide en faveur d'une meilleure protection procédurale que celle prévue par le par. 236(4) ou fait valoir que les contribuables visés auraient dû être consultés avant que le Ministre ne cherche à faire approuver judiciairement l'autorisation d'entrer. L'argument est que la décision du Ministre et l'approbation judiciaire sont fondées sur les mêmes documents et que puisque cette dernière est de nature judiciaire, il en est de même pour la première. A première vue, cet argument est séduisant, mais je ne pense pas qu'il puisse prévaloir.

Les fonctions et pouvoirs du Ministre diffèrent entièrement de ceux du juge. En s'acquittant des responsabilités qui lui sont confiées par la *Loi de l'impôt sur le revenu*, le Ministre remplit des obligations qui sont fondamentalement de nature administrative. Il jouit de pouvoirs d'enquête, y compris le droit de vérifier les comptes, d'exiger des renseignements et la production de documents et le droit d'autoriser la tenue d'une enquête. A ces droits, s'ajoute celui qui est conféré par le par. 231(4) d'accorder l'autorisation d'entrer et de perquisitionner dans des bâtiments. On peut qualifier à bon droit le pouvoir qu'il exerce en vertu du par. 231(4) de pouvoir d'enquête plutôt que de décision. Il recueille des documents et des informations de multiples sources. Sa décision d'exercer le droit

erned by many considerations, dominant among which is the public interest and his duty as an executive officer of the government to administer the Act to the best of his ability. The decision to seek authority to enter and search will be guided by public policy and expediency, having regard to all the circumstances. The powers which the judge exercises are judicial when in review of ministerial administrative discretion.

It would be unusual to have available a review procedure prior to the application to the judge, because, in the absence of judge's approval, any decision on the part of the Minister to authorize seizure of documents is manifestly without effect. The judge's approval is the control on the Minister's decision, while any further recourse to the courts is to serve as a control on the judge's decision. This would appear to be a sensible reading of s. 231(4).

I am satisfied that in giving an authorization under s. 231(4) of the *Income Tax Act*, the Minister's actions are of an administrative nature, and that no obligation rests at law upon the Minister to act on a judicial or quasi-judicial basis. Hence the ministerial decision falls outside s. 28 of the *Federal Court Act* and is not subject to review by that court.

Jurisdiction in respect of the decision of the judge stands on a different footing. Acting pursuant to s. 231 of the *Income Tax Act*, he is discharging his institutional role as an impartial arbiter according to the stylized procedures and restraints of a court. The definition of "federal board, commission or other tribunal" in s. 2 of the *Federal Court Act* expressly excludes persons appointed under s. 96 of the *British North America Act, 1867*. Judge Zalev is such a judge. The vexing problem of whether a s. 96 judge is acting under the relevant legislation in the capacity of judge, or as *persona designata*, arose in *Herman v. Deputy Attorney General of Canada*. In reasons for judgment in *Herman*, recently delivered, I sought to canvass the governing authorities, which I will not again attempt. Upon the authorities, I concluded that a judge acts as *persona designata*

mentionné en dernier sera influencée par bien des considérations dont les principales sont l'intérêt public et son devoir d'agent du pouvoir exécutif d'appliquer la Loi de son mieux. La décision de chercher à obtenir l'autorisation de perquisitionner sera commandée par l'intérêt public et l'opportunité, compte tenu de toutes les circonstances. Les pouvoirs exercés par le juge sont judiciaires lorsqu'il examine la décision administrative discrétionnaire du Ministre.

Il serait curieux d'avoir une procédure d'examen avant la présentation d'une demande au juge puisque sans son approbation, toute décision du Ministre d'autoriser la saisie de documents est manifestement sans effet. L'approbation du juge est un moyen de contrôle de la décision du Ministre, tandis que tout autre recours devant un tribunal permet d'examiner celle du juge. C'est à mon avis une interprétation raisonnable du par. 231(4).

Je suis convaincu que la décision du Ministre d'accorder une autorisation en vertu du par. 231(4) de la *Loi de l'impôt sur le revenu* est de nature administrative et qu'en droit, le Ministre n'a aucune obligation d'agir de façon judiciaire ou quasi judiciaire. En conséquence, la décision du Ministre ne tombe pas sous le coup de l'art. 28 de la *Loi sur la Cour fédérale* et n'est pas sujette à examen par cette cour-là.

La question de compétence en ce qui concerne la décision du juge se pose de façon différente. Lorsqu'il agit aux termes de l'art. 231 de la *Loi de l'impôt sur le revenu*, il s'acquitte de son rôle institutionnel en sa qualité d'arbitre impartial conformément aux procédures et contraintes applicables à un tribunal. La définition de «office, commission ou autre tribunal fédéral» à l'art. 2 de la *Loi sur la Cour fédérale* exclut expressément les personnes nommées en vertu de l'art. 96 de l'*Acte de l'Amérique du Nord britannique, 1867*. Le juge Zalev tombe dans cette catégorie. La question controversée de savoir si un juge nommé en vertu de l'art. 96 agit en vertu de la loi pertinente en sa qualité de juge ou de *persona designata* a été soulevée dans l'arrêt *Herman c. Sous-procureur général du Canada*. Dans cet arrêt, rendu récemment, j'ai passé en revue la jurisprudence applica-

only if "exercising a peculiar, and distinct, and exceptional jurisdiction, separate from and unrelated to the tasks which he performs from day-to-day as a judge, and having nothing in common with the Court of which he is a member." A judge does not become *persona designata* merely through the exercise of powers conferred by a statute other than the provincial *Judicature Act* or its counterpart. Given its widest sweep, s. 28 could make subject to review by the Federal Court of Appeal, decisions or orders of provincial federally-appointed judges, pursuant to such federal enactments as the *Criminal Code*, the *Divorce Act*, or the *Bills of Exchange Act*. That could not have been intended.

It would seem to have been the will of Parliament, in enacting the concluding words of the relevant paragraph of s. 2 of the *Federal Court Act*, that ordinarily the acts of federally-appointed provincial judges, pursuant to authority given to them by federal statutes, will not be subject to supervision by the Federal Court of Appeal.

In *Herman*, the order under attack was one made by a s. 96 judge, pursuant to s. 232 of the *Income Tax Act*, and related to solicitor-client privilege. The Court concluded that the judge was acting *qua* judge, and not as *persona designata*. Although there are obvious points of difference, much of the reasoning in *Herman* applies with equal force in the present case leading to the conclusion that Judge Zalev was not a "federal board, commission or other tribunal."

The close functional relation between s. 231 and s. 232 of the *Income Tax Act*, and the decision in *Herman* as to s. 232, suggest that the same result should be reached in respect of the judge acting under s. 231.

In my opinion, the Federal Court of Appeal did not have a right of review in the case at bar. Whether an appeal lies to the provincial courts

ble, ce que je ne vais pas refaire. Me fondant sur la jurisprudence, je suis arrivé à la conclusion qu'un juge agit à titre de *persona designata* seulement s'il exerce «une compétence particulière, distincte, exceptionnelle et indépendante de ses tâches quotidiennes de juge, et qui n'a aucun rapport avec la cour dont il est membre». Un juge ne devient pas *persona designata* du simple fait qu'il exerce des pouvoirs conférés par une loi autre que la loi provinciale régissant la magistrature ou son équivalent. Si l'on donnait à l'art. 28 la portée la plus large, les décisions ou ordonnances de juges provinciaux nommés par le fédéral, rendues conformément à des lois fédérales comme le *Code criminel*, la *Loi sur le divorce* ou la *Loi sur les lettres de change*, seraient soumises à l'examen de la Cour d'appel fédérale. Ce ne peut être le but de cet article.

Il semble qu'en édictant les derniers mots de l'alinéa pertinent de l'art. 2 de la *Loi sur la Cour fédérale*, le Parlement ait voulu qu'ordinairement, les actes des juges provinciaux nommés par le fédéral, conformément aux pouvoirs qui leur sont conférés par des lois fédérales, soient soustraits au pouvoir de surveillance de la Cour d'appel fédérale.

Dans l'affaire *Herman*, l'ordonnance contestée avait été rendue par un juge nommé en vertu de l'art. 96, conformément à l'art. 232 de la *Loi de l'impôt sur le revenu* et avait trait au privilège des communications entre client et avocat. La Cour a jugé que le juge agissait à titre de juge et non de *persona designata*. Malgré des différences évidentes, une grande partie du raisonnement tenu dans l'arrêt *Herman* s'applique en l'espèce et conduit à la conclusion que le juge Zalev n'est pas un «office, commission ou autre tribunal fédéral.»

L'étroite relation fonctionnelle qui existe entre les art. 231 et 232 de la *Loi de l'impôt sur le revenu* et la décision rendue dans l'affaire *Herman* relativement à l'art. 232 suggèrent qu'il faut parvenir au même résultat en ce qui concerne un juge qui agit aux termes de l'art. 231.

A mon avis, la Cour d'appel fédérale n'avait pas de droit d'examen en l'espèce. Je préfère ne pas me prononcer sur la question de savoir si l'autorisation

from the authorization of the Minister and approval of a judge, pursuant to s. 231(4) of the *Income Tax Act*, is a question I would wish to leave open as it does not arise for decision in the present appeal. I would equally wish to leave for another occasion the question whether recourse could be had to replevin, or to one of the prerogative writs.

I would allow the appeal, set aside the judgment of the Federal Court of Appeal, dismiss the respondent's application with costs and restore the decision or order of the Director-General, Special Investigations Directorate, Department of National Revenue, Taxation, and Judge Carl Zalev. Pursuant to the terms upon which leave to appeal to this Court was granted, the costs of the application for leave to appeal, and of the appeal, should be paid by the appellant to the respondent on a solicitor and client basis.

Appeal allowed.

Solicitor for the appellant: R. Tassé, Ottawa.

Solicitors for the respondent: Wilson, Barnes, Walker, Montello, Beach & Morga, Windsor.

du Ministre et l'approbation d'un juge, conformément au par. 231(4) de la *Loi de l'impôt sur le revenu*, peuvent faire l'objet d'un appel devant les cours provinciales, car cette question n'est pas soulevée par ce pourvoi. Je préfère également que soit tranchée en une autre occasion la question de savoir si l'on peut recourir à une demande de mainlevée ou à l'un des brefs de prérogative.

Je suis d'avis d'accueillir l'appel, d'infirmier l'arrêt de la Cour d'appel fédérale, de rejeter avec dépens la demande de l'intimée et de rétablir la décision ou ordonnance du Directeur général de la Direction des enquêtes spéciales du ministère du Revenu national, Impôt, et du juge Carl Zalev. Conformément aux conditions de l'autorisation d'interjeter appel devant cette Cour, l'appelant paiera les dépens de l'intimée pour la requête en autorisation d'appel et ceux de l'appel en cette Cour, comme entre avocat et client.

Pourvoi accueilli.

Procureur de l'appelant: R. Tassé, Ottawa.

Procureurs de l'intimée: Wilson, Barnes, Walker, Montello, Beach & Morga, Windsor.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Carrier Sekani Tribal Council v.
British Columbia (Utilities Commission),
2009 BCCA 67***

Date: 20090218
Docket: CA035715; CA035791

Between:

The Carrier Sekani Tribal Council

Appellant
(Applicant/Intervenor)

And

**The British Columbia Utilities Commission and
British Columbia Hydro and Power Authority and Alcan Inc.
and The Attorney General of British Columbia**

Respondents
(Respondents)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

G. J. McDade, Q.C.

Counsel for the Appellant

C. W. Sanderson, Q.C. and K. B. Bergner

Counsel for the Respondent, British
Columbia Hydro and Power Authority

D. W. Burse and R. D. W. Dalziel

Counsel for the Respondent,
Rio Tinto Alcan Inc.

P. E. Yearwood and J. J. Oliphant

Counsel for the Respondent,
Attorney General of British Columbia

Place and Date of Hearing:

Vancouver, British Columbia
November 24 and 25, 2008

Place and Date of Judgment:

Vancouver, British Columbia
February 18, 2009

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Madam Justice Huddart
The Honourable Mr. Justice Bauman

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This is one of those cases foreseen by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, where the broad general principles of the Crown's duty to consult and, if necessary, accommodate Aboriginal interests are to be applied to a concrete set of circumstances.

[2] Consultation arises here in relation to the decision of British Columbia Hydro and Power Authority (B.C. Hydro) to buy electricity from Rio Tinto Alcan Inc. (Alcan) which is surplus to its smelter requirements, in accordance with an Energy Purchase Agreement (EPA) made in 2007.

[3] For the EPA to be enforceable, B.C. Hydro needs the approval of the British Columbia Utilities Commission (Commission) under s. 71 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473.

[4] The Carrier Sekani Tribal Council (the appellant) sought to be heard in the s. 71 proceeding before the Commission on the issue of whether the Crown fulfilled its duty to consult before B.C. Hydro entered into the EPA.

[5] The appellant's interest (asserted both in a pending action for Aboriginal title and within the treaty process) is in the water and related resources east of the discharge of the Nechako Reservoir created by Alcan in the early 1950s to drive its generators in Kemano for use at the Kitimat aluminum smelter.

[6] The appellant claims that the diversion of water for Alcan's use is an infringement of its rights and title and that no consultation has ever taken place.

[7] The Commission considered the appellant's request as a reconsideration of its decision, made prior to the appellant's involvement, that consultation was not relevant and, thus, not within the scope of its proceeding and oral hearing (the Scoping Order). It was held not to be relevant then because the only First Nations groups involved at that point were the Haisla First Nation and the Haisla Hereditary Chiefs, who did not press the issue of consultation.

[8] The Commission addressed the reconsideration in two phases. At Phase I, the Commission "concluded that the CSTC [Carrier Sekani Tribal Council] established a prima facie case sufficient to warrant a reconsideration of the Scoping Order", and that the ground for reconsideration was "the impacts on the water flows arising from the 2007 EPA": Reasons for Decision, "Impacts on Water Flows", 29 November 2007 (Letter No. L-95-07). Within Phase I, the Commission conducted a fact-finding hearing into water flow impacts and concluded as follows:

The Commission Panel accepts the submissions of counsel for BC Hydro regarding the determinations that should be made at this time in the proceeding. The Commission Panel concludes as a matter of fact that:

- a) the 2007 EPA will have no impact on the volume, timing or source of water flows into the Nechako River;
- b) the 2007 EPA will not change the volume of water to be released into the Kemano River; and
- c) the 2007 EPA may cause reservoir elevations to vary approximately one or two inches which will be an imperceptible change in the water levels of the Nechako Reservoir. This change to reservoir levels will not affect water flows other than the timing of releases to the Kemano River.

[9] Then, in Phase II, the Commission received argument based on, *inter alia*, the facts found as described above and on certain assumptions built into the question framed by the Commission as follows:

Assuming there has been a historical, continuing infringement of aboriginal title and rights and assuming there has been no consultation or accommodation with CSTC on either the historical, continuing infringement or the 2007 EPA, would it be a jurisdictional error for the Commission to accept the 2007 EPA?

[10] On December 17, 2007, the Commission dismissed the appellant's reconsideration motion for reasons given in the overall s. 71 decision, January 29, 2008.

[11] In brief, the Commission rejected the appellant's motion because it found as a fact that since there were no "new physical impacts" created by the EPA, the duty to consult was not triggered:

... assuming a failure of the duty of consultation for the historical, continuing infringement and no consultation on the 2007 EPA, the Commission Panel concludes that acceptance of the 2007 EPA is not a jurisdictional error because a duty to consult does not arise by acceptance of the 2007 EPA and because a failure of the duty of consultation on the historical, continuing infringement cannot be relevant to acceptance of the 2007 EPA where there are no new physical impacts.

[12] Among other points taken in the appeal, the appellant says that the Commission was wrong in narrowing the inquiry to "new physical impacts" and ignoring other "non-physical impacts" affecting the appellant's interests.

[13] But of greater importance from my viewpoint as a reviewing judge is the Commission's decision not to decide whether B.C. Hydro had a duty to consult. It decided that it did not need to address that question because of its conclusion on the triggering issue. As I will explain later, I consider that to be an unreasonable disposition for, amongst other reasons, the fact that B.C. Hydro, as a Crown corporation, was taking commercial advantage of an assumed infringement on a massive scale, without consultation. In my view, that is sufficient to put the Commission on inquiry whether the honour of the Crown was upheld in the making of the EPA.

[14] There is an institutional dimension to this error. The Commission has demonstrated in several cases an aversion to assessing the adequacy of consultation. In three other decisions, the Commission deferred the consultation question to the environmental assessment process: *In the Matter of British Columbia Transmission Corporation, An Application for a Certificate of Public Convenience and Necessity for the Vancouver Island Transmission Reinforcement Project*, B.C.U.C. Decision, 7 July 2006, Commission Order No. C-4-06; *In the Matter of British Columbia Hydro and Power Authority, Application for a Certificate of Public Convenience and Necessity for Revelstoke Unit 5*, B.C.U.C. Decision, 12 July 2007, Commission Order No. C-8-07; *Re British Columbia Transmission Corporation Application for a Certificate of Public Convenience and Necessity for the Interior to Lower Mainland Transmission Project*, First Nations Scoping Issue, B.C.U.C. Letter Decision No. L-6-08, 5 March 2008. (The appeal from the last decision (*Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, CA035864) was heard together with the appeal in the present case.)

[15] The Commission is a quasi-judicial tribunal with authority to decide questions of law. As

such, it has the jurisdiction, and in my opinion the obligation, to decide the constitutional question of whether the duty to consult exists and, if so, whether it has been discharged: *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585. That obligation is not met by deciding, as a preliminary question, an adverse impact issue that properly belongs within an inquiry whether a duty is owed and has been fulfilled.

[16] B.C. Hydro may be able to defend the Crown's honour on a number of powerful grounds, including the impact question, but this should happen in a setting where the tribunal accepts the jurisdiction to make a decision on the duty to consult.

Factual Background

[17] I have said that the infringement, if such it is, associated with the Alcan/Kemano Power Project is on a massive scale. The project involved reversing the flow of a river and the creation of a watershed that discharges west into a long tunnel through a mountain down to sea level at Kemano where it drives the generators at the power station and then flows into the Kemano River. To the east the watershed discharges into the Nechako River which eventually joins the Fraser River at Prince George. The westerly diversion is manmade. The natural water flows into the Nechako River system were altered by the project with implications for fish and wildlife, especially salmon. Alcan holds a water licence in perpetuity for the reservoir. It is obliged by the licence and an agreement made in 1987 settling litigation involving the Provincial and Federal Governments to maintain water flows that meet specifications for migratory fish.

[18] At the outset of the project in the late 1940s, Alcan envisioned a smelter at Kitimat and power station at Kemano roughly twice their present size. The water licence and related permits for the Nechako Reservoir were issued provisionally with the idea that when the plants were enlarged as planned, the licence would be made permanent.

[19] In the course of an expansion project, sometimes referred to as Kemano II, the Government of British Columbia changed its mind about allowing the full utilization of the reservoir. This shut down the project and prompted a law suit by Alcan. The parties settled the dispute in 1997 on terms which included a power deal whereby the Province would supply Alcan should it enlarge the smelter and need more electricity. The settlement also granted Alcan the water licence on a permanent basis.

[20] Alcan has been selling its excess power since the beginning of its operations, at first directly to neighbouring industries and communities, and later to those customers through the B.C. Hydro grid and to B.C. Hydro for general distribution, and to Powerex Corporation (B.C. Hydro's exporting affiliate).

[21] The Commission found as a fact in the decision under appeal that (1) Alcan can sell its electricity to anyone – B.C. Hydro is not the only potential customer; and (2) water flows will not be influenced by the EPA.

[22] In written submissions on the motion for reconsideration, the appellant articulated a number of ways in addition to "new physical impacts" where the EPA might affect their interests:

18. There are many aspects of the EPA which demonstrate that it is an important decision in relation to the infringements of the Intervenor's rights and title, within the context set out by recent caselaw. This decision:

- (a) Approves an EPA that will confirm and mandate extended electricity sales for a very long time – to 2034;
 - (b) Approves the sale to BC Hydro of all electricity which is surplus to Alcan’s power needs – and therefore authorizes the sale of power resulting from diversions of water that are causing existing impacts and infringements;
 - (c) Removes or affects the flexibility to release additional water, because that power is now the subject of an agreement with BC Hydro;
 - (d) Changes the ‘operator’ – by creating a “Joint Operating Committee” (s.4.13), by authorizing B.C. Hydro to ‘jointly develop’ the reservoir operating model (s.4.17), and by requiring B.C. Hydro approval for any amendments to operating agreements “which constrain the availability of Kemano to generate electricity” (App.1, 70 “Operating Constraints”);
 - (e) Changes in objective – this agreement confirms that power will now be devoted to long-term ‘capacity’ for B.C. Hydro (Even if there had been a ‘compelling social objective’ to grant the water to Alcan (in 1950) for the production of aluminum, that objective is no longer operative under this agreement. A new ‘objective’ requires further consultation.);
 - (f) Creates added incentives to maximize power sales (rather than release water for conservation);
 - (g) Provides incentives to Alcan to ‘optimize’ efficiency of their operations (meaning additional power sales);
 - (h) Encourages sales (i.e. diversion of water) through financial incentives in the most significant low water months (January to March);
 - (i) Affects the complexity required for proper environmental management – e.g. temperature, variable flows, timing, over-spills etc. – in order to accommodate BC Hydro sales;
 - (j) Approves an agreement that contains no positive conditions protecting fish and First Nations rights and which will preclude (by financial disincentives) those conditions from being added later;
 - (k) Fails to include First Nations in any way in management decisions.
19. If, despite the jurisprudence pointing to the contrary, the BC Utilities Commission is not prepared to examine the impacts of existing operations, and instead views the EPA solely as a financial model, there are nevertheless clear impacts on the Intervenor’s interests arising from this agreement:
- (a) Increases the cost of compensation to Alcan;
 - (b) Any change to the 1987 Settlement Agreement flows will be more difficult to achieve;
 - (c) Additional sales (and therefore diversions) may well occur

(evidence of other purchasers – under all conditions and at all times of the year – is speculative).

[Emphasis in original.]

[23] To the extent that the Commission addressed those points, it did so broadly by distinguishing between issues relating to the use of power and the production of power and by noting that its authority under s. 71 is limited:

There may be steps contemplated by the Crown that have no new impacts that would nevertheless trigger the duty to consult because of a historical, continuing infringement. However, a section 71 review does not approve, transfer or change control of licenses or authorization and therefore where there are no new physical impacts acceptance of a section 71 filing would not be a jurisdictional error. That is, it is the combination of no new physical impacts together with the limited scope of a section 71 review that answers the principal question – there is no jurisdictional error in this Decision. Alcan states: “The Crown’s fiduciary duty arises in specific situations, in particular, when the Crown assumes discretionary control over specific Aboriginal interests” (Alcan Submission, para. 5.3). The decision to accept or declare unenforceable the 2007 EPA under section 71 of the Act does not affect underlying water resources or any CSTC aboriginal interests there may be in that resource (Alcan Submissions, para. 5.5).

The CSTC submits:

“The 2007 EPA will also constitute a significant change in use (from power produced for aluminum smelting purposes to power for general provincial consumption) which, if approved by the BCUC, will amount to approval by the Crown of that change in use – without consultation” (CSTC Submission, para. A6).

The 2007 EPA may change the use of power in the sense suggested by the CSTC. However, such change in the use of the power could be effected by Alcan without the 2007 EPA and by means that are beyond the authority of the Commission. Nevertheless, the important question is whether or not there is a change in water flows, not whether or not there is a change in use of power. And, as found by the Commission in Letter No. L-95-07, water flows will not change.

Relevant Enactments

[24] The Commission’s authority regarding energy supply contracts comes from s. 71 of the *Utilities Commission Act*, which, including amendments effective May 1, 2008, now reads:

71. (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must
- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
 - (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale

of natural gas unless the sale is to a public utility.

- (2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.
- (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
 - (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
 - (c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility,
 - (e) the quantity of the energy to be supplied under the contract,
 - (f) the availability of supplies of the energy referred to in paragraph (e),
 - (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
 - (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).
- (2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
- (2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.
- (2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.
- (2.5) In considering the public interest under subsection (2.4), the commission must consider
 - (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1,
 - (c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and
 - (d) the interests of persons in British Columbia who receive or may receive service from the public utility.
- (2.6) If the commission issues an order under subsection (2.4), the

commission may not issue an order under subsection (3) with respect to a contract

- (a) entered into exclusively on the terms and conditions, and
 - (b) as a result of the process referred to in subsection (2.3).
- (3) If subsection (2) applies, the commission may
- (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
 - (b) make any other order it considers advisable in the circumstances.
- (4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.
- (5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

[25] Provisions of that Act bearing on the relationship between the British Columbia Government and the Commission include:

- 3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.
- (2) The commission must comply with a direction issued under subsection (1), despite
- (a) any other provision of
 - (i) this Act, except subsection (3) of this section, or
 - (ii) the regulations, or
 - (b) any previous decision of the commission.
- (3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly
- (a) declare an order or decision of the commission to be of no force or effect, or
 - (b) require the commission to rescind an order or a decision.

* * *

5 (0.1) In this section, "**minister**" means the minister responsible for the

administration of the *Hydro and Power Authority Act*.

- (1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.
- (2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.
- (3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.
- (4) The commission, in accordance with subsection (5), must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period.
- (5) An inquiry under subsection (4) must begin
 - (a) by March 31, 2009, and
 - (b) at least once every 6 years after the conclusion of the previous inquiry,
 unless otherwise ordered by the Lieutenant Governor in Council.
- (6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).
- (7) The minister may declare, by regulation, that the commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection (4).
- (8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or proceeding held during the period specified in the regulation.
- (9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

* * *

71 ...

- (2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider
 - (a) the government's energy objectives, ...

[26] The provisions of the *Utilities Commission Act* dealing with the Commission's jurisdiction and appeals are:

79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

* * *

99 The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

* * *

101 (1) An appeal lies from a decision or order of the commission to the Court of Appeal with leave of a justice of that court.

(2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.

(3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.

(4) The commission and the Attorney General may be heard by counsel on the appeal.

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

* * *

105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

[27] B.C. Hydro's relationship with government is defined in the *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, as follows:

3 (1) The authority is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government.

(2) The Minister of Finance is the fiscal agent of the authority.

(3) The authority, on behalf of the government, may contract in its corporate name without specific reference to the government.

4 (1) The Lieutenant Governor in Council appoints the directors of the

authority who hold office during pleasure.

- (2) The Lieutenant Governor in Council must appoint one or more of the directors to chair the authority.
 - (3) A chair or other director must be paid by the authority the salary, directors' fee and other remuneration the Lieutenant Governor in Council determines.
- 5 The directors must manage the affairs of the authority or supervise the management of those affairs, and may
- (a) exercise the powers conferred on them under this Act,
 - (b) exercise the powers of the authority on behalf of the authority, and
 - (c) delegate the exercise or performance of a power or duty conferred or imposed on them to anyone employed by the authority.

[28] The authority to purchase power is found in s. 12(1)(m) of the *Hydro and Power Authority Act*:

- 12 (1) Subject to the approval of the Lieutenant Governor in Council, which may be given by order of the Lieutenant Governor in Council, the authority has the power to do the following:

* * *

- (m) purchase power from or sell power to a firm or person;

[29] Section 35 of the *Constitution Act, 1982* reads:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Issues

[30] The appellant frames the grounds for appeal in its factum as follows:

22. The appellant submits that the Commission committed errors of law and jurisdiction in determining:
- a) That the failure of the Crown to consult and, if necessary, accommodate the member tribes of the CSTC was not relevant to the proceeding;
 - b) to refuse to allow evidence or cross-examination on the on-going

- existing impacts of the operations of the Nechako reservoir and the Kemano Project on the aboriginal rights and title of the member tribes of the CSTC; and
- c) that the acceptance of the EPA between BC Hydro and Alcan does not trigger a duty to consult and, if necessary accommodate the member tribes of the CSTC.

[31] The Attorney General's factum identifies the question of law in the appeal as follows:

23. The Attorney General says that the question of law in this appeal is whether the Commission correctly refused to amend the Scoping Order to consider the adequacy of Crown consultation with First Nations regarding the impact of the Kemano System upon their asserted Aboriginal rights. In particular:

Is the duty to consult triggered by the Crown contemplating conduct which does not adversely impact claimed Aboriginal rights, but is nonetheless related to historical Crown conduct which does impact claimed Aboriginal rights?

[32] Alcan poses a threshold question about the Commission's jurisdiction and a further question on the merits:

35. This proposition [the appellant's contention that the Commission had a duty to ensure consultation took place] raises a threshold question about the jurisdiction of the Commission:

In a s. 71 review of an energy supply contract, does the Commission have the jurisdiction to decide whether the Crown's duty to consult under s. 35 of the *Constitution Act, 1982* arises and has been met in relation to that contract?

36. If the answer is "no", the appeal must be dismissed, because the CSTC's complaint about consultation will have been taken to the wrong forum. If the answer is "yes", then this Court must address a second question:

Did the 2007 EPA or the Commission's review of the 2007 EPA give rise to a duty to consult under s. 35 of the *Constitution Act, 1982*?

[33] B.C. Hydro's breakdown of the issues is this:

BC Hydro submits that the primary issue on appeal is as follows:

1. Did the review conducted by the BCUC in respect of the 2007 EPA pursuant to s. 71 of the UCA amount to the Crown contemplating conduct that might adversely affect the CSTC's aboriginal interests so as to give rise to the duty to consult with the CSTC?

2. If and only if the primary question is answered in the affirmative, then BC Hydro submits that there is a secondary issue on appeal as follows:

If the answer to question 1 is yes, does the UCA empower and require the Commission to adjudicate a dispute between the Crown and the CSTC regarding the sufficiency of consultation to discharge the Crown's obligation in respect of the original authorization, construction and

operation of the Nechako Reservoir before the BCUC can exercise its jurisdiction under s. 71?

3. If and only if the secondary question is answered in the affirmative, then BC Hydro submits that there is a third issue on appeal as follows:

If the answer to both questions 1 and 2 is yes, what remedy is appropriate?

[34] I will analyze the issues according to this framework:

- A. Was the Commission, in reviewing the enforceability of the EPA under s. 71 of the *Utilities Commission Act*, obliged to decide whether the Crown had a duty to consult and whether it fulfilled the duty?
- B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question defined too strictly and in terms which did not include all of the interests asserted by the appellant?
- C. What is the appropriate remedy if the appellant establishes a reviewable error?

Discussion

A. The Power and Duty to Decide

1. The Power

[35] Under the heading of power to decide, I will discuss three propositions:

- (a) As a quasi-judicial tribunal with authority to decide questions of law, the Commission is competent to decide relevant constitutional questions, including whether the Crown has discharged a duty to consult.
- (b) Section 71 of the *Utilities Commission Act* mandates review of the enforceability of an energy purchase agreement according to factors which include the public interest. This agreement engages the honour of the Crown in its dealings with Aboriginal peoples.
- (c) The Commission has the capacity to address the adequacy of consultation.

(a) Competency

[36] The Commission has not explicitly declared that it has no jurisdiction to decide a consultation issue. But since the Commission has shown a disinclination to grapple with the issue, and the proponents of the EPA have questioned whether it lies within the Commission's statutory mandate, I think the court should settle the point.

[37] In *Paul v. British Columbia (Forest Appeals Commission)*, the Supreme Court of Canada decided, at para. 38, "there is no principled basis for distinguishing s. 35 rights from other constitutional questions."

[38] Moving on to whether administrative tribunals have the power to decide constitutional law questions, the Court in *Paul* stated, at para. 39:

The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision.

[39] I take those statements to be of broad application and not limited to the facts particular to *Paul*. In my opinion, they apply to the instant case, notwithstanding that the determination for the Forest Appeals Commission would have had a more direct effect on Mr. Paul's use of the forest resource than would the effects of B.C. Hydro's involvement in the EPA on the appellant's interests in the water resource.

[40] It can be inferred from the *Utilities Commission Act* that the Commission has the authority to decide relevant questions of law. Section 79, "findings of fact conclusive", implies that the right to appeal under s. 101 is restricted to questions of law or jurisdiction. Further, consideration of the exclusive jurisdiction clause in s. 105 indicates that the Legislature must have empowered the Commission to decide questions of law, otherwise the appellate review would be meaningless.

[41] The Commission is therefore presumed to have the jurisdiction to decide relevant constitutional questions, including whether the Crown has a duty to consult and whether it has fulfilled the duty. These are issues of law arising from Part II of the *Constitution Act, 1982*, ss. 35 and 35.1 that the Commission is competent to decide.

(b) Construction of Section 71

[42] Section 71 of the *Utilities Commission Act* focuses on whether the EPA is in the public interest. I think the respondents advance too narrow a construction of public interest when they define it solely in economic terms. How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry. In saying that, I do not lose sight of the fact that the regulatory scheme revolves around the economics of energy: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, and that Aboriginal law is not in the steady diet of the Commission. But there is no other forum more appropriate to decide consultation issues in a timely and effective manner. As I will develop later, the rationale for the duty to consult, explained in *Haida Nation v. British Columbia (Minister of Forests)*, discourages resort to the ordinary courts for injunctive relief and encourages less contentious measures while reconciliation is pursued. It would seem to follow that the appropriate forum for enforcement of the duty to consult is in the first instance the tribunal with jurisdiction over the subject-matter – here the Commission in relation to the EPA.

[43] B.C. Hydro cites this Court's decision in *British Columbia Hydro & Power Authority v. British Columbia (Utilities Commission)* (1996), 20 B.C.L.R. (3d) 106, as support for the argument that s. 71 should not be interpreted to include the power to assess adequacy of consultation. It was held in that case that the governing statute, then the *Utilities Commission Act*, S.B.C. 1980, c. 60, did not confer jurisdiction on the Commission to enforce as mandatory the guidelines it developed on resource planning. One of the guidelines required public consultation, the inadequacy of which, as perceived by the Commission, led it to issue

directions to B.C. Hydro in connection with an application for a certificate of public convenience and necessity. The Court examined the contested power to enforce guidelines against the language of the *Act*, its purpose and object, and found that no explicit provision enabled the Commission to promulgate mandatory guidelines which intruded on the management of the utility and none should be implied.

[44] On the strength of that case, B.C. Hydro turns to *Dunsmuir v. New Brunswick*, 2008 SCC 9, 291 D.L.R. (4th) 577, for the following general proposition that it says applies to the present matter:

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution.

Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[29] Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234, 127 D.L.R. (3d) 1; also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, 223 D.L.R. (4th) 599, at para. 21.

[Emphasis added.]

[45] I do not accept B.C. Hydro's argument. The rule in question sought to be enforced through proceedings before the Commission arises not as an internal prescription, as in the *B.C. Hydro v. British Columbia (Utilities Commission)* decision just discussed, but from the *Constitution* itself. *Haida*, at paras. 60-63, contemplates review of consultation by administrative tribunals. It is not necessary to find an explicit grant of power in the statute to consider constitutional questions; so long as the Legislature intended that the tribunal decide questions of law, that is sufficient.

[46] It is necessary to address a case cited by all the respondents as standing for the proposition that a tribunal's power to decide the adequacy of consultation requires an explicit provision in the constituent statute. In *Dene Tha' First Nation v. Energy and Utilities Board (Alta.)*, 2005 ABCA 68, 363 A.R. 234, the Alberta Court of Appeal held that the Board's refusal to accept an intervention in the matter of licences for well drilling and access roads was not reviewable as it was based on a factual finding that the First Nation seeking to intervene had not demonstrated an adverse impact. The court said it had no jurisdiction to review findings of fact. Therein lies the *ratio decidendi* of the judgment. The court noted at para. 24 that it was common ground that neither the Utility nor the Board had a duty to consult. As to the duty on the Crown, the court said, *obiter dicta*:

[28] A suggestion made to us in argument, but not made to the Board, was that

the Board had some supervisory role over the Crown and its duty to consult on aboriginal or treaty rights. No specific section of any legislation was pointed out, and we cannot see where the Board would get such a duty. We will now elaborate on that.

[47] The court went on to record that consultation was not addressed at the Board level. I regard the above quoted remarks as having been made *en passant* in an oral judgment rather than a definitive judicial opinion made with the benefit of full argument. With respect, I do not find it persuasive authority for the proposition advanced by the respondents in the present case.

(c) Capacity to decide

[48] I turn to consider the Commission's capacity to decide. As I understand Alcan's submission, the issues surrounding the consultation duty are so remote from the Commission's usual terms of reference that the Commission should not be expected to decide them. Alcan argues that the appellant should go to court for redress. I quote from paras. 88 and 89 of Alcan's factum:

88. ... to accept the CSTC's invitation [to entertain the consultation issue] would mire the Commission in complex questions of fact and law to which its mandate, statutory powers and remedies are ill-suited.

89. In the end, the argument comes full circle: the CSTC are seeking redress for their grievances in the wrong forum.

[49] *Paul* rejected the argument that Aboriginal law issues may be too complex and burdensome for an administrative tribunal, at para. 36:

To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.

[50] I heard nothing in the appeal which causes me to doubt the capacity of the Commission to hear and decide the consultation issue. Expressed in more positive terms, I am confident that the Commission has the skill, expertise and resources to carry out the task.

2. The Duty to Decide

[51] Not only has the Commission the ability to decide the consultation issue, it is the only appropriate forum to decide the issue in a timely way. Furthermore, the honour of the Crown obliges it to do so. As a body to which powers have been delegated by the Crown, it must not deny the appellant timely access to a decision-maker with authority over the subject matter.

[52] The process of consultation envisaged in *Haida* requires discussion at an early stage of a government plan that may impact Aboriginal interests, before matters crystallize, so that First Nations do not have to deal with a plan that has become an accomplished fact. *Haida* said this on the question of timing, at para. 35:

But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, per Dorgan J.

As to timing, see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 at para. 3:

... the principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples.

[53] If First Nations are entitled to early consultation, it logically follows that the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation. Otherwise, the First Nations are driven to seek an interlocutory injunction, which, according to *Haida* at para. 14, is often an unsatisfactory route:

Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the *Haida*. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

[54] While the Commission is a quasi-judicial tribunal bound to observe the duty of fairness and to act impartially, it is a creature of government, subject to government direction on energy policy. The honour of the Crown requires not only that the Crown actor consult, but also that the regulatory tribunal decide any consultation dispute which arises within the scheme of its regulation. It is useful to remember the relationship between government and administrative tribunals generally.

[55] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, the issue was the independence of

members of the Liquor Appeal Board given their terms of appointment. The Court contrasted the ordinary courts with administrative tribunals in the following analysis at para. 24:

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

[56] No one suggests the Commission has a duty itself to consult: *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 at 183. The obligation arising from its status as a Crown entity is to grasp the nettle and decide the consultation dispute.

[57] The honour of the Crown as a basis for the duty to decide is compelling on the facts here: one Crown entity, the responsible Ministry, granted the water licence, allegedly infringing Aboriginal interests without prior consultation; another Crown entity, B.C. Hydro, purchases electricity generated by the alleged infringement on a long-term contract; and a third, the tribunal, dismisses the appellant's claim for consultation on a preliminary point.

B. Did the Commission commit a reviewable error in disposing of the consultation issue on a preliminary or threshold question?

[58] In this part, I identify the appropriate standard of review and apply the standard to the decision under appeal. I conclude that (1) the standard is reasonableness; (2) the Commission set an unreasonably high threshold for the appellant to meet; and (3) it took too narrow a view of the Aboriginal interests asserted.

1. Standard of Review

[59] The appellant argues that the Commission has to be correct in disposing of constitutional issues such as those that arise here. The respondents submit the standard is reasonableness.

[60] I accept the respondents' position. The Commission's decision involves matters of fact, some assumed and others actually found, some questions of mixed fact and law and procedure. While I think the Commission took the wrong approach to the dispute, I cannot isolate a pure question of law for review on a correctness standard. Guidance on the standard is provided by *Haida*, at para. 61:

On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question

in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

2. Reasoning Error

[61] In my respectful judgment, the Commission wrongly decided something as a preliminary matter which properly belonged in a hearing of the merits. The logic flaw was in predicting that consultation could have produced no useful outcome. Put another way, the Commission required a demonstration that the appellant would win the point as a precondition for a hearing into the very same point.

[62] I do not say that the Commission would be bound to find a duty to consult here. The fault in the Commission's decision is in not entertaining the issue of consultation within the scope of a full hearing when the circumstances demanded an inquiry. I refer to the assumed facts, namely, that there is an infringement without consultation and on the unquestioned fact that B.C. Hydro, a Crown agent, takes advantage of the power produced by the infringement by signing the EPA. In my opinion, this is enough to clear any reasonable hurdle. As stated in *Mikisew*, at para. 55:

The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty.

[Emphasis added.]

Whether the EPA triggered a duty is for a hearing on the merits.

[63] Deciding whether a trigger occurred at the threshold becomes all the more problematic when the range of issues presented by the appellant went beyond the "new physical impacts" test formulated by the Commission. The process deprived the appellant the opportunity to develop a case for the non-physical impacts listed in their written application for reconsideration and reproduced earlier at para. 22 of these reasons. For instance, the decision in question does not deal in any substantive way with the appellant's allegations that the EPA tends to perpetuate an historical infringement and to make less likely a satisfactory resolution of the appellant's claimed right to manage the water resource in the future. They say the power sale has cemented the current regime for many years in the future. Arguably, the surface facts would seem to indicate that B.C. Hydro will at least participate in the infringement.

[64] Again, these points may not carry the day for the appellant, but the appellant should have had the opportunity to develop them.

[65] Finally, the consultation duty is not a concept that lends itself to hard-edged tests. The trigger formula in *Haida* is to be applied within the proceeding, not on a threshold inquiry. The duty is to discuss, not necessarily to agree or to make compromises. It is to be open to accommodation, if necessary. The discussion itself has intrinsic value as a tool of reconciliation. It is not always possible to say in advance that consultation would be either productive or futile – the Crown may be influenced by the Aboriginal perspective in the way it carries out a project. At the very least, the First Nation will have had a chance to put its views forward.

[66] In reviewing the history of the duty to consult, the Court in *Haida* said, at para. 24:

The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

[67] According to *Haida*, at para. 38, the consultation may advance the goal of reconciliation by improving the relationship between the Crown and First Nations:

I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

[Emphasis added.]

[68] In summary, I would allow the appeal on the ground that the Commission unreasonably refused to include the consultation issue in the scope of the proceeding and oral hearing.

Remedy

[69] As I have indicated, the merits of the consultation issue are for the Commission to decide in the first instance. The issue should be remitted to it for consideration. The order I would make is in terms similar to those suggested by B.C. Hydro in the event the appeal is allowed:

THAT the proceeding identified as "Re: British Columbia Hydro and Power Authority Project No. 3698475/Order No. G-100-07 Filing of 2007 Electricity Purchase Agreement with RTA as an Energy Supply Contract Pursuant to section 71" be re-opened for the sole purpose of hearing evidence and argument on whether a duty to consult and, if necessary, accommodate the appellant exists and, if so, whether the duty has been met in respect of the filing of the

2007 EPA.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Huddart”

I agree:

“The Honourable Mr. Justice Bauman”

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004
SCC 73

**Minister of Forests and Attorney General of British Columbia
on behalf of Her Majesty The Queen in Right of the Province
of British Columbia**

Appellants

v.

**Council of the Haida Nation and Guujaaw, on their own behalf
and on behalf of all members of the Haida Nation**

Respondents

and between

Weyerhaeuser Company Limited

Appellant

v.

**Council of the Haida Nation and Guujaaw, on their own behalf
and on behalf of all members of the Haida Nation**

Respondents

and

**Attorney General of Canada, Attorney General of Ontario,
Attorney General of Quebec, Attorney General of Nova Scotia,
Attorney General for Saskatchewan, Attorney General of Alberta,
Squamish Indian Band and Lax-kw'alaams Indian Band,
Haisla Nation, First Nations Summit, Dene Tha' First Nation,
Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business
Council of British Columbia, Aggregate Producers Association
of British Columbia, British Columbia and Yukon Chamber of Mines,
British Columbia Chamber of Commerce, Council of Forest
Industries, Mining Association of British Columbia,
British Columbia Cattlemen's Association and
Village of Port Clements**

Interveners

Indexed as: Haida Nation v. British Columbia (Minister of Forests)

Neutral citation: 2004 SCC 73.

File No.: 29419.

2004: March 24; 2004: November 18.

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

on appeal from the court of appeal for british columbia

*Crown — Honour of Crown — Duty to consult and accommodate
Aboriginal peoples — Whether Crown has duty to consult and accommodate
Aboriginal peoples prior to making decisions that might adversely affect their as yet
unproven Aboriginal rights and title claims — Whether duty extends to third party.*

For more than 100 years, the Haida people have claimed title to all the lands of Haida Gwaii and the waters surrounding it, but that title has not yet been legally recognized. The Province of British Columbia issued a “Tree Farm License” (T.F.L. 39) to a large forestry firm in 1961, permitting it to harvest trees in an area of Haida Gwaii designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co. The Haida challenged in court these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. They asked that the replacements and transfer be set aside. The chambers judge dismissed the

petition, but found that the government had a moral, not a legal, duty to negotiate with the Haida. The Court of Appeal reversed the decision, declaring that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida with respect to harvesting timber from Block 6.

Held: The Crown's appeal should be dismissed. Weyerhaeuser Co.'s appeal should be allowed.

While it is open to the Haida to seek an interlocutory injunction, they are not confined to that remedy, which may fail to adequately take account of their interests prior to final determination thereof. If they can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue other available remedies.

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might

adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that s. 35 of the *Constitution Act, 1982*, demands.

The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

Third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples.

Finally, the duty to consult and accommodate applies to the provincial government. At the time of the Union, the Provinces took their interest in land subject

to any interest other than that of the Province in the same. Since the duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union, the Province took the lands subject to this duty.

The Crown's obligation to consult the Haida on the replacement of T.F.L. 39 was engaged in this case. The Haida's claims to title and Aboriginal right to harvest red cedar were supported by a good *prima facie* case, and the Province knew that the potential Aboriginal rights and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. T.F.L. decisions reflect strategic planning for utilization of the resource and may have potentially serious impacts on Aboriginal rights and titles. If consultation is to be meaningful, it must take place at the stage of granting or renewing T.F.L.'s. Furthermore, the strength of the case for both the Haida's title and their right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may also require significant accommodation to preserve the Haida's interest pending resolution of their claims.

Cases Cited

Applied: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010;
referred to: *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Marshall*, [1999] 3 S.C.R. 456; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Gladstone*, [1996] 2 S.C.R. 723; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and*

Immigration), [1999] 2 S.C.R. 817; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45, aff'd [1999] 4 C.N.L.R. 1; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *R. v. Côté*, [1996] 3 S.C.R. 139; *R. v. Adams*, [1996] 3 S.C.R. 101; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

Statutes and Regulations Cited

Constitution Act, 1867, s. 109.

Constitution Act, 1982, s. 35.

Forest Act, R.S.B.C. 1996, c. 157.

Forestry Revitalization Act, S.B.C. 2003, c. 17.

Authors Cited

Concise Oxford Dictionary of Current English, 9th ed. Oxford: Clarendon Press, 1995, "accommodate", "accommodation".

Hunter, John J. L. "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction". Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000.

Isaac, Thomas, and Anthony Knox. “The Crown’s Duty to Consult Aboriginal People” (2003), 41 *Alta. L. Rev.* 49.

Lawrence, Sonia, and Patrick Macklem. “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000), 79 *Can. Bar Rev.* 252.

New Zealand. Ministry of Justice. *A Guide for Consultation with Māori*. Wellington: The Ministry, 1997.

APPEALS from a judgment of the British Columbia Court of Appeal, [2002] 6 W.W.R. 243, 164 B.C.A.C. 217, 268 W.A.C. 217, 99 B.C.L.R. (3d) 209, 44 C.E.L.R. (N.S.) 1, [2002] 2 C.N.L.R. 121, [2002] B.C.J. No. 378 (QL), 2002 BCCA 147, with supplementary reasons (2002), 216 D.L.R. (4th) 1, [2002] 10 W.W.R. 587, 172 B.C.A.C. 75, 282 W.A.C. 75, 5 B.C.L.R. (4th) 33, [2002] 4 C.N.L.R. 117, [2002] B.C.J. No. 1882 (QL), 2002 BCCA 462, reversing a decision of the British Columbia Supreme Court (2000), 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83, [2000] B.C.J. No. 2427 (QL), 2000 BCSC 1280. Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Paul J. Pearlman, Q.C., and *Kathryn L. Kickbush*, for the appellants the Minister of Forests and the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia.

John J. L. Hunter, Q.C., and *K. Michael Stephens*, for the appellant Weyerhaeuser Company Limited.

Louise Mandell, Q.C., *Michael Jackson, Q.C.*, *Terri-Lynn Williams-Davidson*, *Gidfahl Gudsllaay* and *Cheryl Y. Sharvit*, for the respondents.

Mitchell R. Taylor and *Brian McLaughlin*, for the intervener the Attorney General of Canada.

E. Ria Tzimas and *Mark Crow*, for the intervener the Attorney General of Ontario.

Pierre-Christian Labeau, for the intervener the Attorney General of Quebec.

Written submissions only by *Alexander MacBain Cameron*, for the intervener the Attorney General of Nova Scotia.

Graeme G. Mitchell, Q.C., and *P. Mitch McAdam*, for the intervener the Attorney General for Saskatchewan.

Stanley H. Rutwind and *Kurt Sandstrom*, for the intervener the Attorney General of Alberta.

Gregory J. McDade, Q.C., and *John R. Rich*, for the interveners the Squamish Indian Band and the Lax-kw'alaams Indian Band.

Allan Donovan, for the intervener the Haisla Nation.

Hugh M. G. Braker, Q.C., *Anja Brown*, *Arthur C. Pape* and *Jean Teillet*, for the intervener the First Nations Summit.

Robert C. Freedman, for the intervener the Dene Tha' First Nation.

Robert J. M. Janes and *Dominique Nouvet*, for the intervener Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief.

Charles F. Willms and *Kevin O'Callaghan*, for the interveners the Business Council of British Columbia, the Aggregate Producers Association of British Columbia, the British Columbia and Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council of Forest Industries and the Mining Association of British Columbia.

Thomas F. Isaac, for the intervener the British Columbia Cattlemen's Association.

Stuart A. Rush, Q.C., for the intervener the Village of Port Clements.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and

the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.'s. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the

Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: [2001] 2 C.N.L.R. 83, 2000 BCSC 1280. The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147, with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462.

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this

framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. *Does the Law of Injunctions Govern This Situation?*

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer

to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to “lose” outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J. J. L. Hunter, “Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction” (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida’s claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. *The Source of a Duty to Consult and Accommodate*

16 The government’s duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”: *Delgamuukw, supra*, at para. 186, quoting *Van der Peet, supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, at para. 79. The content of the fiduciary duty may vary to take into account the Crown’s other, broader obligations. However, the duty’s fulfilment requires that the Crown act with reference to the Aboriginal group’s best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Wewaykum*, at para. 81,

the term “fiduciary duty” does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

. . . “fiduciary duty” as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship . . . overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group’s best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of “sharp dealing” (*Badger*, at para. 41). Thus in *Marshall, supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that “nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi’kmaq people to secure their peace and friendship . . .”.

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger, supra*, at para. 41). This promise is realized and sovereignty

claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow, supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is “whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented”.

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013, where Cory J. wrote: “So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement” (para. 110).

23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723, Lamer C.J. referred to the need for “consultation and compensation”, and to consider “how the government has accommodated different aboriginal rights in a particular fishery . . . , how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users” (para. 64).

24 The Court’s seminal decision in *Delgamuukw, supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty

to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

C. When the Duty to Consult and Accommodate Arises

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants’ inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal

claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only a broad, common law “duty of fairness”, based on the general rule that an administrative decision that affects the “rights, privileges or interests of an individual” triggers application of the duty of fairness: *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no

legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be “sound practical and policy reasons” to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow, supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403, which held that “what triggers a consideration of the Crown’s duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)” (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a “mere” duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government’s arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if

appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, “[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation” (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the “meaningful content” mandated by the “solemn commitment” made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow, supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*,

supra, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall, supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-

based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. *The Scope and Content of the Duty to Consult and Accommodate*

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw, supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw, supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Māori* (1997) provides insight (at pp. 21 and 31):

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed
.....

...

... genuine consultation means a process that involves ...:

- gathering information to test policy proposals
- putting forward proposals that are not yet finalised
- seeking Māori opinion on those proposals
- informing Māori of all relevant information upon which those proposals are based
- not promoting but listening with an open mind to what Māori have to say
- being prepared to alter the original proposal
- providing feedback both during the consultation process and after the decision-process.

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of “accommodate”. The terms “accommodate” and “accommodation” have been defined as to “adapt, harmonize, reconcile” . . . “an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise”: *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other’s concerns and move to address them.

50 The Court’s decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands “cannot be accommodated to reasonable exercise of the Hurons’ rights”. And in *R. v. Côté*, [1996] 3 S.C.R. 139, at para. 81, the Court spoke of whether restrictions on Aboriginal rights “can be accommodated with the Crown’s special fiduciary relationship with First Nations”. Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making

decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government “may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance”. It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries’ and agencies’ operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

E. Do Third Parties Owe a Duty to Consult and Accommodate?

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A.) that a third party’s obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown’s assumption of sovereignty over lands and

resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with “aboriginal people claiming an aboriginal interest in or to the area” (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii)). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A.) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of “knowing receipt”. However, as discussed above, while the Crown’s fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown’s honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. As noted earlier, the Court cautioned in *Wewaykum* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, made it clear that the “trust-like” relationship between the Crown and Aboriginal peoples is not a true “trust”, noting that “[t]he law of trusts is a highly developed, specialized branch of the law” (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from

the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d)). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" ((2002), 5 B.C.L.R. (4th) 33, at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. *The Province's Duty*

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces." The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The*

Queen (1888), 14 App. Cas. 46 (P.C.), lands in the Province are “available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title” (p. 59). The Crown’s argument on this point has been canvassed by this Court in *Delgamuukw, supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine’s Milling, supra*. There is therefore no foundation to the Province’s argument on this point.

G. Administrative Review

60 Where the government’s conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government’s efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were

within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul, supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”: *Gladstone, supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal, supra*, at para. 110, “in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice.” The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government’s process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. *Application to the Facts*

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be “yes”.

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida’s exclusive use and occupation of some areas of Block 6 “[s]ince 1994, and probably much earlier”. The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

66 The Province raises concerns over the breadth of the Haida’s claims, observing that “[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space. . . . The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space” (Crown’s factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a

right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

(i) *Strength of the Case*

69 On the basis of evidence described as "voluminous", the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has

utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge’s thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

(1) a “reasonable probability” that the Haida may establish title to “at least some parts” of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a “reasonable possibility” that these areas will include inland areas of Block 6;

(2) a “substantial probability” that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it “fair to say that the Haida claim goes far beyond the mere ‘assertion’ of Aboriginal title” (para. 50).

71 The chambers judge’s findings grounded the Court of Appeal’s conclusion that the Haida claims to title and Aboriginal rights were “supported by a good *prima facie* case” (para. 49). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of

Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

(ii) *Seriousness of the Potential Impact*

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a “reasonable probability” that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar “by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply” (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that “it [is] apparent that large areas of Block 6 have been logged off” (para. 59). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province’s credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting

permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it “has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans” (Crown’s factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area’s resources, a timber supply analysis, and a “20-Year Plan” setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut (“A.A.C.”) for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown’s duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with

the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L.

39. The chambers judge found, at para. 42:

[O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that “[t]he Haida were and are consulted with respect to forest development plans and cutting permits. . . . Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting . . .” (Crown’s factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence’s terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

Appeal by the Crown dismissed. Appeal by Weyerhaeuser Co. allowed.

Solicitors for the appellant the Minister of Forests: Fuller Pearlman & McNeil, Victoria.

Solicitor for the appellant the Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the appellant Weyerhaeuser Company Limited: Hunter Voith, Vancouver.

Solicitors for the respondents: EAGLE, Surrey.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Department of Justice, Halifax.

*Solicitor for the intervener the Attorney General for Saskatchewan:
Deputy Attorney General for Saskatchewan, Regina.*

*Solicitor for the intervener the Attorney General of Alberta: Department
of Justice, Edmonton.*

*Solicitors for the interveners the Squamish Indian Band and the
Lax-kw'alaams Indian Band: Ratcliff & Company, North Vancouver.*

*Solicitors for the intervener the Haisla Nation: Donovan & Company,
Vancouver.*

*Solicitors for the intervener the First Nations Summit: Braker &
Company, West Vancouver.*

*Solicitors for the intervener the Dene Tha' First Nation: Cook Roberts,
Victoria.*

*Solicitors for the intervener Tenimgyet, aka Art Matthews,
Gitxsan Hereditary Chief: Cook Roberts, Victoria.*

*Solicitors for the interveners the Business Council of British Columbia, the
Aggregate Producers Association of British Columbia, the British Columbia and
Yukon Chamber of Mines, the British Columbia Chamber of Commerce, the Council
of Forest Industries and the Mining Association of British Columbia: Fasken
Martineau DuMoulin, Vancouver.*

*Solicitors for the intervener the British Columbia Cattlemen's Association:
McCarthy Tétrault, Vancouver.*

*Solicitors for the intervener the Village of Port Clements: Rush Crane
Guenther & Adams, Vancouver.*

Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R.

159

**The Grand Council of the Crees (of Quebec)
and the Cree Regional Authority**

Appellants

v.

**The Attorney General of Canada, the Attorney
General of Quebec, Hydro-Québec and the
National Energy Board**

Respondents

and

**Sierra Legal Defence Fund, Canadian
Environmental Law Association, Cultural
Survival (Canada), Friends of the Earth
and Sierra Club of Canada**

Interveners

Indexed as: Quebec (Attorney General) v. Canada (National Energy Board)

File No.: 22705.

1993: October 13; 1994: February 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory,
McLachlin, Iacobucci and Major JJ.

on appeal from the federal court of appeal

Public utilities -- Electricity -- Licences -- National Energy Board granting licences for export of electrical power to U.S. -- Licences granted subject to environmental assessments of future generating facilities -- Whether Board erred in granting licences -- National Energy Board Act, R.S.C., 1985, c. N-7 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Following lengthy public hearings at which the appellants made numerous submissions, the National Energy Board granted Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. At the time the licence applications were filed, the Board was required to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements and that the price to be charged by the power authority was just and reasonable in relation to the public interest. After the hearings but prior to the Board's ruling, these two explicit criteria were removed from the *National Energy Board Act*, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. In evaluating the environmental impact of the applications, the Board considered itself bound by both its own Act as amended and the *Environmental Assessment and Review Process Guidelines Order*. The licences were granted subject to two conditions relating to the successful completion of environmental assessments of future generating facilities. The Federal Court of Appeal rejected the appellants' argument that the Board erred in several respects in granting the licences, but allowed the appeal by Hydro-Québec and the Attorney General of Quebec, concluding that the Board had exceeded its jurisdiction in imposing the environmental assessment conditions. It severed these two conditions and allowed the licences to stand. This appeal is to

determine (1) whether the Board properly conducted the required social cost-benefit review; (2) whether the Board's failure to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness; (3) whether the Board owed the appellants a fiduciary duty in the exercise of its decision-making power, and, if so, whether the requirements of this duty were fulfilled; (4) whether the Board's decision affects the appellants' aboriginal rights; and (5) whether the Board failed to follow the requirements of its own Act and of the Guidelines Order in conducting its environmental impact assessment.

Held: The appeal should be allowed and the order of the Board restored.

Hydro-Québec provided evidence on which the Board could reasonably conclude that the consideration of cost recoverability was satisfied. The Board did not err in considering relevant to this issue the fact that the export contracts had received the approval of the province. Also, as this was only one of the factors considered, the Board did not improperly delegate its decision-making responsibility. It has not been shown that the Board's discretion to determine what evidence is relevant to its decision was improperly exercised in this case so as to result in inadequate disclosure to the appellants. The Board had sufficient evidence before it to make a valid finding that all costs would be recovered, and the appellants were given access to all the material before the Board. While there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada, the function of the Board

in deciding whether to grant an export licence is quasi-judicial and inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it. The fiduciary relationship between the Crown and the appellants thus does not impose a duty on the Board to make its decisions in the appellants' best interests, or to change its hearing process so as to impose superadded requirements of disclosure. Moreover, even assuming that the Board should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, the Board's actions in this case would have met the requirements of such a duty. The appellants had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by Hydro-Québec. On the issue of whether the Board's decision will have a negative impact on the appellants' aboriginal rights, it is not possible to evaluate realistically the impact of the Board's decision on the appellants' rights without reference to the James Bay Agreement, on which the appellants disavowed reliance. Moreover, even assuming that the Board's decision is one that has, *prima facie*, an impact on the appellants' aboriginal rights, and that for the Board to justify its interference it must at the very least conduct a rigorous, thorough, and proper cost-benefit review, the review carried out in this case was not wanting in this respect.

The Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of

power by a line of wire across the border. Even though the Board found that the new facilities contemplated would have to be built in any event to supply increasing domestic needs, if the construction of new facilities is required to serve the demands of the export contract, among other needs, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power. In defining the jurisdictional limits of the Board, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern, but the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. The Board met its obligations under the Guidelines Order in attaching to the licence the two impugned conditions. Having concluded that the environmental effects of the construction and operation of the planned facilities were unknown, the Board was required by s. 12(d) of the Order to see either that the proposal was subjected to further study and subsequent rescreening, or that it was submitted to a public review. The conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the Guidelines Order, but rather are an attempt to avoid the duplication warned against in the Order, while continuing the Board's jurisdiction over this matter.

Cases Cited

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *In re Canadian Radio-Television Commission and in re London Cable TV Ltd.*, [1976] 2 F.C. 621; *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Gitludahl v. Minister of Forests*, B.C.S.C., Vancouver A922935, August 13, 1992; *Dick v. The Queen*, F.C.T.D., T-951-89, June 3, 1992; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), aff'd [1991] 1 F.C. 641 (C.A.); *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229.

Statutes and Regulations Cited

Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof, S.C. 1990, c. 7, s. 32.

Constitution Act, 1867, s. 91(2).

Constitution Act, 1982, s. 35(1).

Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2, 3, 4(1), 5(1), 6, 8, 10(2), 12.

Hydro-Québec Act, R.S.Q., c. H-5, s. 24.

James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, c. 32.

National Energy Board Act, R.S.C., 1985, c. N-7 [am. 1990, c. 7], ss. 2, 22(1), 24, 118, 119.02, 119.03, 119.06(2), 119.07, 119.08, 119.09, 119.093.

National Energy Board Part VI Regulations, C.R.C. 1978, c. 1056, ss. 6, 15(m).

Authors Cited

Canada. Energy, Mines and Resources Canada. *Canadian Electricity Policy*. Ottawa: Energy, Mines and Resources Canada, 1988.

Canada. National Energy Board. *The Regulation of Electricity Exports: Report of an Inquiry By a Panel of the National Energy Board Following a Hearing in November and December 1986*. Ottawa: The Board, 1987.

APPEAL from a judgment of the Federal Court of Appeal, [1991] 3 F.C. 443, 83 D.L.R. (4th) 146, 7 C.E.L.R. (N.S.) 315, 132 N.R. 214, severing conditions from licences granted by the National Energy Board, [1991] 2 C.N.L.R. 70, and allowing the licences to stand. Appeal allowed.

Robert Mainville, Peter W. Hutchins and Johanne Mainville, for the appellants.

Jean-Marc Aubry, Q.C., and René LeBlanc, for the respondent the Attorney General of Canada.

Pierre Lachance and Jean Robitaille, for the respondent the Attorney General of Quebec.

Pierre Bienvenu, Jean G. Bertrand and Bernard Roy, for the respondent Hydro-Québec.

Judith B. Hanebury, for the respondent the National Energy Board.

Gregory J. McDade and Stewart A. G. Elgie, for the interveners.

The judgment of the Court was delivered by

IACOBUCCI J. -- This appeal arises from the decision of the respondent National Energy Board ("the Board") to grant to the respondent Hydro-Québec licences for the export of electrical power to the states of New York and Vermont. This decision followed lengthy public hearings at which the Grand Council of the Crees (of Quebec) and the Cree Regional Authority ("the appellants"), along with other concerned groups, made numerous submissions.

The Attorneys General of Quebec and of Canada appeared as respondents to this appeal, as did the Board. The Court also heard the joint submissions of the Sierra Legal Defence Fund, the Canadian Environmental Law Association, Cultural Survival (Canada), Friends of the Earth and the Sierra Club of Canada ("the interveners").

The appellants argued before the Federal Court of Appeal that the Board erred in several respects in granting the licences. The respondents Hydro-Québec and the Attorney General of Quebec claimed that the Board erred in

making the granting of the licences conditional on the successful completion of environmental assessments of the power generation facilities contemplated by Hydro-Québec for future construction. The Federal Court of Appeal rejected the argument of the appellants, and concluded that the Board had erred in imposing the conditions impugned by the respondents. The Court of Appeal severed these conditions, and allowed the licences to stand. The appellants now appeal to this Court.

I. Facts

On July 28, 1989, Hydro-Québec applied to the Board for licences to export blocks of power to New York and Vermont. These applications involved nine blocks of power which were to be provided over periods ranging from five to twenty-two years, pursuant to two agreements signed with the U.S. power companies that covered a total of 1 450 MW of power and were projected to generate nearly \$25 billion in income for Hydro-Québec. The purpose of the export was to raise sufficient revenue such that Hydro-Québec would be able to implement its development plan for expansion to meet the constantly rising demand for the provision of electrical services within the province.

The Board held public hearings during the months of February and March of 1990 on the application for licences for export. A number of interested parties, including the appellants, took part. At the time the applications were filed, the Board was required by s. 118 of the *National Energy Board Act*, R.S.C., 1985, c. N-7, to satisfy itself both that the power sought to be exported was not needed to meet reasonably foreseeable Canadian requirements

at the relevant times, and that the price to be charged by the power authority was just and reasonable. After the hearings but prior to the Board's ruling, s. 118 was modified by the *Act to amend the National Energy Board Act and to repeal certain enactments in consequence thereof*, S.C. 1990, c. 7 ("Bill C-23"). These two explicit criteria were removed from the statute, leaving only the requirement that the Board is to have regard to all conditions that appear to it to be relevant. The parties made submissions before the Board on the effect of these amendments.

On September 27, 1990, the Board granted the export licences, subject to a list of conditions. The appellants appealed the Board's decision to grant the licences to the Federal Court of Appeal. The respondents Hydro-Québec and the Attorney General of Quebec also appealed the decision of the Board, challenging the validity of the imposition of two of the conditions to the licences, which related to environmental assessment of future generating facilities. The Federal Court of Appeal unanimously dismissed the appellants' appeal and allowed the appeal of Hydro-Québec and the Attorney General of Quebec. The Court of Appeal severed the two conditions but otherwise allowed the licences to stand.

II. Relevant Statutory Provisions

National Energy Board Act, R.S.C., 1985, c. N-7 (as amended by S.C. 1990, c. 7):

2. In this Act,

...

"export" means, with reference to

(a) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada,

...

22. (1) An appeal lies from a decision or order of the Board to the Federal Court of Appeal on a question of law or of jurisdiction, after leave to appeal is obtained from that Court.

24. (1). . . hearings before the Board with respect to the issuance, revocation or suspension of certificates or of licences for the exportation of gas or electricity or the importation of gas or for leave to abandon the operation of a pipeline shall be public.

119.02 No person shall export any electricity except under and in accordance with a permit issued under section 119.03 or a licence issued under section 119.08.

119.03 (1) Except in the case of an application designated by order of the Governor in Council under section 119.07, the Board shall, on application to it and without holding a public hearing, issue a permit authorizing the exportation of electricity.

(2) The application must be accompanied by the information that under the regulations is to be furnished in connection with the application.

119.06 (1) The Board may make a recommendation to the Minister, which it shall make public, that an application for exportation of electricity be designated by order of the Governor in Council under section 119.07, and may delay issuing a permit during such period as is necessary for the purpose of making such an order.

(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

...

(b) the impact of the exportation on the environment;

...

(d) such considerations as may be specified in the regulations.

119.07 (1) The Governor in Council may make orders

(a) designating an application for exportation of electricity as an application in respect of which section 119.08 applies; and

(b) revoking any permit issued in respect of the exportation.

...

(3) Where an order is made under subsection (1),

(a) no permit shall be issued in respect of the application; and

(b) any application in respect of the exportation shall be dealt with as an application for a licence.

119.08 (1) The Board may, subject to section 24 and to the approval of the Governor in Council, issue a licence for the exportation of electricity in relation to which an order made under section 119.07 is in force.

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

119.09 (1) The Board may, on the issuance of a permit, make the permit subject to such terms and conditions respecting the matters prescribed by the regulations as the Board considers necessary or desirable in the public interest.

(2) The Board may, on the issuance of a licence, make the licence subject to such terms and conditions as the Board may impose.

119.093 (1) The Board may revoke or suspend a permit or licence issued in respect of the exportation of electricity

...

(b) where a holder of the permit or licence has contravened or failed to comply with a term or condition of the permit or licence.

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

...

(y) evidence that the applicant has obtained any licence, permit or other form of approval required under any law of Canada or a province respecting the electric power proposed to be exported;

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas, and

(iii) would not result in prices in the country to which the power is exported being materially less than the least cost alternative for power and energy at the same location within that country; and

(aa) evidence on any environmental impact that would result from the generation of the power for export.

15. Every licence for the export of electric power and energy is subject to such terms and conditions as the Board may prescribe and, without restricting the generality of the foregoing, is subject to every statement set out by the Board in the licence respecting

...

(m) the requirements for environmental protection.

Environmental Assessment and Review Process Guidelines Order, SOR/84-467:

2. In these Guidelines,

...

"proposal" includes any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility.

3. The Process shall be a self assessment process under which the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel.

4. (1) An initiating department shall include in its consideration of a proposal pursuant to section 3

(a) the potential environmental effects of the proposal and the social effects directly related to those environmental effects, including any effects that are external to Canadian territory; and

(b) the concerns of the public regarding the proposal and its potential environmental effects.

5. (1) Where a proposal is subject to environmental regulation, independently of the Process, duplication in terms of public reviews is to be avoided.

(2) For the purpose of avoiding the duplication referred to in subsection (1), the initiating department shall use a public review under the Process as a planning tool at the earliest stages of development of the proposal rather than as a regulatory mechanism and make the results of the public review available for use in any regulatory deliberations respecting the proposal.

6. These Guidelines shall apply to any proposal

...

(b) that may have an environmental effect on an area of federal responsibility;

8. Where a board or an agency of the Government of Canada or a regulatory body has a regulatory function in respect of a proposal, these Guidelines shall apply to that board, agency or body only if there is no legal impediment to or duplication resulting from the application of these Guidelines.

10. (1) Every initiating department shall ensure that each proposal for which it is the decision making authority shall be subject to an environmental screening or initial assessment to determine whether,

and the extent to which, there may be any potentially adverse environmental effects from the proposal.

(2) Any decisions to be made as a result of the environmental screening or initial assessment referred to in subsection (1) shall be made by the initiating department and not delegated to any other body.

12. Every initiating department shall screen or assess each proposal for which it is the decision making authority to determine if

(a) the proposal is of a type identified by the list described under paragraph 11(a) [one that would not produce any adverse environmental effects], in which case the proposal may automatically proceed;

(b) the proposal is of a type identified by the list under paragraph 11(b) [one that would produce significant adverse environmental effects], in which case the proposal shall be referred to the Minister for public review by a Panel;

(c) the potentially adverse environmental effects that may be caused by the proposal are insignificant or mitigable with known technology, in which case the proposal may proceed or proceed with the mitigation, as the case may be;

(d) the potentially adverse environmental effects that may be caused by the proposal are unknown, in which case the proposal shall either require further study and subsequent rescreening or reassessment or be referred to the Minister for public review by a Panel;

(e) the potentially adverse environmental effects that may be caused by the proposal are significant, as determined in accordance with criteria developed by the Office in cooperation with the initiating department, in which case the proposal shall be referred to the Minister for public review by a Panel; or

(f) the potentially adverse environmental effects that may be caused by the proposal are unacceptable, in which case the proposal shall either be modified and subsequently rescreened or reassessed or be abandoned.

III. Judgments Below

A. *National Energy Board, Decision No. EH-3-89, August 1990 (Fredette, Gilmour and Bélanger, members)*

The Board wrote lengthy reasons for its decision, which set out in some detail the status of the applicant, Hydro-Québec, the nature of the licences for which Hydro-Québec was applying, and the evidence of the applicant as it related to surplus, price, and fair market access, the three criteria expressly set out in the former provisions of the *National Energy Board Act*. The Board also considered the nature of the export markets, the reliability of the system proposed for implementing the export contracts, and the environmental impact of the exports for which the applications were made.

The Board noted that, were the licences to be granted, sufficient power could be generated to service the contracts by the combined use of the existing facilities of Hydro-Québec as well as those contemplated by its development plan. In other words, the exports did not require the use of facilities other than those existing, or already planned. However, the Board found that some of the facilities contemplated by the development plan for future construction would need to be built earlier than if no power were to be exported. The Board then examined the submissions of the various interveners, along with those of the appellants, as to the advisability of granting the licences.

In its disposition of the application, the Board noted that the amendments to the *National Energy Board Act* had removed the express requirement that the Board satisfy itself that the power to be exported was surplus to reasonably foreseeable Canadian requirements, and that the price to be charged was just and reasonable in the public interest. Nonetheless, there was nothing in the amended Act which would preclude the Board from taking these factors into account. The Board therefore explicitly considered the issues of cost recovery and whether pricing was

competitive to rates charged within Canada. On the issue of cost recovery, the Board concluded (at p. 30):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than \$24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable.

The Board was accordingly persuaded that the export price charged would provide for recovery of the applicable costs incurred in Canada.

In evaluating the environmental impact of the application, the Board considered itself bound by both its own Act and by the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 ("the *EARP Guidelines Order*").

The Board held (at pp. 37-38):

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

The Board granted the applications subject to several conditions. In particular, in order to satisfy itself that the electricity to be exported would originate from

facilities that had been subjected to the appropriate environmental reviews, the Board attached to the licence the following two conditions:

10. This licence remains valid to the extent that
 - (a) any production facility required by Hydro-Québec to supply the exports authorized herein, for which construction had not yet been authorized pursuant to the evidence presented to the Board at the EH-3-89 hearing that ended on 5 March 1990, will have been subjected, prior to its construction, to the appropriate environmental assessment and review procedures as well as to the applicable environmental standards and guidelines in accordance with federal government laws and regulations.
 - (b) Hydro-Québec, following any of the environmental assessment and review procedures mentioned in subcondition (a), will have filed with the Board
 - i) a summary of all environmental impact assessments and reports on the conclusions and recommendations arising from the said assessment and review procedures;
 - ii) governmental authorizations received; and
 - iii) a statement of the measures that Hydro-Québec intends to take to minimize the negative environmental impacts.
11. The generation of thermal energy to be exported hereunder shall not contravene relevant federal environmental standards or guidelines.

B. *Federal Court of Appeal*, [1991] 3 F.C. 443 (Pratte, Marceau and Desjardins J.J.A.)

Writing for the Federal Court of Appeal, Marceau J.A. dealt first with the validity of conditions 10 and 11 to the licence. He noted that the Board had imposed those conditions so as to meet its perceived mandate under the *EARP Guidelines Order*. In his view, this raised the questions of the application of this

Order to the Board, and to Hydro-Québec as an agent of the Crown in right of the Province, as well as the question of the constitutional validity of the Order itself.

However, Marceau J.A. held that he did not have to deal with these concerns, since it was clear that, in this case, the imposition by the Board of the conditions to the licence emanated from its concerns as to the potential effects of the eventual construction of the production facilities planned to meet the increased demand for electrical power. Marceau J.A. held that the Board had no jurisdiction to make the granting of a licence to export certain goods subject to conditions which pertained to their production. He stated (at pp. 450-51):

The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. Section 2 of the Act defines what is meant by export (in French "*exportation*") in the case of electricity:

2. ...

"export" means, with reference to

(a) power, to send from Canada by a line of wire or other conductor power produced in Canada...

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. . . . However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

Marceau J.A. held that the Board had therefore exceeded its jurisdiction in affixing to the licence conditions 10 and 11. That did not mean, however, that the entire decision was vitiated. Marceau J.A. found the two sections to be severable from the remainder of the licence.

Marceau J.A. then considered the contention of the appellants that the Board erred in its decision to grant the licences. The appellants argued that the Board erred in taking into account the amendments to the *National Energy Board Act* which came into force while its decision was reserved. In the version of the Act in force at the time of the application, and at the time of the subsequent hearing, applicants for licences were required to satisfy the Board that the export price charged would recover the appropriate share of the costs incurred in Canada. This condition was deleted from the version of the Act in force at the time that the decision was rendered. The appellants argued that, in following the new provisions, the Board applied the requirement of cost recovery incorrectly.

Marceau J.A. noted that the new Act was designed to deregulate and simplify the licence application process. The express requirement of cost recovery had been deleted. The new provisions simply required the Board to take into consideration all factors which appeared to it to be relevant. Marceau J.A. held that the Board was correct in considering itself bound by the new provisions of the Act. Nonetheless, he found that, even if he was incorrect in so concluding, the argument of the appellants did not lead anywhere. The Board chose, despite the amendments, to analyze the application in light of the former price criteria.

The appellants argued in the alternative that, if the Board did consider the issue of cost recovery, it could not have concluded that this requirement was met, since there was no direct evidence before the Board on this point. Marceau J.A. agreed that the evidence on this point was not direct in all respects. In particular, the financial data relating to proposed production facilities was reviewed by an accountant, who then testified as to its veracity. He held, however, that nothing required the Board to decide this point on direct evidence. There was persuasive indirect evidence before it. To reevaluate the weight of this evidence was not a task for the courts, since appeals from decisions of the Board were limited by s. 22 of the *National Energy Board Act* to questions of law or jurisdiction.

IV. Issues on Appeal

Although the parties to this appeal have made numerous specific allegations of error on the part of the Board and of the Court of Appeal, discussed individually below, the issues in this appeal can be reduced to the following three questions:

1. Did the Federal Court of Appeal err in holding that the National Energy Board acted within its jurisdiction in granting the export licences to the respondent Hydro-Québec?
2. Did the Federal Court of Appeal err in holding that the National Energy Board erred in the exercise of its jurisdiction in its imposition of conditions 10 and 11 of the licences?

3. If the Federal Court of Appeal was not in error with respect to these two findings, did it nonetheless err in holding that conditions 10 and 11 were severable from the rest of the licences?

V. Analysis

The appellants challenge on a number of grounds the validity of the decision of the Board to grant the export licences. First, the appellants argue that the Board did not properly conduct the required social cost-benefit review. Second, they argue that the failure of the Board to require that Hydro-Québec disclose in full the assumptions and methodologies on which its cost-benefit review was based breached the requirements of procedural fairness by depriving the appellants of the opportunity for full participation in the review process. Third, the appellants argue that the Board owed them a fiduciary duty in the exercise of its decision-making power, and that the requirements of this duty were not fulfilled. Fourth, the appellants assert that the decision of the Board affects their aboriginal rights, and that the Board is therefore required to meet the justification test set out by this Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Finally, the appellants submit that the Board failed to follow the requirements of its own Act and of the *EARP Guidelines Order* in conducting its environmental impact assessment. I will consider each of these arguments in turn.

A. *Social Cost-Benefit Review*

The appellants argue that the Board was required to carry out a social cost-benefit review which would consider all direct and indirect costs, including

economic and social costs, arising from the exports for which the licences were sought. The appellants claim that, in relying on solely the indirect evidence of Hydro-Québec and the fact that the proposal had been approved by the government of Quebec, the Board failed to carry out this review properly. The duty to carry out such a review is ostensibly found in the *National Energy Board Part VI Regulations*, s. 6(2)(z)(i), which states:

6. (1) Every applicant for a licence for the exportation of power shall furnish to the Board such information as the Board may require.

(2) Without restricting the generality of subsection (1), the information required to be furnished by any applicant described in subsection (1) shall, unless otherwise authorized by the Board, include

...

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

It appears that both the *Canadian Electricity Policy*, September 1988, and the Board's own internal report, entitled *The Regulation of Electricity Exports*, June 1987, interpret this requirement to mean that all direct and indirect costs, including environmental, land use, and economic costs ("social costs"), should be considered. However, I need express no opinion on the correctness of these interpretations or on whether the requirement in the regulations that the applicant for a licence furnish such evidence also means that the Board is required to consider it, especially in light of s. 119.08(2) of the Act, which gives the Board the

discretion to determine which considerations are relevant to its decision, and of the terms of s. 6(2) itself, which gives the Board the authority to dispense with proof of any of the items specifically enumerated thereafter. In this case, it is clear that the Board considered that evidence of the nature and recoverability of such costs was relevant to its decision (reasons of the Board, at p. 29).

While the respondents are correct in asserting that the principle of curial deference applies to the weighing of the evidence by the Board in the exercise of its discretion, this principle cannot be invoked to save a decision for which there is no foundation in the evidence or that is based on irrelevant considerations. Once the Board decides that a particular factor is relevant to its decision, there must be some evidence to support the conclusion reached relating to it. The Board must not act unreasonably in evaluating the evidence it requests to make its decision: *Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722.

However, in this appeal, it cannot be said that the Board was without evidence on which it could reasonably have concluded that the consideration of cost recoverability was satisfied. The Board, in its decision, summarized the evidence given by Hydro-Québec on this point as follows (at p. 13):

Hydro-Québec did not supply the Board with copies of the cost-benefit analyses for the advancement of facilities required to meet its obligations under the two contracts. Nevertheless it did provide information on the methodology, assumptions and the revenues used in the private and social cost-benefit analyses. It also underlined that the costs and benefits associated with the environmental impacts of the advancement of production facilities had been considered, including the funds necessary to compensate, if required, the economic losses

resulting from impacts on forests, trapping regions or even agricultural lands.

The Applicant provided additional proof to demonstrate that the export price would allow recovery of the appropriate costs in Canada while maintaining the confidentiality of certain of its financial information. To that end, Hydro-Québec hired a chartered accountant whose mandate was to undertake verification of the accuracy of the assessment. . . .

The accountant testified before the Board and was cross-examined by the appellants.

It is, of course, insufficient for Hydro-Québec to ask the Board simply to accept a bare assertion that all costs will be recovered. However, that is not what happened in this case. Hydro-Québec provided evidence on which the Board could reasonably conclude that the requirement in s. 6(2)(z)(i) was met. This is evident from the conclusions of the Board, which state (at pp. 30-31):

The Board notes that Hydro-Québec did provide information on the magnitude of the revenues expected to be generated by the proposed export sales and that these would be significant, totalling more than \$24 billion. . . . In addition, Hydro-Québec provided some details on the methodology used in carrying out its feasibility study as well as on the economic, financial and other relevant assumptions underlying that analysis. The Board has examined this information and finds that the methodology and assumptions described are reasonable. . . . The fact that the provincial government has concurred with Hydro-Québec by approving the export contracts. . . suggests to the Board that the exports are projected to yield net benefits to Québec.

Intervenors raised concerns with regard to potential adverse environmental impacts outside of Québec but any specific costs that might be associated with such impacts were not identified. There were no other identified costs. . . .

Finally, the Board is convinced that the parties to these contracts have negotiated at arm's length and under free market conditions. The Board

thus has no reason to believe that there would not be net benefits accruing from the proposed exports.

The interveners argued that the final sentence in this passage shows that the Board made its decision in the absence of positive evidence on cost recovery. When the sentence is read in context, however, it indicates rather that the Board was satisfied on the evidence before it that the relevant costs would be recovered. The Board cannot simply rely on the conclusions of the respondent as to cost recovery without evaluating their validity, but that does not appear to have been the situation here. Moreover, a prohibition on the reliance on the unsubstantiated affirmations of the applicant should not be transformed into a duty on the Board to conduct its own independent analysis where such an undertaking is unnecessary.

The Board did consider relevant to the issue of cost recovery, in addition to the evidence presented by Hydro-Québec, the fact that the export contracts had received the approval of the province. Evidence of such approval is expressly referred to in s. 6(2)(y) of the *Part VI Regulations* as a factor which the Board may wish to consider. The appellants contend, however, that this approval is irrelevant to the s. 6(2)(z)(i) cost-benefit analysis, as the orders-in-council pursuant to the *Hydro-Québec Act*, R.S.Q., c. H-5, under which provincial approval was given, require only that the contracts be consistent with sound financial management, not that they be in the public interest. Section 24 of the *Hydro-Québec Act* requires Hydro-Québec to maintain the rates charged for power at a sufficient level to defray operating expenditures and interest on its debt. In my view, sound financial management of a public utility is part of the public interest. While such a factor is obviously only one of the many relevant considerations in such a determination,

it cannot be said that evidence of governmental approval is wholly irrelevant in the context of cost recovery, such that the Board committed a jurisdictional error in considering it.

I also reject the appellants' argument that the mere fact that all contracts in Quebec require such approval renders consideration of this factor by the Board an improper delegation of its decision-making power. The Board must, of course, make its own decision as to whether the cost-benefit requirement is satisfied. It cannot delegate that responsibility to the Government of Quebec or to any other body. In this case, for such a delegation to have occurred, the Board would have had to treat the mere existence of government approval as sufficient in and of itself to satisfy the cost-benefit requirement, without any independent consideration of the issue. But that was not the case here. Therefore, it cannot be said that there was any jurisdictional error committed by the Board in this aspect of its decision.

B. *Opportunity for Fair Participation in the Review Process*

Given my conclusions on the nature and scope of the cost-benefit review undertaken by the Board, the appellants' arguments relating to procedural fairness can be dispensed with rather simply. The appellants argue that the Board breached the requirements of procedural fairness in failing to require disclosure to the appellants by Hydro-Québec of all information pertinent to the issue of cost recovery. In particular, they point to the failure of the Board to require Hydro-Québec to reveal in full the assumptions and methodologies on which its cost-benefit analysis was based.

In general, included in the requirements of procedural fairness is the right to disclosure by the administrative decision-maker of sufficient information to permit meaningful participation in the hearing process: *In re Canadian Radio-Television Commission and in re London Cable TV Ltd.*, [1976] 2 F.C. 621 (C.A.), at pp. 624-25. The extent of the disclosure required to meet the dictates of natural justice will vary with the facts of the case, and in particular with the type of decision to be made, and the nature of the hearing to which the affected parties are entitled.

The issue in this case, then, is not the sufficiency of the disclosure made by Hydro-Québec. That relates to the question, discussed above, of whether there was evidence before the decision-maker on which it could reasonably have reached the decision which it did: *Parke, Davis & Co. v. Fine Chemicals of Canada Ltd.*, [1959] S.C.R. 219, at p. 223, *per* Rand J. Rather, the issue is whether the Board provided to the appellants disclosure sufficient for their meaningful participation in the hearing, such that they were treated fairly in all the circumstances: *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at pp. 630-31; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 654; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at p. 226, *per* McLachlin J. (dissenting on another ground).

In carrying out its decision-making function, the Board has the discretion to determine what evidence is relevant to its decision. It has not been shown that, in this case, the discretion was improperly exercised so as to result in inadequate disclosure to the appellants. As noted above, the Board had sufficient evidence before it to make a valid finding that all costs would be recovered. The appellants were given access to all the material that was before the Board. The Board

specifically found that the appellants themselves presented no evidence of added social costs, and did not call into question the veracity of Hydro-Québec's report. Therefore, it cannot be said that, on this basis, the Board erred in its decision to grant the licences.

C. *Fiduciary Duty*

The appellants claim that, by virtue of their status as aboriginal peoples, the Board owes them a fiduciary duty extending to the decision-making process used in considering applications for export licences. The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown, as recognized by this Court in *R. v. Sparrow, supra*, extends to the Board, as an agent of government and creation of Parliament, in the exercise of its delegated powers. The duty applies whenever the decision made pursuant to a federal regulatory process is likely to affect aboriginal rights.

The appellants characterize the scope of this duty as twofold. They argue that it includes the duty to ensure the full and fair participation of the appellants in the hearing process, as well as the duty to take into account their best interests when making decisions. The appellants argue that such an obligation imports with it rights that go beyond those created by the dictates of natural justice, and that in this case, at a minimum, the Board should have required disclosure to the appellants of all information necessary to the making of their case against the applications. The respondents to this appeal, on the other hand, dispute both the existence of a duty, and, if it does exist, that the Board failed to meet it.

It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed. The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision-making agencies by imposing upon them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 385. While this characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.

It is for this reason that I do not find helpful the authorities cited to me by the appellants as indicative of this evolving trend: *Gitludahl v. Minister of Forests*, B.C.S.C., August 13, 1992, Vancouver A922935, unreported, and *Dick v. The*

Queen, F.C.T.D., June 3, 1992, Ottawa T-951-89, unreported. Those cases were concerned, respectively, with the decision-making of the Minister of Forests, and the conduct of the Crown when adverse in interest to aboriginal peoples in litigation. The considerations which may animate the application of a fiduciary duty in these contexts are far different from those raised in the context of a licence application before an independent decision-making body operating at arm's length from government.

Therefore, I conclude that the fiduciary relationship between the Crown and the appellants does not impose a duty on the Board to make its decisions in the best interests of the appellants, or to change its hearing process so as to impose superadded requirements of disclosure. When the duty is defined in this manner, such tribunals no more owe this sort of fiduciary duty than do the courts. Consequently, no such duty existed in relation to the decision-making function of the Board.

Moreover, even if this Court were to assume that the Board, in conducting its review, should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, I am satisfied that, for the reasons set out above relating to the procedure followed by the Board, its actions in this case would have met the requirements of such a duty. There is no indication that the appellants were given anything less than the fullest opportunity to be heard. They had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by the respondent Hydro-Québec. This argument must therefore

fail for the same reasons as the arguments relating to the nature of the review conducted by the Board.

D. *Aboriginal Rights*

This Court, in *R. v. Sparrow, supra*, recognized the interrelationship between the recognition and affirmation of aboriginal rights constitutionally enshrined in s. 35(1) of the *Constitution Act, 1982*, and the fiduciary relationship which has historically existed between the Crown and aboriginal peoples. It is this relationship that indicates that the exercise of sovereign power may be limited or restrained when it amounts to an unjustifiable interference with aboriginal rights. In this appeal, the appellants argue that the decision of the Board to grant the licences will have a negative impact on their aboriginal rights, and that the Board was therefore required to meet the test of justification as set out in *Sparrow*.

It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).

The respondents in this appeal argue that it cannot. They assert that, with the signing by the appellants of the James Bay and Northern Quebec Agreement,

incorporated in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32 ("the *James Bay Act*"), the appellants ceded and renounced all aboriginal rights except as set out in the Agreement. Since the act of granting a licence neither requires nor permits the construction of the new production facilities which the appellants claim will interfere with their rights, and since the Agreement itself provides for a participatory review process to authorize the construction of such facilities, Hydro-Québec and the Attorney General of Quebec argue that no *prima facie* infringement results from the decision of the Board.

The evaluation of these competing arguments requires an examination and interpretation of the Agreement as embodied in the *James Bay Act*. The appellants, however, requested that this question be determined without reference to the Agreement or to the Act, since its interpretation and application form the subject of other legal proceedings involving the parties to this appeal. The appellants accordingly placed no reliance on this document in their assertion of a breach of aboriginal rights.

In my view, it is not possible to evaluate realistically the impact of the decision of the Board on the rights of the appellants without reference to the *James Bay Act*. The respondents assert that the rights of the appellants are limited to those set out in this document. The validity of this assertion cannot be tested without construing the provisions of the Agreement.

Moreover, even assuming that the decision of the Board is one that has, *prima facie*, an impact on the aboriginal rights of the appellants, and that the appellants are correct in arguing that, for the Board to justify its interference, it must, at a

minimum, conduct a rigorous, thorough, and proper cost-benefit review, I find, for the reasons expressed above, that the review carried out in this case was not wanting in this respect.

E. *Environmental Impact Assessment*

Given that the social cost-benefit analysis appears to have been reasonable, the sole remaining ground on which the decision of the Board can be impugned relates to the environmental impact assessment carried out by the Board. It must be determined both whether the Board followed the procedures for such an assessment set out in the *National Energy Board Act* and in the *EARP Guidelines Order*, and whether the imposition of conditions 10 and 11 was a valid mechanism for fulfilling these requirements. If it is found that the conditions imposed by the Board caused it to exceed, or alternately to fail to exercise, its jurisdiction, it must also be determined whether the conditions are severable, and the order of the Board nonetheless remains valid.

(a) *The National Energy Board Act*

It is clear, and indeed it does not appear to have been seriously contested by the parties that, while the Board in making its decision was bound by the Act as amended, it was nonetheless entitled to require evidence of the factors listed in the former Act, since s. 119.08(2) of the amended Act gives to the Board the mandate to consider any matters which it deems relevant in the circumstances.

The proper interpretation of the scope of the Board's inquiry is found by looking at the procedural framework created by the Act as a whole. The procedure for the issuing of permits for the export of electricity is set out in Division II of Part VI of the Act. In the version of the Act in force at the time that the initial application was made by Hydro-Québec, each applicant was required to apply for a licence, and the factors which the Board was to consider in its determination whether to grant the licence were explicitly listed.

By the terms of the Act as amended by Bill C-23, the Board is in general now required, on application and without a public hearing, to issue permits for export (s. 119.03). However, the Board may recommend to the Minister that the granting be delayed and that an inquiry be held. Section 119.06(2) provides that, in determining whether to make such a recommendation:

... the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to all considerations that appear to it to be relevant, including

...
(b) the impact of the exportation on the environment:

...

(d) such considerations as may be specified in the regulations.

If the Minister accepts this recommendation, the application is designated as one to which s. 119.08 applies, and a licence is required rather than a permit. The enumerated factors which the Board was required to take into account at this stage, in considering whether a licence should be granted, were eliminated by the amendments to the Act. Now, the section simply provides:

119.08 . . .

(2) In deciding whether to issue a licence, the Board shall have regard to all considerations that appear to it to be relevant.

Section 6 of the *Part VI Regulations* governs the information that must be furnished to the Board in an application for a licence. The section gives the Board the power both to request any information that it might require, and to dispense with the provision of any evidence that it deems unnecessary. However, s. 6(2) nonetheless sets out a long list of factors that must be furnished by the applicant unless the Board otherwise authorizes. The subsections relevant to this appeal are ss. 6(2)(z) and 6(2)(aa), which require:

(z) evidence to demonstrate that the price to be charged by the applicant for electric power and energy exported by him is just and reasonable in relation to the public interest, and in particular that the export price

(i) would recover its appropriate share of the costs incurred in Canada,

(ii) would not be less than the price to Canadians for equivalent service in related areas...

(aa) evidence on any environmental impact that would result from the generation of the power for export.

In this case, the Board considered the environmental effects of the actual transmission of the electricity to the United States, and the resulting effects on the U.S. environment, and found them to be either neutral or beneficial. The real area of concern for negative environmental impact, as raised by the appellants and other parties appearing at the public hearing, was the future construction of production facilities, as contemplated by the development plan, to meet increased needs for power. The Board specifically found that these planned facilities would have to

be built to meet the projected increase in the domestic demand for electrical power even if the licences were not approved. The Board also found that, if the licences were granted, the construction of some of these contemplated facilities would take place earlier than would otherwise be necessary. Finally, the Board held that the additional environmental effects occurring solely as a result of the acceleration of construction would be negligible.

However, the Board found that the potential environmental effects of the actual construction of these future facilities were not known with certainty. It therefore imposed conditions 10 and 11 to the licences, which require compliance with federal standards, and successful completion of existing review processes. In this appeal, the prime dispute in the area of environmental impact is whether the Board was entitled to consider, as relevant to its decision to grant the licences sought, the environmental impact of the construction by Hydro-Québec of these future facilities.

The Court of Appeal in this case found that, in deciding whether to grant a licence, the Board was limited solely to the consideration of the environmental effects of export as that term is defined in the *National Energy Board Act*. As noted above, s. 2 of the Act provides:

"export" means, with reference to

(a) electricity, to send from Canada by a line of wire or other conductor electricity produced in Canada,....

As mentioned above, the Court of Appeal (at pp. 450-51) interpreted the section to mean that

. . . the Board's jurisdiction still is and has always been the granting of leave to export electricity. The factors which may be relevant in considering an application for leave to export electricity and the conditions which the Board may place on its leave clearly cannot relate to anything but the export of electricity. . . .

It seems clear that, as it is understood in the Act with respect to electricity, export does not cover production itself, and it is only reasonable that this should be so. Of course, anyone wishing to export a good must produce it or arrange for it to be produced elsewhere, but when he produces it or arranges for its production elsewhere he is not exporting it, and when he is exporting it he is not producing it.

I do not think anyone would dispute for a moment that in considering an application for leave to export electricity, the Board must be concerned about the environmental consequences, since the public interest is involved. The Board's function in this respect is in any case confirmed in several enactments. However, the only question can be as to the environmental consequences of the export, namely the consequences for the environment of "[sending] from Canada . . . power produced in Canada".

The Board is specifically permitted by s. 119.06(2) of the *National Energy Board Act* to take into consideration, in its decision whether to recommend to the Minister that the matter proceed by way of a licence application with a public review rather than by the issuance of a permit, both the environmental effects of the exportation of the electricity, and, as specified in the Regulations, the effects on the environment of the generation of the power for export. Once a licence application review process is instituted, s. 119.08(2) of the Act gives to the Board the power to consider all factors which appear to it to be relevant. In my opinion, given that the Board is permitted at the earlier stage to take such factors into

account, it would be inconsistent to prohibit the Board from having regard to such factors at this later stage, although such concerns continue to be relevant.

I am of the view that the Court of Appeal erred in limiting the scope of the Board's environmental inquiry to the effects on the environment of the transmission of power by a line of wire across the border. To limit the effects considered to those resulting from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question. The narrowness of this view of the Board's inquiry is emphasized by the detailed regulatory process that has been created. I would find it surprising that such an elaborate review process would be created for such a limited inquiry. As the Court of Appeal in this case recognized, electricity must be produced, either through existing facilities or the construction of new ones, in order for an export contract to be fulfilled. Ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs of granting the licence sought.

However, such a task is particularly difficult in this case, given the Board's finding that, although existing facilities were not sufficient to service the contracts, the new facilities contemplated would have to be built in any event to supply increasing domestic needs. The approval of the application for the licences would therefore simply have the effect of accelerating construction of these facilities, and the environmental effects of the acceleration alone were found not to be significant. Nevertheless, in my opinion, the Board did not err in giving some weight to the environmental effects of the construction of the planned facilities. To say that such effects cannot be considered unless the Board finds that, but for

the export contracts, the facilities would not be constructed, is to create a situation in which the construction of a generating facility may be contemplated solely for the purpose of fulfilling the demands of a number of export contracts, but because no one export contract can be said to be the cause of the facility's construction, its environmental effects will never be considered.

A better approach is simply to ask whether the construction of new facilities is required to serve, among other needs, the demands of the export contract. If this question is answered in the affirmative, then the environmental effects of the construction of such facilities are related to the export. In these circumstances, it becomes appropriate for the Board to consider the source of the electrical power to be exported, and the environmental costs that are associated with the generation of that power.

The respondents expressed concern that giving such a scope to the inquiry of the Board might then bring into its contemplation areas which are more properly the subject of provincial regulation and control. I hasten to add that no constitutional question was raised in this appeal, and I expressly refrain from making any determinations relating to the interpretation of the provisions of the *Constitution Act, 1867*. However, it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects these concerns. Obviously, while matters relating to export clearly fall within federal jurisdiction according to s. 91(2) of the *Constitution Act, 1867*, as part of the federal government power over matters relating to trade and commerce, it is undeniable that a proposal for export may have ramifications for the operation of provincial undertakings or other matters under provincial jurisdiction.

In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern. At the same time, however, the scope of its inquiry must not be narrowed to such a degree that the function of the Board is rendered meaningless or ineffective. In this regard, I find helpful the reasons of this Court in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, a decision released after the Federal Court of Appeal had rendered judgment in this case.

In *Oldman River* this Court considered, among other issues, the constitutional validity of the *EARP Guidelines Order*. La Forest J., for the majority, concluded, in words I find apposite to this appeal (at p. 64):

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

Therefore (at p. 65):

. . . the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting.

As noted earlier, the *vires* of the *National Energy Board Act* is not in dispute in this appeal. If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially

regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid, and that the Board attempted to reduce with the imposition of conditions 10 and 11 to the licences.

It is also worth noting that the Board is the forum in which the environmental impact attributable solely to the export, that is, to the impact of the increase in power output needed to service the export contracts, will be considered. A focused assessment of these effects may be lost if subsumed in a comprehensive evaluation by the province of the environmental effects of the projects in their totality. In this way, both levels of government have a unique sphere in which to contribute to environmental impact assessment.

I conclude, therefore, that the Board did not exceed its jurisdiction under the *National Energy Board Act* in considering the environmental effects of the construction of future generating facilities as they related to the proposed export, an area of federal responsibility. The Board is permitted by s. 15 of the Regulations to the Act to attach conditions to the licences which it grants, including conditions relating to environmental protection: s. 15(m). The only issue that remains, then, is whether in imposing conditions 10 and 11, the Board failed to meet its obligations under the *EARP Guidelines Order*.

- (b) The *EARP Guidelines Order* and the Validity of Conditions 10 and 11

That the *EARP Guidelines Order* applied to the Board in its decision whether to grant the export licences does not appear to be in serious dispute. The *EARP Guidelines Order* applies to all "initiating department[s]", defined in s. 2 as "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal". "Proposal" is also defined in s. 2, as "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility".

The key feature to be extracted from these somewhat circular definitions is that the application of the *EARP Guidelines Order* to the Board relates to the aspect of Hydro-Québec's undertakings for which it has decision-making authority, that is, the decision to grant a licence permitting export. That does not artificially limit the scope of the inquiry to the environmental ramifications of the transmission of power by a line of wire, but it equally does not permit a wholesale review of the entire operational plan of Hydro-Québec. Section 6(b) of the *EARP Guidelines Order* makes it clear that "[t]hese Guidelines shall apply to any proposal . . . that may have an environmental effect on an area of federal responsibility". As will be evident from the reasons which follow, I am of the view that the Board in its decision struck an appropriate balance between these two extremes.

The main goal of the Process created by the *EARP Guidelines Order* is that "the initiating department shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals for which it is the decision-making authority are fully considered and where the implications are significant, refer the proposal to the Minister for public review by a Panel" (s. 3). The overarching purpose of the *EARP Guidelines Order*

is to avoid, in situations in which multiple regulatory steps impinge on an undertaking or proposal, disregard for the fundamentally important matter of the protection of the environment.

The *EARP Guidelines Order* also notes explicitly, as mentioned above, that duplication in review is to be avoided (ss. 5(1) and 8), although the initiating department is prohibited from delegating its task of environmental screening or initial assessment to any other body: s. 10(2). The Board in this case was therefore required by s. 12 of the *EARP Guidelines Order* to determine whether the export proposal would not produce any adverse environmental effects, would produce significant adverse environmental effects, would produce effects which were insignificant or mitigable with known technology, or would produce effects which were unknown. In the words of the Board (at pp. 34-35):

In conducting a screening of electricity export proposals, the Board examines the potential environmental and corresponding social effects in and outside of Canada, of the production, transmission, and end use of the electricity proposed to be exported. The purpose of such a screening is to enable the Board to reach one of the conclusions required in section 12 of the *EARP Guidelines Order*.

The Board noted that Hydro-Québec had provided information that approval of the export arrangements would mean that the facilities contemplated by its general development plan would be built two to six years earlier than anticipated. Hydro-Québec took the position that the effect of permitting the exports on the environmental impact of the implementation of the plan would be insignificant. As a result, it did not provide information on the overall impact of the construction and operation of the planned facilities. The Board noted (at pp. 37-38):

Hydro-Québec argued only that the early construction and operation of facilities to serve the exports would not result in significant environmental impacts and consequently it provided no evidence on this point. Specifically, Hydro-Québec did not provide a comprehensive environmental assessment of the impact of the construction and operation of facilities required to support the proposed exports. In this regard, the Board is of the view that the issue of environmental impact does not hinge on whether or not it should consider the impact of the construction and operation of facilities or only the impact of their advancement. Sufficient evidence was provided indicating that major hydro-electric facilities such as those required to meet the proposed exports do have environmental effects. Hydro-Québec itself did not deny this. The issue rather is whether, on balance, the environmental consequences are acceptable or mitigable. This, the Board does not know at this time.

The Board recognizes that when electric utilities negotiate long-term system-to-system firm sales agreements, there can be circumstances in such arrangements that require capacity to come from generating facilities to be built at some future date and for which the necessary detailed environmental assessments have not been completed at the time of the export application. The proposed export contracts now before the Board have been negotiated on this basis. Nonetheless, for the Board to reach its decision on Hydro-Québec's applications, and at the same time meet its obligations under the Act and *EARP Guidelines Order*, it must take into account the environmental impacts arising from the construction of such future facilities.

However, it was apparent that all the facilities in issue would be subject at later dates either to provincial review under the James Bay Agreement or to review by other federal departments under the *EARP Guidelines Order* or other enactments. Therefore, the Board held (at pp. 39-40):

The Board is also of the view that, to the extent that Hydro-Québec's future facilities are subjected to the *EARP Guidelines Order* review process, or any equivalent review process, and are subsequently accepted for construction, the environmental and social impacts of these projects, as well as the related public concerns, will have been adequately addressed. . . . The Board is therefore satisfied that to the extent that such reviews take place and the facilities are accepted for construction, then the environmental impact of the construction and operation of the facilities required to support the proposed exports will be known and mitigable with known technology.

In order to satisfy itself that these reviews would be carried out, the Board attached conditions 10 and 11 to the licences.

The respondents challenge the validity of conditions 10 and 11 on the grounds that the jurisdiction of the Board in considering an application for an export licence does not extend to the environmental effects of the construction and operation of facilities which will generate the power to be exported. As noted above, I am of the view that the jurisdiction of the Board can properly encompass such a review. The appellants, however, also challenge the validity of these conditions. They argue that to approve the Board's transfer of the responsibility for environmental review to these future processes is to permit the Board to avoid its responsibilities under the *EARP Guidelines Order*.

The conclusion of the Board in this case appears to have been, not surprisingly, that the environmental effects of the construction and operation of the planned facilities were unknown. The Board is therefore required by s. 12(d) of the *EARP Guidelines Order* to see either that the proposal is subjected to further study and subsequent rescreening, or that it is submitted to a public review. In my view, the conditions imposed by the Board meet in substance this obligation. They do not amount to an improper delegation of the Board's responsibility under the *EARP Guidelines Order*. Rather, they are an attempt to avoid the duplication warned against in the Order, while continuing the jurisdiction of the Board over this matter.

In the same way that the *EARP Guidelines Order* does not require an initiating department to wait for the results of a public review before proceeding with a

proposal (see *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 201 (F.C.T.D.), aff'd [1991] 1 F.C. 641 (C.A.)), it does not require the Board to suspend its decision-making until the environmental assessment of all future generating facilities is completed. In this appeal, it is presently unclear exactly when and to what extent these contemplated facilities will be used to fulfil the requirements of the export contracts. This will not be known with certainty until those portions of the contract arise for completion. It is not unreasonable for the Board to exert some control over the timing of this process, while at the same time waiting for the results of environmental reviews which will be tailored to the specifications of the facilities as they are actually constructed.

This case appears to me to be just such a situation where the nature of the proposal means that the flexibility of the process set out in the *EARP Guidelines Order* is helpful. In this regard, I adopt the words of Reed J. of the Trial Division of the Federal Court in *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C. 229, where she stated (at p. 264):

It is not disputed that it is preferable to identify potential environmental concerns relating to a project before private sector developers (or public sector developers for that matter) proceed to a final design. It is also desirable to use the process as a planning tool and to avoid duplication. I am not convinced however that it is useful to consider whether the Guidelines Order requires the assessment of [a] proposal at the concept stage or at a more specific design stage. What is required may very well depend on the type of project being reviewed. What does seem clear is that the assessment is required to take place at a stage when the environmental implications can be fully considered (s. 3) and when it can be determined whether there may be any potentially adverse environmental effects (s. 10(1)). [Emphasis in original.]

The Board retains the power, through s. 119.093(1) of the *National Energy Board Act*, to revoke the licences if the conditions are not fulfilled. The conditions relate to contemplated environmental review and regulation in the federal sphere. By proceeding in this way, the full environmental effects of the proposals are known to the Board before the construction is to proceed, and before the decision to grant the licences is irrevocable. At the same time, duplication is minimized and Hydro-Québec is not required to provide concrete evidence of the effects of proposals for future construction still some years away. The Board has thus fulfilled its mandate under the *EARP Guidelines Order* in a manner which, I would add, is not unreasonable in the circumstances.

VI. Conclusion and Disposition

At issue in this appeal are jurisdictional facts. While it is the proper function of this Court to determine whether the Board erred in the exercise of its jurisdiction, this Court will not interfere with the factual findings of the Board on which it bases that exercise, where there is some evidence to support its findings. I conclude that the appellants were given a full and fair opportunity to be heard before the Board, and that the Board had sufficient evidence to reach the conclusions which it did. In particular, I find that the order as set out by the Board neither exceeded nor avoided the scope of the Board's review in the area of the environmental impact of the proposed exports.

The reinstatement of the order as made by the Board is not the result sought by either the appellants or the respondents Hydro-Québec and the Attorney General of Quebec. This does not mean, however, that such a result is beyond the

jurisdiction of this Court. Both the appellants and the respondents appealed the decision of the Board to the Federal Court of Appeal. These appeals were consolidated, and the court ruled that the appeal of the present appellants should be dismissed, and the appeal of the respondents allowed. It is this decision, *in toto*, that the appellants appeal to this Court.

I am of the view that the Court of Appeal erred in allowing the appeal of the respondents, and that it should have dismissed both appeals. This Court has jurisdiction to make the order that the court below should have made. Accordingly, the appeal is allowed, the judgment of the Federal Court of Appeal is set aside, and the order of the Board restored. Given the nature of the result, each party will bear its own costs here and in the court below.

Appeal allowed.

Solicitors for the appellants: Robert Mainville & Associés, Montréal.

Solicitor for the respondent the Attorney General of Canada: Jean-Marc Aubry, Ottawa.

Solicitors for the respondent the Attorney General of Quebec: Pierre Lachance and Jean Bouchard, Ste-Foy.

Solicitors for the respondent Hydro-Québec: Ogilvy Renault, Montréal.

Solicitor for the respondent the National Energy Board: Judith B. Hanebury, Calgary.

Solicitor for the interveners: Gregory J. McDade, Vancouver.

Indexed as:

**Rigaux v. British Columbia (Commission of Inquiry
into the Death of Vaudreuil - Gove Inquiry)**

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT,

R.S.B.C. 1979, c. 209

**AND IN THE MATTER OF the Commission of Inquiry into the
adequacy of the services policies and practices of the
Ministry of Social Services as they relate to the apparent
neglect, abuse and death of Matthew John Vaudreuil, pursuant
to Order in Council 0692, approved and ordered May 19, 1994
("The Gove Inquiry")**

Between

**Joyce Rigaux, petitioner, and
The Honourable Judge Thomas J. Gove, Commissioner of the
inquiry into the adequacy of the services, policies, and
practices of the Ministry of Social Services as they relate to
the apparent neglect, abuse and death of Matthew John
Vaudreuil and Attorney General of British Columbia,
respondents**

[1998] B.C.J. No. 32

155 D.L.R. (4th) 716

51 B.C.L.R. (3d) 228

76 A.C.W.S. (3d) 669

Vancouver Registry No. A970167

British Columbia Supreme Court
Vancouver, British Columbia

Allan J.

Heard: October 6-10, 1997.
Judgment: filed January 12, 1998.

(19 pp.)

Administrative law -- Public inquiries -- Status of public inquiry findings -- Judicial review.

Petition to quash a portion of a commissioner's report. The petitioner was the Superintendent of Family and Child Services. The report was prepared pursuant to an inquiry into a child's death. The child had been neglected and abused and the mother pleaded guilty to manslaughter. The terms of reference of the inquiry specifically related to events preceding the child's death. One chapter of the report described what the Ministry of Social Services and the Superintendent did from the day of the death until the Superintendent's review was tabled in the Legislative Assembly. The report severely criticized the Superintendent, finding that she reversed and misrepresented an inspector's findings, and put the interests of the Ministry ahead of those of the child protection system.

HELD: Petition granted. The offending chapter of the report was quashed and the findings adverse to the Superintendent were set aside. Almost all of the chapter dealing with what happened after the child died was beyond the terms of reference of the inquiry. In order to obtain the relief sought, the petitioner had to show that the commissioner made findings of misconduct against her, as opposed to findings of judgmental errors. The findings of improper and unprofessional behaviour constituted findings of misconduct detrimental to the petitioner's career and reputation.

Statutes, Regulations and Rules Cited:

Departmental Inquiries Act, S.B.C. 1926-27. Family and Child Service Act, S.B.C. 1980, c. 11, Inquiry Act, R.S.B.C. 1979, c. 198, s. 8. Public Inquiries Act, S.B.C. 1872.

Counsel:

R.H. Hamilton and H.E. Maconachie, for the petitioner Rigaux.
L.T. Doust, Q.C., for the respondent Gove.
G.H. Copley, Q.C., for the Attorney General.

1 ALLAN J.:-- Few people in British Columbia are unaware of the tragedy of Matthew Vaudreuil's brief life, ending in his death at age five at the hands of his mother. As a result of widespread media coverage since July 1992, images of Matthew have become synonymous with child abuse and neglect.

2 On May 18, 1994, by Order in Council, Judge Thomas J. Gove was appointed Commissioner to inquire into, report and make recommendations on the adequacy of services and the policies and practices of the Ministry of Social Services ("the Ministry") in certain specified areas as they related to Matthew ("the Gove Inquiry"). The two volume Report of the Gove Inquiry into Child Protection ("the Report") entitled British Columbia (Gove Inquiry into Child Protection) -- Report, Volume 1 - Matthew's Story and Volume 2 - Matthew's Legacy, [1995] B.C.J. No. 2256, was released in November 1995. It was highly publicized and widely circulated. The Report was critical of the petitioner, Ms. Rigaux, who was Superintendent of Family and Child Services in British Columbia ("the Superintendent") between March 30, 1992 and January 1995.

RELIEF SOUGHT:

3 In this petition, Ms. Rigaux seeks a declaration that the Gove Inquiry violated her procedural rights and an order that the 30 page chapter entitled "What the Ministry did after Matthew Died", which contains findings adverse to her, be quashed. Counsel for the petitioner submits that this remedy will help repair the damage to Ms. Rigaux's reputation; it may assist her to defend disciplinary proceedings commenced against her by the Board of Registration for Social Workers of British Columbia; and it will prevent injustices in future inquiries.

ISSUES:

4 The petition raises several issues:

Jurisdiction:

- (1) Was a consideration of the Superintendent's Review which led to the adverse findings against Ms. Rigaux within the mandate of the Gove Inquiry?
- (2) Did Commissioner Gove make findings of misconduct against Ms. Rigaux? If so, was it within his mandate to do so? Was he required to give the petitioner reasonable notice and an opportunity to respond? Were his findings based on evidence that had some probative value?

Judicial Review:

- (3) What is the appropriate standard of review for an inquiry under the Inquiry Act?
- (4) Do the Commissioner's impugned findings meet that standard?

Fairness:

- (5) Was the petitioner treated fairly?

FACTS:

5 Matthew died on July 9, 1992 following an abysmal pattern of neglect and abuse during the five years of his life. His mother, Verna Vaudreuil, pled guilty to manslaughter in the spring of 1994.

6 The petitioner was appointed Superintendent commencing March 30, 1992. Pursuant to the Family and Child Service Act, S.B.C. 1980, c. 11, (the Act in place at the time of her appointment), all social workers carry out their responsibilities under authority delegated by the Superintendent.

7 Ministry policy required that the Superintendent review the circumstances of a suspicious or unusual death of a child "in care" or "known to the Ministry" and refer the case to the Audit Review Division, formerly the Inspections and Standards Unit ("ISU/ARD") for a full, independent review. Commissioner Gove described the purpose of ISU/ARD reviews according to a 1993 policy statement:

... to improve service delivery to ministry clients and to contribute to the evaluation of child welfare practice and programs, as well as to meet the need for public accountability.

8 Commissioner Gove noted that in the usual course of an ISU/ARD review, an inspector examines the relevant case files, interviews staff and other people involved in the case, and prepares a written report which is then canvassed with the field. The report, which either contains the joint conclusions and recommendations of the inspector and the field staff or the divergent views, is sent to the superintendent.

9 In this case, Ms. Knox, an ISU/ARD inspector conducted a preliminary file review and prepared a chronology in July 1992. She met with the Superintendent who told her not to proceed at that time. Commissioner Gove was critical of Ms. Rigaux's failure to proceed with a review before 1994 and her motivation and priorities when she did order the Superintendent's Review on March 3, 1994, almost two years after Matthew's death. He concluded that the petitioner's decision to order the review "was motivated primarily by a desire to control damage to the ministry and its employees." He stated that the priority of the petitioner and other (unnamed) Ministry employees who participated in the decision "was not Matthew and the implications of what had happened to him for other children in the province."

10 The Superintendent was designated by, and reported to, the Minister of Social Services. In late April 1994, the Honourable Joy McPhail (the "Minister"), announced that the Superintendent's Review would be tabled in the Legislature and made public. This was the first time that a superintendent's review had been made public.

11 The petitioner saw Inspector Orla Petersen's first draft of the Superintendent's Review on May 9, 1994. It was not complete and had not been circulated to field staff. The petitioner directed that certain changes be made to the draft. Mr. Petersen and Ms. Bitschy, the Acting Director of ISU/ARD, prepared a second draft. Ms. Bitschy prepared the third draft on the basis of her conversations with the petitioner. After that, further drafts were subjected to advice regarding legal issues and plain language, comments from the Ministry's Freedom of Information and Protection of Privacy Office and advice from the Ministry's Communications Division.

12 Ms. Rigaux, as Superintendent, had ultimate responsibility for the final version of the Superintendent's Review. She directed substantial changes in the knowledge that this Review would be made public. It is those changes, the circumstances surrounding them, and her decision not to conduct a review earlier, that led to the findings of Commissioner Gove which are in issue. On May 17, 1994, the Minister tabled the Superintendent's Review in the legislature.

13 Two days later, on May 19, 1994, Commissioner Gove was appointed sole Commissioner to inquire into, report and make recommendations on the adequacy of services and the policies and practices of the Ministry respecting four specific areas as they related to Matthew. Commissioner Gove was appointed by an Order of the Lieutenant Governor in Council under s. 8, Part 2 of the Inquiry Act, R.S.B.C. 1979, c. 198. The Terms of Reference of the Inquiry attached to the Order in Council were:

1. To inquire, report and make recommendations on the adequacy of services, and the policies and practices, including training and workload, of the Ministry of Social Services respecting

- receipt and investigation of reports that a child is in need of protection,
 - decision making concerning provision of services to the child and the child's family,
 - case management, monitoring and termination of these services, and,
 - case co-ordination and documentation and sharing of information on the case, within the Ministry and among the ministries, professionals and agencies having contact with the family as they relate to the apparent neglect and abuse, and the death, of Matthew Vaudreuil.
2. To make the report under section 1 in a form lawful for release to the public as soon as practicable and state in the report the legal limitations, if any, on publication or disclosure of information that governed the preparation of the report.

14 The Inquiry itself consisted of two parts. Part I gathered evidence from those involved with Matthew and his mother and evidence relating to the Superintendent's Review and the management of the Ministry's child protection service. Part II gathered evidence from members of the public, social workers and community organizations with respect to their concerns and recommendations for change.

15 During Part I, Commissioner Gove held public hearings in which 113 witnesses gave sworn testimony over 41 days. He then held six days of hearings to receive evidence from Ministry personnel responsible for policy development and from the Ministry's senior managers responsible for child protection policy and management of child protection services.

16 The Ministry, twelve doctors and Ms. Vaudreuil applied for and were granted standing. Standing included the right to be represented by counsel, to cross examine witnesses, to call evidence and to file documents. The petitioner did not apply for standing and she was not represented by counsel. Counsel for the Ministry, Ms. Jane Morley, who represented the Ministry and its employees, did not represent the petitioner personally.

17 Before the hearings commenced, an issue arose as to whether the social workers involved in Matthew's life required individual representation or union representation in case disciplinary issues arose. Ms. Morley, concerned that there might be a conflict of interest between the interests of the Ministry and its employees, asked commission counsel to advise her if he became aware of any evidence that would suggest the need for separate representation.

18 Commissioner Gove stated that the inquiry would be a public inquiry but made a ruling, over Ms. Morley's objections, which excluded certain witnesses, including the petitioner, from attending the hearings. Mr. Petersen was permitted to be present throughout as a representative of the Ministry.

19 Witnesses testified at the Inquiry under oath and in public. Documents were filed as exhibits. These procedures gave the inquiry a quasi-judicial flavour. Indeed, with respect to the Part I hearings, Commissioner Gove stated: "There can be no question that what I was conducting was, in fact, a quasi-judicial proceeding."

20 The petitioner was interviewed on August 16, 1994 and October 19, 1994 in the presence of Ms. Morley. She testified at the hearings on November 16 and November 17, 1994. In these proceedings, she complains that no allegations of wrongdoing were put to her.

21 The Report was released in November 1995. The chapter entitled "What the Ministry did after Matthew Died" is described in Commissioner Gove's words as "what the ministry and the Superintendent did from the day Matthew died until the day the Superintendent's Review was tabled in the Legislative Assembly." It was extremely critical of the petitioner and the changes she made to Mr. Petersen's initial draft of the Superintendent's Review.

22 This petition was filed January 20, 1997.

JURISDICTION:

Was a Consideration of the Superintendent's Review within the Mandate of the Gove Inquiry?

23 In *The Canadian Red Cross Society et al. v. The Honourable Horace Krever* (1997), 151 D.L.R. (4th) 1 (S.C.C.) at p. 13, Mr. Justice Cory noted that commissions of inquiry in Canada "have frequently played a key role in the investigation of tragedies and made a great many helpful recommendations aimed at rectifying dangerous situations." On the other hand, he recognized that an inquiry's roles of investigation and educating the public

should not be fulfilled at the expense of the denial of the rights of those being investigated . . . no matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly. (p. 14)

24 Because public inquiries are generally high-profile, they receive intensive media coverage. Such publicity assists in satisfying one of the objectives of such an inquiry: education of the public. However, the risk of damage to reputations and careers in a public forum which lacks the institutional protections of judicial proceedings highlights the importance of procedural safeguards to protect individual rights.

25 It is a fundamental principle of inquiries that a commissioner's jurisdiction is circumscribed by the terms of reference found in the governing statute and the instrument of appointment. Even if he or she has the noblest of motives, a commissioner has no discretion to exceed or extend those terms of reference. In this case, Commissioner Gove's mandate was set out in the Order in Council appointing him "to inquire into and report on the matters and in the manner set out in the attached Terms of Reference." The Terms of Reference of the Inquiry attached to the Order in Council, cited above, were very specific. They clearly relate to events preceding Matthew's death. They simply do not bear a construction which would include an investigation into the preparation of the Superintendent's Review commencing on March 3, 1994, almost two years after Matthew's death.

26 I am unable to accept Mr. Doust's contention that the Gove Inquiry's mandate extended to "making recommendations about the Ministry's services, policies and practices generally as they arose from the findings in the case of Matthew Vaudreuil." It is true that the Ministry's involvement with Matthew's case continued after his death in the form of the Superintendent's Review. However, the Terms of Reference did not empower the Commissioner to inquire, report and make recommendations on the adequacy of services and the policies and practices of the Ministry generally. They specifically restricted him to four areas of investigation: the Ministry's services, policies and proce-

dures respecting (1) receiving and investigating reports that a child is in need of protection; (2) decision making concerning provision of services to the child and the child's family; (3) case management, monitoring and termination of those services; and (4) case co-ordination and documentation and sharing of information on the case. All of those activities were completed (or, as the Inquiry found in Matthew's case, not completed or not completed satisfactorily) prior to the commencement of the Superintendent's Review. The "monitoring" referred to clearly relates to the services provided to the child and his or her family, not a "monitoring" of the Ministry's activity or inactivity two years after the event. The Review is not "a service to the child or child's family." The preparation of the post-death Superintendent's Review or "monitoring" of the Ministry's earlier procedures is not encompassed by the areas of investigation articulated in the Terms of Reference.

27 Before the resumption of the Inquiry's hearings on November 7, 1994 to hear evidence with respect to the issue of the Superintendent's Review, the Ministry of the Attorney General objected that the proposed line of inquiry was not relevant to the Commission's mandate. However, prior to the hearings, counsel for the Attorney General advised:

The view of the Ministry remains that the Superintendent's Review in general, and enquiries respecting the evolution from draft 2 to the final draft filed in the Legislature in particular, are irrelevant and outside of the Terms of Reference upon which the jurisdiction of the Commission is based. Our concerns respecting privilege, relevancy and jurisdiction are waived in this instance without prejudice to our right to raise these matters in the future.

28 Counsel for the Attorney General made no submissions on this issue at the judicial review proceedings. Mr. Doust submits that it is significant that counsel for the Ministry waived its initial objection to the jurisdiction of the Commission to inquire into the Superintendent's Review. I disagree. The jurisdiction of a Commissioner cannot be extended by consent of any of the participants. It could have been extended by a further order in council expanding the mandate of the Inquiry; it was not.

29 Commissioner Gove considered the Ministry's review process to be "a critically important quality assurance function" because "if mistakes were made which contributed to a child's death or injury, the review process should enable the ministry to learn from its mistakes so that children will be better protected in the future." Mr. Doust submits that an inquiry into the Ministry's review mechanisms to prevent future tragedies and to assess whether the Superintendent's Review assisted the Ministry and the public in learning from Matthew's tragedy was an appropriate part of Commissioner Gove's mandate. Nonetheless, noble or honourable motives cannot bestow jurisdiction. The Order in Council could have specified a fifth consideration for investigation: " - reviewing its procedures when a child in care or known to the ministry dies or is seriously injured [i.e., conducting a Superintendent's Review]." It did not. The Commissioner could have sought an extension of his mandate from the Lieutenant Governor to bring this specific Review within his purview. He did not.

30 Virtually all of the chapter entitled "What the Ministry did after Matthew Died" was beyond the jurisdiction of the Gove Inquiry. However, it does not necessarily follow that the petitioner is entitled to the relief she seeks. The second issue to be determined is whether Commissioner Gove made consequential findings of misconduct against her or simply "errors of judgment".

Did Commissioner Gove Make Findings of Misconduct against the Petitioner?

31 The chapter entitled "What the Ministry did after Matthew Died" contains the following findings:

... Rigaux forcefully defended the view that she, as superintendent, had the right to make changes to ISU/ARD inspectors' reports. Her position on this issue was a complete reversal of earlier ministry practice.

...

In fact, it is inappropriate for someone other than the inspector who did the investigation to make substantive changes to a death review report.

...

It is even more troubling that the superintendent would presume to decide that the report should focus on themes rather than individual culpability.

...

Joyce Rigaux eliminated all of Petersen's statements that were critical of the Ministry of Social Service.

...

Rigaux downplayed or removed references to poor social work practice by ministry employees in Matthew's case.

...

Rigaux twice reversed Petersen's findings.

...

Rigaux misrepresented Petersen's findings. This meant the superintendent . . . took Peterson's statement that ministry social workers had enough evidence of abuse and neglect to justify apprehending Matthew under the Family and Child Service Act, and twisted it into a contradictory statement that the Act limited the ability to respond to high-risk cases of neglect and that this contributed to Matthew's death.

...

The report of Matthew's life and death that the Legislature and the public saw was an attempt to obscure inadequate practice by ministry social workers, and to shift blame away from the Ministry of Social Services.

...

Rigaux, as superintendent, should have been at the front of the line pushing for improvements in the child protection system to better protect "her" children. Tragically, she was not. Instead of putting children first, she put the ministry

first. The one who should have stayed outside the "system" became the consummate insider.

...

There was, in this case, a blatant conflict of interest between the interests of the ministry and the interests of children as represented by Joyce Rigaux and her staff.

...

Joyce Rigaux ... render[ed] ineffective the role of ISU/ARD in independently reviewing children's deaths and injuries.

32 Mr. Copley submits that those descriptions of Ms. Rigaux's conduct constituted errors in judgment rather than findings of misconduct. Mr. Doust submits that findings of misconduct may be appropriate to fulfil the mandate of an inquiry and, in this case, Commissioner Gove was entitled to be critical of the petitioner. He characterizes the focus of the Commissioner's criticism on the petitioner as the holder of the office of Superintendent rather than as a personal attack. Mr. Doust further submits that the findings critical of the petitioner have no legal consequences.

33 A definition of the word "misconduct" in the abstract is elusive: is it conduct which would lead to civil or criminal proceedings? Does misconduct encompass damage to reputation? In the case of the Krever Commission, the provisions of the relevant Act expressly gave Mr. Justice Krever jurisdiction to make findings of "misconduct". In Krever, supra, at p. 18, Mr. Justice Cory utilized the definition of misconduct in the Concise Oxford Dictionary (8th ed. 1990): "improper or unprofessional behaviour" or "bad management." That is the applicable definition in this case. Cory J. stated that where harm to a person's reputation will result from the factual findings which are clearly within the commissioner's jurisdiction, there is no reason to prevent the commissioner from drawing the appropriate evaluations or conclusions which flow from those facts. However, he also noted that findings of misconduct should be made only where they are required to carry out the mandate of the inquiry.

34 In this case, I find that the criticisms of the petitioner's involvement in the Superintendent's Review constituted findings of misconduct which have been detrimental to her career and reputation. As the investigation of the Superintendent's Review was beyond the mandate of the Inquiry, it follows that those findings of misconduct were outside Commissioner Gove's jurisdiction.

35 Having found that Commissioner Gove lacked jurisdiction to investigate the Superintendent's Review and that, in the course of that investigation, he made findings of misconduct against Ms. Rigaux, it is unnecessary to consider the further issues of whether he was obligated by statute or common law to give notice of those intended findings and whether she did, in effect, have notice. It is also unnecessary to articulate the relevant standard of review of the findings of such a commission of inquiry or determine whether Ms. Rigaux received the appropriate degree of procedural fairness. In view of the findings I have made, any judicial determination on these further issues would be obiter dicta and of no assistance to the development of the law in these uncharted waters.

36 I do, however, venture to comment generally that inquiries in British Columbia are hampered by the unwieldy structure of the Inquiry Act which is a single statute comprised of two ancient acts which were merged sometime after 1960: Part I of the present Act is the Departmental Inquiries

Act, S.B.C. 1926-27; Part II is the Public Inquiries Act, S.B.C. 1872. The powers, duties, and statutory protections of commissioners differ greatly according to whether they were appointed under Part I or Part II. While the focus of the inquiry in Parts I and II is very different, it is questionable that the disparate procedures set out in each part are justified. For example, Part I which specifies that a commissioner can inquire into the conduct of a person, requires that any person against whom a charge is made in the course of an inquiry, is to be represented by counsel; no report can be made against a person until he or she has been given reasonable notice of "the charge of misconduct" alleged against them and has been given full opportunity to be heard in person or by counsel. Part II, which governed the Gove Inquiry, does not contemplate findings of misconduct and provides no procedural protections in the event that such findings are made. One important question, which was argued but must remain unanswered in these reasons, is whether it is open to a Commissioner to make findings of misconduct in a Part II inquiry; if so, do the statutory protections of notice, counsel and the right to be heard contained in Part I apply or, in the alternative, are common law principles or Charter rights available? A revision of the Act would eliminate these foreseeable difficulties.

Conclusion:

37 I conclude that Ms. Rigaux is entitled to an order that the 30-page chapter entitled "What the Ministry did after Matthew Died" be quashed and that the findings adverse to her therein be set aside. Counsel may address the issue of costs at a mutually convenient date.

ALLAN J.

cp/d/mrz/DRS

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Sierra Club of Canada (British Columbia) v. British Columbia Utilities Commission***,
2008 BCCA 98

Date: 20080307
Docket: CA035051

Between: **Sierra Club of Canada (British Columbia),
British Columbia Sustainable Energy Association,
Peace Valley Environment Association**

Appellants
(Applicants)

And **British Columbia Utilities Commission,
British Columbia Hydro and Power Authority**

Respondents
(Respondents)

Before: The Honourable Mr. Justice Low
The Honourable Mr. Justice Smith
The Honourable Mr. Justice Lowry

W.J. Andrews Counsel for the Appellants

G.A. Fulton, Q.C. Counsel for the Respondent,
British Columbia Utilities Commission

C.D. Wilson Counsel for the Respondent,
British Columbia Hydro and Power Authority

Place and Date of Hearing: Vancouver, British Columbia
22 February 2008

Place and Date of Judgment: Vancouver, British Columbia
7 March 2008

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] The British Columbia Utilities Commission is a statutory tribunal that regulates public utilities under the ***Utilities Commission Act***, R.S.B.C. 1996, c. 473. The Sierra Club of Canada (British Columbia), British Columbia Sustainable Energy Association, and Peace Valley

Environment Association appeal, with leave, orders made by the Commission denying costs they sought as participants in two regulatory proceedings involving British Columbia Hydro and Power Authority. They seek to have the matter remitted to the Commission with directions for reconsideration. The questions raised are whether the Commission's decisions were patently unreasonable and whether the Commission violated the principles of natural justice.

The Proceedings

[2] The proceedings giving rise to the impugned orders are two of three that were to some extent interconnected. The appellants were three of several participants in all three proceedings.

[3] The first proceeding concerned a Revenue Requirements Application ("RRA") made by B.C. Hydro under section 58 of the Act. The section authorizes the Commission to determine and set the rates to be paid by B.C. Hydro for the hydro-electric power it distributes, having regard for what is just, reasonable, and sufficient.

[4] The second proceeding concerned a plan filed by B.C. Hydro under section 45(6.1) of the Act, referred to as its 2006 Integrated Electricity Plan and Long-Term Acquisition Plan ("IEP/LTAP"). The material part of the section requires B.C. Hydro to file plans when required by the Commission for its consideration, addressing anticipated capital expenditures and the way the utility intends to meet and reduce the demand for power.

[5] The third proceeding concerned an agreement for B.C. Hydro's purchase of power from Alcan Inc. referred to as the Amended and Restated Long-Term Electricity Purchase Agreement ("LTEPA") filed under section 71 of the Act. The section authorizes the Commission to consider whether, having regard for the stipulated statutory criteria, an agreement of that kind is in the public interest, and where it is not, to make an order rendering it unenforceable in whole or in part.

[6] The appellants are non-profit organizations who regularly participate in proceedings of this kind. They do so as a public service in furthering their constituents' interests, which include the promotion of cost-effective environmentally sustainable electricity. The orders that are the subject of their appeal were made in the first and third proceedings.

The Orders

[7] Section 118 of the Act authorizes the Commission to order costs payable by one party in a proceeding to another. The Commission has adopted guidelines for awarding such costs, referred to as the Participant Assistance/Cost Award Guidelines. Costs are regularly ordered to be paid by the utility involved in a proceeding to other participants where the Commission considers a participant has addressed material issues and made a worthwhile contribution. Such costs, though borne by the utility in the first instance, are customarily passed on to the ratepayers. Thus, the Commission must be satisfied the public has received value for the costs it orders a utility to pay. We are told that in the five-year period from 2001 to 2006 the Commission made 55 cost orders for amounts totalling \$3.5 million. Because the costs awarded against B.C. Hydro are subsumed in the rates paid for the power it distributes, the utility takes no position on applications for costs made against it and it takes no position in this instance.

[8] At the outset of each of the proceedings, the appellants submitted a budget estimate to the Commission. The estimates included an outline of the issues the appellants wished to

address and the expenses to be incurred for legal and administrative services as well as for expert evidence. The budgets received a favourable review by the Commission's administrative staff as reflected in letters sent to the appellants in each instance. The letters did, however, make it clear the staff's advice was not binding on the appellants or the Commission and that the determination of any cost award would be made by the Commission at the conclusion of the proceeding.

[9] When each proceeding was concluded, the appellants, like the other participants, applied for an award of costs against B.C. Hydro. In the section 58 RRA proceeding, they sought costs of \$49,501.41 and were awarded only \$7,479.72. In the section 45 LTAP proceeding, they sought \$223,640.09 and were awarded \$187,119.62. In the section 71 LTEPA proceeding, they sought \$33,552.45 and were awarded only \$1,074.72. The appellants sought a reconsideration of the RRA and LTEPA awards. The Commission declined to reconsider either award.

[10] The reasons given by the Commission for substantially denying the costs sought by the appellants in the RRA proceeding were (Appendix A to Order No. F-3-07, January 24, 2007):

SCCBC [Sierra Club of Canada (B.C. Chapter)] claims a Bill of Cost for the amount of \$49,501.41 (including PST and GST). The Bill of Cost is based on a total of 15.6 days (proceeding and preparation) for legal counsel, 10.625 days (proceeding and preparation) for the case manager, and 9.55 days (proceeding and preparation) for the expert consultants. The daily rates for legal counsel at \$1,710, the case manager at \$480, and the expert witness consultant at \$1,400 are consistent with the PACA Guidelines.

However, the Commission Panel is of the view that SCCBC should be awarded costs for attendance at only the first two Procedural Conferences, which were joint Procedural Conferences dealing with both the F07/08 RRA and the 2006 IEP/LTAP. Commission Order No. G-96-06 issued on August 3, 2006 after the Procedural Conference No. 2 established separate processes for the F07/08 RRA and the 2006 IEP/LTAP. The Commission Panel determines the demand side management ("DSM") issues raised by SCCBC do not represent substantial issues in the F07/08 RRA proceeding. The total days (proceeding and preparation) allowed for SCCBC is three days (1 proceeding day and 2 preparation days) for each of the legal counsel and case manager. The allowed legal counsel award is \$5,796.90 (\$1,710/day for legal counsel x 3 days plus 7% PST and 6% GST). The allowed case manager award including expenses is \$1,682.82 (\$480/day for case manager x 3 days plus \$242.82 of expenses). The SCCBC adjusted cost award amount is \$7,479.72.

[Emphasis added.]

[11] The reasons given for substantially denying costs in the LTEPA proceeding were (Appendix A to Order No. F-5-07, February 15, 2007):

The Commission Panel does not consider SCCBC *et al.* to represent a substantial interest in this proceeding. SCCBC *et al.*'s objective of "minimizing environmental harm from Alcan's smelting operations" is, in the Commission Panel's view, far removed from the key issues under consideration in this proceeding. The Commission Panel also finds that SCCBC *et al.* has not established how the groups that comprise SCCBC *et al.* will be impacted by the outcome of the proceeding. However, SCCBC *et al.* was an active participant in

the proceeding and will receive an award equal to its out-of-pocket expenses for the case manager to attend the hearing. The SCCBC *et al.* adjusted cost award amount is \$1,074.72.

[Emphasis added.]

[12] In response to the appellants' applications for reconsideration, the Commission concluded insufficient grounds were advanced to warrant reconsideration because the appellants had not shown any *prima facie* error of fact or law in the awards and the errors alleged did not have significant material implications.

The Grounds Advanced

[13] The appellants advance four grounds of appeal which can be paraphrased as follows:

1. With respect to the RRA proceeding award, the appellants contend it was patently unreasonable because it was based on a clearly erroneous finding of fact: what are referred to as the demand-side management ("DSM") issues they addressed were not substantial issues in the proceeding, and the award was made without consideration of the fact the appellants addressed other issues in that proceeding.
2. With respect to the LTEPA proceeding award, the appellants contend it was patently unreasonable because it was also based on an erroneous finding of fact: they had no interest in the proceeding.
3. The appellants contend the decisions to dismiss their applications for reconsideration were patently unreasonable because, in addition to the errors of fact underlying the original decisions not being recognized, the dismissal of the applications was based on a further erroneous finding of fact: the refusal of the costs sought does not have significant material implications.
4. Finally, the appellants contend the Commission violated principles of procedural fairness in refusing to award costs on the basis of a failure to meet criteria the Commission had previously stated to be met when the budgets were reviewed.

Discussion

[14] The Act includes both a privative clause (section 79) and a statutory right of appeal (section 101). Thus, an appeal to this Court is confined to questions of law: ***Plateau Pipe Line Ltd. v. British Columbia Utilities Commission***, 2002 BCCA 246, 170 B.C.A.C. 6 at para. 8. A decision based solely on findings of fact cannot be challenged unless it can be said to be patently unreasonable such that it amounts to an error of law. To be patently unreasonable, a decision must be so clearly irrational and at odds with reason that no amount of curial deference will justify it: ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 52.

[15] Further, the Commission is a tribunal with particular expertise in the conduct of the proceedings for which the Act provides. Unlike a court which resolves disputes between litigants, a tribunal like the Commission is required to manage disputes among various constituents and must balance competing interests, as well as the public interest, in the regulatory proceedings it conducts. The Commission's expertise extends to the awarding of costs: see the discussions in ***Green, Michaels & Associates Ltd. v. Alberta (Public Utilities Board)***, [1979] 2 W.W.R. 481 at 493-94, 94 D.L.R. (3d) 641 (Alta. C.A.); and ***Cabre***

Exploration Ltd. v. Alberta (Environmental Appeal Board), 2001 ABQB 293, 33 Admin. L.R. (3d) 140 at paras. 18-21. Further still, section 118 of the Act affords the Commission a discretion with respect to awarding costs, and it is well recognized this Court will only interfere with the exercise of a discretion if it was based on an error in principle or was clearly wrong.

[16] Thus, the appellants face a formidable burden in grounding their appeal in large measure, as they do, on the Commission – being a tribunal with accepted expertise – having made decisions in the exercise of its discretion that are patently unreasonable. It is of no small significance the appellants do not cite a single case where an award of costs made by a tribunal has been set aside by an appellate court.

[17] In my view, the appellants fall far short of establishing the Commission’s decisions to refuse costs sought in the RRA and the LTEPA proceedings were patently unreasonable exercises of its discretion. I say that principally because there is on the record before us no basis upon which we could properly consider the Commission’s conclusions with respect to the appellants’ entitlement to costs. The evidence adduced in the proceedings is not before us.

[18] The appellants describe the proceedings as giving rise to a “constellation” of issues. Many were apparently highly complex and technical. Some would probably have been interrelated. The record does not disclose, much less explain, what the issues in each of the proceedings actually were or what significance they had. Nor does it permit an evaluation of the appellants’ interest in the issues or the contribution the appellants may have been able to make. We have only the appellants’ assertions concerning some of the issues, the evidence, and the extent of the appellants’ participation. The Commission oversaw the proceedings, although the RRA proceeding led to an agreement negotiated in confidence without the Commission’s involvement apart from giving effect to what was agreed. Given its knowledge and understanding of the issues in the three proceedings, the Commission was in a position to consider the value of the applicants’ participation in deciding how much of their expense should properly be borne by B.C. Hydro’s ratepayers. We are not.

[19] The appellants contend the DSM issues were substantial issues in the RRA proceeding. The Commission considered they were substantial issues in the LTAP proceeding but only incidental issues in the RRA proceeding. The Commission made a substantial award in favour of the appellants in the LTAP proceeding (which included the expenses of the appellants’ DSM expert evidence) based on its knowledge and understanding of those issues in relation to other issues. On the record before us, I am unable to make any assessment of the view taken by the Commission in this regard, and I certainly could not say its decision to deny the costs sought in the RRA proceeding was irrational or not in accordance with reason. Much the same is to be said about the appellants’ contention that their having addressed other issues in the RRA proceeding was not considered by the Commission in making its award. Without an understanding of what all the issues in the proceeding were and what issues the appellants were able to meaningfully address, there is no basis on which to question the reasonableness of the Commission’s award in the RRA proceeding.

[20] The appellants contend they had an interest in the LTEPA proceeding that was not, as the Commission suggested, confined to environmental concerns relating to the production of aluminum at Alcan’s smelter. They maintain they had an interest as ratepayers whose principal interest is a sustainable electricity system. However, in making their application for costs, they did say that in participating fully in all aspects of the hearing they represented a unique perspective: “the public interest in minimizing environmental harm” from the smelter and “in maximizing sustainable electricity resources, i.e., resources that minimize harmful effects”. The Commission took the appellants’ objective in participating in the LTEPA proceeding to be

minimizing environmental harm caused by the smelter, which it saw as far removed from the key issues. Without the benefit of the evidence the appellants adduced and the submissions they made, it is not possible to say the Commission's assessment of their participation and entitlement to costs is patently unreasonable.

[21] I would not accede to either of the first two grounds of appeal advanced by the appellants and it accordingly becomes unnecessary to consider the third.

[22] The appellants' fourth ground of appeal appears to me to be without merit. They contend the Commission provided them with a favourable review of their budget at the outset and it could not be heard to say at the conclusion of the proceedings that favourable budget reviews are not binding as stated in denying the appellants' application for reconsideration of the LTEPA award. The appellants say they relied on the reviews received, and the Commission failed to provide any explanation for the discrepancy between the favourable reviews it received and the denial of the costs they sought. They argue no basis for such a discrepancy existed.

[23] It is important that the budget reviews are undertaken by the Commission's staff, not by the members of the panel who preside over the proceedings. The concluding paragraph of each of the reviews the appellant's received read:

As identified earlier, Commission staff advice is not binding on the Participant or the Commission Panel, and the determination on any cost award will be made by the Commission Panel upon application after the proceeding.

[24] A review of a budget submitted by a participant serves a limited purpose. It may alert the participant to difficulties foreseen at the outset, but it does not provide a participant with anything that may later be said to be in any way binding on the Commission after the issues have been flushed out, the evidence adduced, and the submissions made. There is nothing unfair about that.

[25] A tribunal is required to provide those affected with a meaningful opportunity to be heard fully and fairly, and to have decisions made in a fair, impartial, and open process appropriate to the attendant statutory, institutional, and social context: ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, per L'Heureux-Dubé J. at para. 28. There is nothing in the record that suggests the appellants were denied any measure of the procedural fairness to which they were entitled.

[26] I would not accede to their fourth ground of appeal.

Disposition

[27] I would dismiss the appeal.

“The Honourable Mr. Justice Lowry”

I agree:

“The Honourable Mr. Justice Low”

I agree:

“The Honourable Mr. Justice Smith”

This Act is Current to July 15, 2009

UTILITIES COMMISSION ACT

[RSBC 1996] CHAPTER 473

Contents

Section

1 Definitions

Part 1 – Utilities Commission

- 2 Commission continued
- 3 Commission subject to direction
- 4 Sittings and divisions
- 5 Commission's duties
- 6 Repealed
- 7 Employees
- 8 Technical consultants
- 9 Pensions
- 10 Secretary's duties
- 11 Conflict of interest
- 12 Obligation to keep information confidential
- 13 Annual report

Part 2

14–20 Repealed

Part 3 – Regulation of Public Utilities

- 21 Application of this Part
- 22 Exemptions
- 23 General supervision of public utilities
- 24 Commission must make examinations and inquiries
- 25 Commission may order improved service
- 26 Commission may set standards
- 27 Joint use of facilities
- 28 Utility must provide service if supply line near
- 29 Commission may order utility to provide service if supply line distant
- 30 Commission may order extension of existing service
- 31 Regulation of agreements

- 32 Use of municipal thoroughfares
- 33 Dispensing with municipal consent
- 34 Order to extend service in municipality
- 35 Other orders to extend service
- 36 Use of municipal structures
- 37 Supervisors and inspectors
- 38 Public utility must provide service
- 39 No discrimination or delay in service
- 40 Exemption for part of municipality
- 41 No discontinuance without permission
- 42 Duty to obey orders
- 43 Duty to provide information
- 44 Duty to keep records
- 44.1 Long-term resource and conservation planning
- 44.2 Expenditure schedule
 - 45 Certificate of public convenience and necessity
 - 46 Procedure on application
 - 47 Order to cease work
 - 48 Cancellation or suspension of franchises and permits
 - 49 Accounts and reports
 - 50 Commission approval of issue of securities
 - 51 Restraint on capitalization
 - 52 Restraint on disposition
 - 53 Consolidation, amalgamation and merger
 - 54 Reviewable interests
 - 55 Appraisal of utility property
 - 56 Depreciation accounts and funds
 - 57 Reserve funds
 - 58 Commission may order amendment of schedules
- 58.1 Rate rebalancing
 - 59 Discrimination in rates
 - 60 Setting of rates
 - 61 Rate schedules to be filed with commission
 - 62 Schedules must be available to public
 - 63 Schedules must be observed
 - 64 Orders respecting contracts

Part 3.1 — Energy Security and the Environment

- 64.01 Electricity self-sufficiency
- 64.02 Clean and renewable resources
- 64.03 Standing offer
- 64.04 Smart meters

Part 4 — Carriers, Purchasers and Processors

- 64.1 Definition
- 65 Common carrier
- 66 Common purchaser
- 67 Common processor

Part 5 — Electricity Transmission

- 68 Definitions
- 69 Repealed
- 70 Use of electricity transmission facilities
- 71 Energy supply contracts
- 71.1 Gas marketers

Part 6 — Commission Jurisdiction

- 72 Jurisdiction of commission to deal with applications
- 73 Mandatory and restraining orders
- 74 Inspections and depositions
- 75 Commission not bound by precedent
- 76 Jurisdiction as to liquidators and receivers
- 77 Power to extend time
- 78 Evidence
- 79 Findings of fact conclusive
- 80 Commission not bound by judicial acts
- 81 Pending litigation
- 82 Power to inquire without application
- 83 Action on complaints
- 84 General powers not limited
- 85 Hearings to be held in certain cases
- 86 Public hearing
- 86.1 Repealed
- 86.2 When oral hearings not required
- 87 Recitals not required in orders
- 88 Application of orders
- 88.1 Withdrawal of application
- 89 Partial relief
- 90 Commencement of orders
- 91 Orders without notice
- 92 Directions
- 93-94 Repealed
- 95 Lien on land
- 96 Substitute to carry out orders
- 97 Entry, seizure and management

98 Defaulting utility may be dissolved

Part 7 — Decisions and Appeals

99 Reconsideration by commission

100 Requirement for hearing

101 Appeal to Court of Appeal

102 No automatic stay of proceedings while matter appealed

103 Costs of appeal

104 Case stated by commission

105 Jurisdiction of commission exclusive

Part 8 — Offences and Penalties

106 Offences

107 Restraining orders

108 Revocation of certificates

109 Remedies not mutually exclusive

Part 9 — General

110 Powers of commission in relation to other Acts

111 Substantial compliance

112 Vicarious liability

113 Public utilities may apply

114 Municipalities may apply

115 Certified documents as evidence

116 Class representation

117 Costs of commission

118 Participant costs

119 Tariff of fees

120 No waiver of rights

121 Relationship with *Local Government Act*

122 Repealed

123 Service of notice

124 Reasons to be given

125 Regulations

125.1 Minister's regulations

125.2 Adoption of reliability standards, rules or codes

126 Intent of Legislature

Definitions

1 In this Act:

"appraisal" means appraisal by the commission;

"authority" means the British Columbia Hydro and Power Authority;

"commission" means the British Columbia Utilities Commission continued under this Act;

"compensation" means a rate, remuneration, gain or reward of any kind paid, payable, promised, demanded, received or expected, directly or indirectly, and includes a promise or undertaking by a public utility to provide service as consideration for, or as part of, a proposal or contract to dispose of land or any interest in it;

"costs" includes fees, counsel fees and expenses;

"demand-side measure" means a rate, measure, action or program undertaken

- (a) to conserve energy or promote energy efficiency,
- (b) to reduce the energy demand a public utility must serve, or
- (c) to shift the use of energy to periods of lower demand;

"distribution equipment" means posts, pipes, wires, transmission mains, distribution mains and other apparatus of a public utility used to supply service to the utility customers;

"expenses" includes expenses of the commission;

"government's energy objectives"

- (a) to encourage public utilities to reduce greenhouse gas emissions;
- (b) to encourage public utilities to take demand-side measures;
- (c) to encourage public utilities to produce, generate and acquire electricity from clean or renewable sources;
- (d) to encourage public utilities to develop adequate energy transmission infrastructure and capacity in the time required to serve persons who receive or may receive service from the public utility;

(e) to encourage public utilities to use innovative energy technologies

(i) that facilitate electricity self-sufficiency or the fulfillment of their long-term transmission requirements, or

(ii) that support energy conservation or efficiency or the use of clean or renewable sources of energy;

(f) to encourage public utilities to take prescribed actions in support of any other goals prescribed by regulation;

"petroleum industry" includes the carrying on within British Columbia of any of the following industries or businesses:

(a) the distillation, refining or blending of petroleum;

(b) the manufacture, refining, preparation or blending of products obtained from petroleum;

(c) the storage of petroleum or petroleum products;

(d) the wholesale or retail distribution or sale of petroleum products;

(e) the retail distribution of liquefied or compressed natural gas;

"petroleum products" includes gasoline, naphtha, benzene, kerosene, lubricating oils, stove oil, fuel oil, furnace oil, paraffin, aviation fuels, butane, propane and other liquefied petroleum gas and all derivatives of petroleum and all products obtained from petroleum, whether or not blended with or added to other things;

"public hearing" means a hearing of which public notice is given, which is open to the public, and at which any person whom the commission determines to have an interest in the matter may be heard;

"public utility" means a person, or the person's lessee, trustee, receiver or liquidator, who owns or operates in British Columbia, equipment or facilities for

(a) the production, generation, storage, transmission, sale,

delivery or provision of electricity, natural gas, steam or any other agent for the production of light, heat, cold or power to or for the public or a corporation for compensation, or

(b) the conveyance or transmission of information, messages or communications by guided or unguided electromagnetic waves, including systems of cable, microwave, optical fibre or radiocommunications if that service is offered to the public for compensation,

but does not include

(c) a municipality or regional district in respect of services provided by the municipality or regional district within its own boundaries,

(d) a person not otherwise a public utility who provides the service or commodity only to the person or the person's employees or tenants, if the service or commodity is not resold to or used by others,

(e) a person not otherwise a public utility who is engaged in the petroleum industry or in the wellhead production of oil, natural gas or other natural petroleum substances,

(f) a person not otherwise a public utility who is engaged in the production of a geothermal resource, as defined in the *Geothermal Resources Act*, or

(g) a person, other than the authority, who enters into or is created by, under or in furtherance of an agreement designated under section 12 (9) of the *Hydro and Power Authority Act*, in respect of anything done, owned or operated under or in relation to that agreement;

"rate" includes

(a) a general, individual or joint rate, fare, toll, charge, rental or other compensation of a public utility,

(b) a rule, practice, measurement, classification or contract of a public utility or corporation relating to a rate, and

(c) a schedule or tariff respecting a rate;

"service" includes

- (a) the use and accommodation provided by a public utility,
- (b) a product or commodity provided by a public utility, and
- (c) the plant, equipment, apparatus, appliances, property and facilities employed by or in connection with a public utility in providing service or a product or commodity for the purposes in which the public utility is engaged and for the use and accommodation of the public;

"tenant" does not include a lessee for a term of more than 5 years;

"transmission corporation" has the same meaning as in the *Transmission Corporation Act*;

"value" or **"appraised value"** means the value determined by the commission.

Part 1 — Utilities Commission

Commission continued

- 2 (1) The British Columbia Utilities Commission is continued consisting of individuals appointed as follows by the Lieutenant Governor in Council after a merit based process:
- (a) one commissioner designated as the chair;
 - (b) other commissioners appointed after consultation with the chair.
- (2) The Lieutenant Governor in Council, after consultation with the chair, may designate a commissioner appointed under subsection (1) (b) as a deputy chair.
- (3) The chair may appoint a deputy chair or commissioner to act as chair for any purpose specified in the appointment.
- (4) Sections 1 to 13, 15, 18 to 21, 28 to 30, 32, 34 (3) and (4), 35 to 42, 44, 46.3, 48, 49, 54, 56, 60 (a) and (b) and 61 of the *Administrative Tribunals Act* apply to the commission, and for that purpose a reference to a deputy chair in this Act is a reference to a

vice chair under that Act.

(5) The chair is the chief executive officer of the commission and has supervision over and direction of the work and the staff of the commission.

Commission subject to direction

3 (1) Subject to subsection (3), the Lieutenant Governor in Council, by regulation, may issue a direction to the commission with respect to the exercise of the powers and the performance of the duties of the commission, including, without limitation, a direction requiring the commission to exercise a power or perform a duty, or to refrain from doing either, as specified in the regulation.

(2) The commission must comply with a direction issued under subsection (1), despite

(a) any other provision of

(i) this Act, except subsection (3) of this section, or

(ii) the regulations, or

(b) any previous decision of the commission.

(3) The Lieutenant Governor in Council may not under subsection (1) specifically and expressly

(a) declare an order or decision of the commission to be of no force or effect, or

(b) require the commission to rescind an order or a decision.

Sittings and divisions

4 (1) The commission

(a) must sit at the times and conduct its proceedings in a manner it considers convenient for the proper discharge and speedy dispatch of its duties under this Act

(b) [Repealed 2004-45-164(b).]

(2) The chair may organize the commission into divisions.

(3) The commissioners must sit

- (a) as the commission, or
 - (b) as a division of the commission.
- (4) If commissioners sit as a division
- (a) 2 or more divisions may sit at the same time,
 - (b) the division has all the jurisdiction of and may exercise and perform the powers and duties of the commission, and
 - (c) a decision or action of the division is a decision or action of the commission.
- (5) At a sitting of the commission or of a division of the commission, one commissioner is a quorum.
- (6) The chair may designate a commissioner to serve as chair at any sitting of the commission or a division of it.
- (7) If a proceeding is being held by the commission or by a division and a sitting commissioner is absent or unable to attend,
- (a) that commissioner is thereafter disqualified from continuing to sit on the proceeding, and
 - (b) despite subsection (5), the commissioner or commissioners remaining present and sitting must exercise and perform all the jurisdiction, powers and duties of the commission.
- (8) and (9) [Repealed 2003-46-2.]
- (10) In the case of a tie vote at a sitting of the commission or a division of the commission, the decision of the chair of the commission or the division governs.
- (11) If a division is comprised of one member and that member is unable for any reason to complete the member's duties, the chair of the commission, with the consent of all parties to the application, may organize a new division to continue to hear and determine the matter on terms agreed to by the parties, and the vacancy does not invalidate the proceeding.

Commission's duties

- 5 (0.1) In this section, "**minister**" means the minister responsible for

the administration of the *Hydro and Power Authority Act*.

(1) On the request of the Lieutenant Governor in Council, it is the duty of the commission to advise the Lieutenant Governor in Council on any matter, whether or not it is a matter in respect of which the commission otherwise has jurisdiction.

(2) If, under subsection (1), the Lieutenant Governor in Council refers a matter to the commission, the Lieutenant Governor in Council may specify terms of reference requiring and empowering the commission to inquire into the matter.

(3) The commission may carry out a function or perform a duty delegated to it under an enactment of British Columbia or Canada.

(4) The commission, in accordance with subsection (5), must conduct an inquiry to make determinations with respect to British Columbia's infrastructure and capacity needs for electricity transmission for the period ending 20 years after the day the inquiry begins or, if the terms of reference given under subsection (6) specify a different period, for that period.

(5) An inquiry under subsection (4) must begin

(a) by March 31, 2009, and

(b) at least once every 6 years after the conclusion of the previous inquiry,

unless otherwise ordered by the Lieutenant Governor in Council.

(6) For an inquiry under subsection (4), the minister may specify, by order, terms of reference requiring and empowering the commission to inquire into the matter referred to in that subsection, including terms of reference regarding the manner in which and the time by which the commission must issue its determinations under subsection (4).

(7) The minister may declare, by regulation, that the commission may not, during the period specified in the regulation, reconsider, vary or rescind a determination made under subsection (4).

(8) Despite section 75, if a regulation is made for the purposes of subsection (7) of this section with respect to a determination, the commission is bound by that determination in any hearing or

proceeding held during the period specified in the regulation.

(9) The commission may order a public utility to submit an application under section 46, by the time specified in the order, in relation to a determination made under subsection (4).

Repealed

6 [Repealed 2004-45-165.]

Employees

7 Despite the *Public Service Act*, the commission may employ a secretary and other officers and other employees it considers necessary and may determine their duties, conditions of employment and remuneration.

Technical consultants

8 The commission may appoint or engage persons having special or technical knowledge necessary to assist the commission in carrying out its functions.

Pensions

9 The Lieutenant Governor in Council may, by order, direct that the Public Service Pension Plan, continued under the *Public Sector Pension Plans Act*, applies to commissioners, officers and other employees of the commission, but the commission may, alone or in cooperation with other corporations, departments, commissions or other agencies of the Crown, establish, support or participate in any one or more of

(a) a pension or superannuation plan, or

(b) a group insurance plan

for the benefit of commissioners, officers and other employees of the commission and their dependants.

Secretary's duties

10 (1) The secretary must

- (a) keep a record of the proceedings before the commission,
- (b) ensure that every rule, regulation and order of the commission is filed in the records of the commission,
- (c) have custody of all rules, regulations and orders made by the commission and all other records and documents of, or filed with, the commission, and
- (d) carry out the instructions and directions of the commission under this Act respecting the secretary's duties or office.

(2) On the application of a person who pays a prescribed fee, the secretary must deliver to the person a certified copy of any rule, regulation or order of the commission.

(3) In the absence of the secretary, the duties of the secretary under this Act may be performed by another person appointed by the commission.

(4) A rule, regulation and order of the commission must be signed by the chair, a deputy chair or an acting chair, and the original or a copy of it must be delivered to the secretary for filing.

Conflict of interest

11 (1) A commissioner or employee of the commission must not, directly or indirectly,

- (a) hold, acquire or have a beneficial interest in a share, stock, bond, debenture or other security of a corporation or other person subject to regulation under Part 3 of this Act,
- (b) have a significant beneficial interest in a device, appliance, machine, article, patent or patented process, or a part of it, that is required or used by a corporation or other person referred to in paragraph (a) for the purpose of its equipment or service, or
- (c) have a significant beneficial interest in a contract for the construction of works or the provision of a service for or by a corporation or other person referred to in paragraph (a).

(2) A commissioner or employee of the commission, in whom a beneficial interest referred to in subsection (1) is or becomes vested, must divest himself or herself of the beneficial interest within 3 months after appointment to the commission or acquisition of the property, as the case may be.

(3) The use or purchase for personal or domestic purposes, of gas, heat, light, power, electricity or petroleum products or service from a corporation or other person subject to regulation under this Act is not a contravention of this section, and does not disqualify a commissioner or employee from acting in any matter affecting that corporation or other person.

Obligation to keep information confidential

12 (1) Every commissioner and every officer and employee of the commission must keep secret all information coming to the person's knowledge during the course of the administration of this Act, except insofar as disclosure is necessary for the administration of this Act or insofar as the commission authorizes the person to release the information.

(2) A commissioner, officer or employee of the commission must not be required to testify or produce evidence in any proceeding, other than a criminal proceeding, about records or information obtained in the discharge of duties under this Act.

(3) Despite subsection (2), the Supreme Court may require the commission to produce the record of a proceeding that is the subject of an application for judicial review under the *Judicial Review Procedure Act*.

Annual report

13 (1) In each year, the commission must make a report to the Lieutenant Governor in Council for the preceding fiscal year, setting out briefly

(a) all applications and complaints to the commission under this Act and summaries of the commission's findings on them,

(b) other matters that the commission considers to be of public interest in connection with the discharge of its duties under this Act, and

(c) other information the Lieutenant Governor in Council directs.

(2) The report must be laid before the Legislative Assembly as soon as possible after it is submitted to the Lieutenant Governor in Council.

Part 2

Repealed

14–20 [Repealed 2003-46-5.]

Part 3 — Regulation of Public Utilities

Application of this Part

21 (1) This Part applies only to a public utility that is subject to the legislative authority of the Province.

(2) The provision by a public utility of a class of service in respect of which the public utility is not subject to the legislative authority of the Province does not make this Part inapplicable to that public utility in respect of any other class of service.

Exemptions

22 (1) In this section:

"eligible person" means a person, or a class of persons, that

(a) generates, produces, transmits, distributes or sells electricity,

(b) for the purpose of heating or cooling any building, structure or equipment or for any industrial purpose, heats, cools or refrigerates water, air or any heating medium or coolant, using for that purpose equipment powered by a fuel, a geothermal resource or solar energy, or

(c) enters into an energy supply contract, within the meaning of section 68, for the provision of electricity;

"minister" means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(2) The minister, by regulation, may

(a) exempt from any or all of section 71 and the provisions of this Part

(i) an eligible person, or

(ii) an eligible person in respect of any equipment, facility, plant, project, activity, contract, service or system of the eligible person, and

(b) in respect of an exemption made under paragraph (a), impose any terms and conditions the minister considers to be in the public interest.

(3) The minister, before making a regulation under subsection (2), may refer the matter to the commission for a review.

General supervision of public utilities

23 (1) The commission has general supervision of all public utilities and may make orders about

(a) equipment,

(b) appliances,

(c) safety devices,

(d) extension of works or systems,

(e) filing of rate schedules,

(f) reporting, and

(g) other matters it considers necessary or advisable for

(i) the safety, convenience or service of the public, or

(ii) 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.

Commission must make examinations and inquiries

24 In its supervision of public utilities, the commission must make examinations and conduct inquiries necessary to keep itself informed about

- (a) the conduct of public utility business,
- (b) compliance by public utilities with this Act, regulations or any other law, and
- (c) any other matter in the commission's jurisdiction.

Commission may order improved service

25 If the commission, after a hearing held on its own motion or on complaint, finds that the service of a public utility is unreasonable, unsafe, inadequate or unreasonably discriminatory, the commission must

- (a) determine what is reasonable, safe, adequate and fair service, and
- (b) order the utility to provide it.

Commission may set standards

26 After a hearing held on the commission's own motion or on complaint, the commission may do one or more of the following:

- (a) determine and set just and reasonable standards, classifications, rules, practices or service to be used by a public utility;
- (b) determine and set adequate and reasonable standards for measuring quantity, quality, pressure, initial voltage or other conditions of supplying service;
- (c) prescribe reasonable regulations for examining, testing or measuring a service;

- (d) establish or approve reasonable standards for accuracy of meters and other measurement appliances;
- (e) provide for the examination and testing of appliances used to measure a service of a utility.

Joint use of facilities

27 (1) If the commission, after a hearing, finds that

(a) public convenience and necessity require the use by a public utility of conduits, subways, poles, wires or other equipment belonging to another public utility, and

(b) the use will not prevent the owner or other users from performing their duties or result in any substantial detriment to their service,

the commission may, if the utilities fail to agree on the use, conditions or compensation, make an order it considers reasonable, directing that the use or joint use of the conduits, subways, poles, wires or other equipment be allowed and prescribing conditions of and compensation for the use.

(2) If the commission, after a hearing, finds that the provision of adequate service by one public utility or the safety of the persons operating or using that service requires that wires or cables carrying electricity and run, placed, erected, maintained or used by another public utility be placed, constructed or equipped with safety devices, the commission may make an order it considers reasonable about the placing, construction or equipment.

(3) By the same or a later order, the commission may

(a) direct that the cost of the placing, construction or equipment be at the expense of the public utility whose wire, cable or apparatus was most recently placed, or

(b) in the discretion of the commission, apportion the cost between the utilities.

Utility must provide service if supply line near

28 (1) On being requested by the owner or occupier of the premises to

do so, a public utility must supply its service to premises that are located within 90 metres of its supply line or any lesser distance that the commission prescribes suitable for that purpose.

(2) Before supplying the service under subsection (1) or making a connection for the purpose, or as a condition of continuing to supply the service, the public utility may require the owner or occupier to give reasonable security for repayment of the costs of making the connection as set out in the filed schedule of rates.

(3) After a hearing and for proper cause, the commission may relieve a public utility from the obligation to supply service under this Act on terms the commission considers proper and in the public interest.

Commission may order utility to provide service if supply line distant

29 On the application of a person whose premises are located more than 90 metres from a supply line suitable for that purpose, the commission may order a public utility that controls or operates the line

(a) to supply, within the time the commission directs, the service required by that person, and

(b) to make extensions and install necessary equipment and apparatus on terms the commission directs, which terms may include payment of all or part of the cost by the applicant.

Commission may order extension of existing service

30 If the commission, after a hearing, determines that

(a) an extension of the existing services of a public utility, in a general area that the public utility may properly be considered responsible for developing, is feasible and required in the public interest, and

(b) the construction and maintenance of the extension will not necessitate a substantial increase in rates chargeable, or a decrease in services provided, by the utility elsewhere,

the commission may order the utility to make the extension on terms

the commission directs, which may include payment of all or part of the cost by the persons affected.

Regulation of agreements

- 31** The commission may make rules governing conditions to be contained in agreements entered into by public utilities for their regulated services or for a class of regulated service.

Use of municipal thoroughfares

- 32** (1) This section applies if a public utility
- (a) has the right to enter a municipality to place its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse, and
 - (b) cannot come to an agreement with the municipality on the use of the street or other place or on the terms of the use.
- (2) On application and after any inquiry it considers advisable, the commission may, by order, allow the use of the street or other place by the public utility for that purpose and specify the manner and terms of use.

Dispensing with municipal consent

- 33** (1) This section applies if a public utility
- (a) cannot agree with a municipality respecting placing its distribution equipment on, along, across, over or under a public street, lane, square, park, public place, bridge, viaduct, subway or watercourse in a municipality, and
 - (b) the public utility is otherwise unable, without expenditures that the commission considers unreasonable, to extend its system, line or apparatus from a place where it lawfully does business to another place where it is authorized to do business.
- (2) On application and after a hearing, for the purpose of that extension only and without unduly preventing the use of the street or

other place by other persons, the commission may, by order,

- (a) allow the use of the street or other place by the public utility, despite any law or contract granting to another person exclusive rights, and
- (b) specify the manner and terms of the use.

Order to extend service in municipality

34 (1) On the complaint of a municipality that a public utility doing business in the municipality fails to extend its service to a part of the municipality, and after any hearing the commission considers advisable, the commission may order the public utility to extend its service in a way that the commission considers reasonable and proper.

(2) An order under subsection (1) may

- (a) in the commission's discretion, impose terms for the extension, including the expenditure to be incurred for all necessary works, and
- (b) apportion the cost between the public utility, the municipality and consumers receiving service from the extension.

Other orders to extend service

35 If the commission, after a hearing, concludes that in its opinion an extension by a public utility of its existing service would provide sufficient business to justify the construction and maintenance of the extension, and the financial condition of the public utility reasonably warrants the capital expenditure required, the commission may order the utility to extend its service to the extent the commission considers reasonable and proper.

Use of municipal structures

36 Subject to any agreement between a public utility and a municipality and to the franchise or rights of the public utility, and after any hearing the commission considers advisable, the commission may, by order, specify the terms on which the public utility may use for any

purpose of its service

- (a) a highway in the municipality, or
- (b) a public bridge, viaduct or subway constructed or to be constructed by the municipality alone or jointly with another municipality, corporation or government.

Supervisors and inspectors

37 (1) If the commission considers that a supervisor or inspector should be appointed to supervise or inspect, continuously or otherwise, the system, works, plant, equipment or service of a public utility with a view to establishing and carrying out measures for

- (a) the safety of the public and of the users of the utility's service, or
- (b) adequacy of service,

the commission may appoint a supervisor or inspector for that utility and may specify the person's duties.

(2) The commission may

- (a) set the salary and expenses of a supervisor or inspector appointed under subsection (1), and
- (b) order the amount set
 - (i) to be borne by the municipality in which the operations of the public utility are carried on or its service is provided, or
 - (ii) to be borne or apportioned in a way the commission considers equitable.

Public utility must provide service

38 A public utility must

- (a) provide, and
- (b) maintain its property and equipment in a condition to enable it to provide,

a service to the public that the commission considers is in all respects adequate, safe, efficient, just and reasonable.

No discrimination or delay in service

- 39** On reasonable notice, a public utility must provide suitable service without undue discrimination or undue delay to all persons who
- (a) apply for service,
 - (b) are reasonably entitled to it, and
 - (c) pay or agree to pay the rates established for that service under this Act.

Exemption for part of municipality

- 40** (1) On application, the commission may, by order, exempt a municipality from section 39 except in a defined area.
- (2) On application by any person and after notice to the municipality, the commission may enlarge or reduce an area defined under subsection (1).

No discontinuance without permission

- 41** A public utility that has been granted a certificate of public convenience and necessity or a franchise, or that has been deemed to have been granted a certificate of public convenience and necessity, and has begun any operation for which the certificate or franchise is necessary, or in respect of which the certificate is deemed to have been granted, must not cease the operation or a part of it without first obtaining the permission of the commission.

Duty to obey orders

- 42** A public utility must obey the lawful orders of the commission made under this Act for its business or service, and must do all things necessary to secure observance of those orders by its officers, agents and employees.

Duty to provide information

- 43** (1) A public utility must, for the purposes of this Act,
- (a) answer specifically all questions of the commission, and
 - (b) provide to the commission

- (i) the information the commission requires, and
- (ii) a report, submitted annually and in the manner the commission requires, regarding the demand-side measures taken by the public utility during the period addressed by the report, and the effectiveness of those measures.

(1.1) The authority, in addition to providing the information and reports referred to in subsection (1), must provide to the commission, in accordance with the regulations, an annual report comparing the electricity rates charged by the authority with electricity rates charged by public utilities in other jurisdictions in North America, including an assessment of whether the authority's electricity rates are competitive with those other rates.

(2) A public utility that receives from the commission any form of return must fully and correctly answer each question in the return and deliver it to the commission.

(3) On request by the commission, a public utility must deliver to the commission

- (a) all profiles, contracts, reports of engineers, accounts and records in its possession or control relating in any way to its property or service or affecting its business, or verified copies of them, and

- (b) complete inventories of the utility's property in the form the commission directs.

(4) On request by the commission, a public utility must file with the commission a statement in writing setting out the name, title of office, post office address and the authority, powers and duties of

- (a) every member of the board of directors and the executive committee,

- (b) every trustee, superintendent, chief or head of construction or operation, or of any department, branch, division or line of construction or operation, and

- (c) other officers of the utility.

(5) The statement required under subsection (4) must be filed in a

form that discloses the source and origin of each administrative act, rule, decision, order or other action of the utility.

Duty to keep records

44 (1) A public utility must have in British Columbia an office in which it must keep all accounts and records required by the commission to be kept in British Columbia.

(2) A public utility must not remove or permit to be removed from British Columbia an account or record required to be kept under subsection (1), except on conditions specified by the commission.

Long-term resource and conservation planning

44.1 (1) In this section, "**demand increase**" means the greater of

(a) the difference between

(i) the sum of the estimate referred to in subsection (4) (b) and a prescribed amount, if any, and

(ii) the demand the authority would serve during the period referred to in subsection (4) (b) if the demand in each year of that period remains equal to the demand referred to in subsection (4) (a), and

(b) zero.

(2) Subject to subsection (4), a public utility must file with the commission, in the form and at the times the commission requires, a long-term resource plan including all of the following:

(a) an estimate of the demand for energy the public utility would expect to serve if the public utility does not take new demand-side measures during the period addressed by the plan;

(b) a plan of how the public utility intends to reduce the demand referred to in paragraph (a) by taking cost-effective demand-side measures;

(c) an estimate of the demand for energy that the public utility expects to serve after it has taken cost-effective demand-side measures;

- (d) a description of the facilities that the public utility intends to construct or extend in order to serve the estimated demand referred to in paragraph (c);
- (e) information regarding the energy purchases from other persons that the public utility intends to make in order to serve the estimated demand referred to in paragraph (c);
- (f) an explanation of why the demand for energy to be served by the facilities referred to in paragraph (d) and the purchases referred to in paragraph (e) are not planned to be replaced by demand-side measures;
- (g) any other information required by the commission.

(3) The commission may exempt a public utility from the requirement to include in a long-term resource plan filed under subsection (2) any of the information referred to in paragraphs (a) to (f) of that subsection if the commission is satisfied that the information is not applicable with respect to the nature of the service provided by the public utility

(4) A long-term resource plan filed under subsection (2) by the authority before the end of the 2020 calendar year must include, in addition to everything referred to in subsection (2) (a) to (g), all of the following:

- (a) a statement of the demand for electricity the authority served in the year beginning on April 1, 2007, and ending on March 31, 2008;
- (b) an estimate of the total demand for electricity the authority would expect to serve in the period beginning on April 1, 2008, and ending on March 31, 2021, if no new demand-side measures are taken during that period;
- (c) a statement of the demand-side measures the authority would need to take so that, in combination with demand-side measures taken by the government of British Columbia or of Canada or a local authority, the demand increase would be reduced by 50% by 2020.

(5) The commission may establish a process to review long-term resource plans filed under subsection (2).

(6) After reviewing a long-term resource plan filed under subsection (2), the commission must

- (a) accept the plan, if the commission determines that carrying out the plan would be in the public interest, or
- (b) reject the plan.

(7) The commission may accept or reject, under subsection (6), a part of a public utility's plan, and, if the commission rejects a part of a plan,

- (a) the public utility may resubmit the part within a time specified by the commission, and
- (b) the commission may accept or reject, under subsection (6), the part resubmitted under paragraph (a) of this subsection.

(8) In determining under subsection (6) whether to accept a long-term resource plan, the commission must consider

- (a) the government's energy objectives,
- (b) whether the plan is consistent with the requirements under sections 64.01 and 64.02, if applicable,
- (c) whether the plan shows that the public utility intends to pursue adequate, cost-effective demand-side measures, and
- (d) the interests of persons in British Columbia who receive or may receive service from the public utility.

(9) In accepting under subsection (6) a long-term resource plan, or part of a plan, the commission may do one or both of the following:

- (a) order that a proposed utility plant or system, or extension of either, referred to in the accepted plan or the part is exempt from the operation of section 45 (1);
- (b) order that, despite section 75, a matter the commission considers to be adequately addressed in the accepted plan or the part is to be considered as conclusively determined for the purposes of any hearing or proceeding to be conducted by the commission under this Act, other than a

hearing or proceeding for the purposes of section 99.

Expenditure schedule

44.2 (1) A public utility may file with the commission an expenditure schedule containing one or more of the following:

(a) a statement of the expenditures on demand-side measures the public utility has made or anticipates making during the period addressed by the schedule;

(b) a statement of capital expenditures the public utility has made or anticipates making during the period addressed by the schedule;

(c) a statement of expenditures the public utility has made or anticipates making during the period addressed by the schedule to acquire energy from other persons.

(2) The commission may not consent under section 61 (2) to an amendment to or a rescission of a schedule filed under section 61 (1) to the extent that the amendment or the rescission is for the purpose of recovering expenditures referred to in subsection (1) (a) of this section, unless

(a) the expenditure is the subject of a schedule filed and accepted under this section, or

(b) the amendment or rescission is for the purpose of setting an interim rate.

(3) After reviewing an expenditure schedule submitted under subsection (1), the commission, subject to subsections (5) and (6), must

(a) accept the schedule, if the commission considers that making the expenditures referred to in the schedule would be in the public interest, or

(b) reject the schedule.

(4) The commission may accept or reject, under subsection (3), a part of a schedule.

(5) In considering whether to accept an expenditure schedule, the commission must consider

- (a) the government's energy objectives,
- (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
- (c) whether the schedule is consistent with the requirements under section 64.01 or 64.02, if applicable,
- (d) if the schedule includes expenditures on demand-side measures, whether the demand-side measures are cost-effective within the meaning prescribed by regulation, if any, and
- (e) the interests of persons in British Columbia who receive or may receive service from the public utility.

(6) If the commission considers that an expenditure in an expenditure schedule was determined to be in the public interest in the course of determining that a long-term resource plan was in the public interest under section 44.1 (6),

- (a) subsection (5) of this section does not apply with respect to that expenditure, and
- (b) the commission must accept under subsection (3) the expenditure in the expenditure schedule.

Certificate of public convenience and necessity

45 (1) Except as otherwise provided, after September 11, 1980, a person must not 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.

(2) For the purposes of subsection (1), a public utility that is operating a public utility plant or system on September 11, 1980 is deemed to have received a certificate of public convenience and necessity, authorizing it

- (a) to operate the plant or system, and
- (b) subject to subsection (5), to construct and operate extensions to the plant or system.

(3) Nothing in subsection (2) authorizes the construction or operation

of an extension that is a reviewable project under the *Environmental Assessment Act*.

(4) The commission may, by regulation, exclude utility plant or categories of utility plant from the operation of subsection (1).

(5) If it appears to the commission that a public utility should, before constructing or operating an extension to a utility plant or system, apply for a separate certificate of public convenience and necessity, the commission may, not later than 30 days after construction of the extension is begun, order that subsection (2) does not apply in respect of the construction or operation of the extension.

(6) A public utility must file with the commission at least once each year a statement in a form prescribed by the commission of the extensions to its facilities that it plans to construct.

(6.1) [Repealed 2008-13-8.]

(6.2) [Repealed 2008-13-8.]

(7) Except as otherwise provided, a privilege, concession or franchise granted to a public utility by a municipality or other public authority after September 11, 1980 is not valid unless approved by the commission.

(8) The commission must not give its approval unless it determines that the privilege, concession or franchise proposed is necessary for the public convenience and properly conserves the public interest.

(9) In giving its approval, the commission

(a) must grant a certificate of public convenience and necessity, and

(b) may impose conditions about

(i) the duration and termination of the privilege, concession or franchise, or

(ii) construction, equipment, maintenance, rates or service,

as the public convenience and interest reasonably require.

Procedure on application

- 46** (1) An applicant for a certificate of public convenience and necessity must file with the commission information, material, evidence and documents that the commission prescribes.
- (2) The commission has a discretion whether or not to hold any hearing on the application.
- (3) Subject to subsections (3.1) and (3.2), the commission may issue or refuse to issue the certificate, or may issue a certificate of public convenience and necessity for the construction or operation of a part only of the proposed facility, line, plant, system or extension, or for the partial exercise only of a right or privilege, and may attach to the exercise of the right or privilege granted by the certificate, terms, including conditions about the duration of the right or privilege under this Act as, in its judgment, the public convenience or necessity may require.
- (3.1) In deciding whether to issue a certificate under subsection (3), the commission must consider
- (a) the government's energy objectives,
 - (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any, and
 - (c) whether the application for the certificate is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable.
- (3.2) Section (3.1) does not apply if the commission considers that the matters addressed in the application for the certificate were determined to be in the public interest in the course of considering a long-term resource plan under section 44.1.
- (4) If a public utility desires to exercise a right or privilege under a consent, franchise, licence, permit, vote or other authority that it proposes to obtain but that has not, at the date of the application, been granted to it, the public utility may apply to the commission for an order preliminary to the issue of the certificate.
- (5) On application under subsection (4), the commission may make an order declaring that it will, on application, under rules it specifies, issue the desired certificate, on the terms it designates in the order,

after the public utility has obtained the proposed consent, franchise, licence, permit, vote or other authority.

(6) On evidence satisfactory to the commission that the consent, franchise, licence, permit, vote or other authority has been secured, the commission must issue a certificate under section 45.

(7) The commission may amend a certificate previously issued, or issue a new certificate, for the purpose of renewing, extending or consolidating a certificate previously issued.

(8) A public utility to which a certificate is, or has been, issued, or to which an exemption is, or has been, granted under section 45 (4), is authorized, subject to this Act, to construct, maintain and operate the plant, system or extension authorized in the certificate or exemption.

Order to cease work

47 (1) If a public utility

(a) is engaged, or is about to engage, in the construction or operation of a plant or system, and

(b) has not secured or has not been exempted from the requirement for, or is not deemed to have received a certificate of public convenience and necessity required under this Act,

any interested person may file a complaint with the commission.

(2) The commission may, with or without notice, make an order requiring the public utility complained of to cease the construction or operation until the commission makes and files its decision on the complaint, or until further order of the commission.

(3) The commission may, after a hearing, make the order and specify the terms under this Act that it considers advisable.

(4) If the commission considers it necessary to determine whether a person is engaged or is about to engage in construction or operation of any plant or system, the commission may request that person to provide information required by it and to answer specifically all questions of the commission, and the person must comply.

Cancellation or suspension of franchises and permits

48 (1) If the commission, after a hearing, determines that a public utility holding a franchise, licence or permit has failed to exercise or has not continued to exercise or use the right and privilege granted by the franchise, licence or permit, the commission may

(a) cancel the franchise, licence or permit, or

(b) suspend for a time the commission considers advisable the rights, or any of them, under the franchise, licence or permit.

(2) If a franchise, licence or permit is cancelled, the utility must cease to operate.

(3) If a right under a franchise, licence or permit is suspended, the utility must cease to exercise the suspended right during the period of suspension.

Accounts and reports

49 The commission may, by order, require every public utility to do one or more of the following:

(a) keep the records and accounts of the conduct of the utility's business that the commission may specify, and for public utilities of the same class, adopt a uniform system of accounting specified by the commission;

(b) provide, at the times and in the form and manner the commission specifies, a detailed report of finances and operations, verified as specified;

(c) file with the commission, at the times and in the form and manner the commission specifies, a report of every accident occurring to or on the plant, equipment or other property of the utility, if the accident is of such nature as to endanger the safety, health or property of any person;

(d) obtain from a board, tribunal, municipal or other body or official having jurisdiction or authority, permission, if necessary, to undertake or carry on a work or service ordered by the commission to be undertaken or carried on

that is contingent on the permission.

Commission approval of issue of securities

- 50** (1) In this section, "**security**" means any share of any class of shares of a public utility or any bond, debenture, note or other obligation of a public utility whether secured or unsecured.
- (2) Except in the case of a security evidencing indebtedness payable less than one year from its date, a public utility must not issue a security without first obtaining approval of the commission under this section and, if section 54 applies, under that section.
- (3) Without first obtaining the commission's approval, a public utility must not,
- (a) in respect of a security that it has issued,
 - (i) increase a fixed dividend or fixed interest rate,
 - (ii) alter a maturity date for the issue,
 - (ii) restrict the utility's right to redeem the issue,
 - (iv) increase the premium to be paid on redemption, or
 - (v) make a material alteration in the characteristics of the security, or
 - (b) purchase, redeem or otherwise acquire shares of any class of the utility except in accordance with any special rights or restrictions attached to them.
- (4) Subsections (2) and (3) do not apply to the issue of shares under a genuine employee share purchase plan or genuine employee share option plan that has been filed with the commission.
- (5) Without first obtaining the commission's approval, a public utility must not guarantee the payment of all or part of a loan or all or part of the interest on a loan made to another person.
- (6) A public utility is not liable under a guarantee given by it after June 29, 1988, in contravention of subsection (5) or of a condition of approval imposed under subsection (7).
- (7) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in

the public interest.

(8) A municipality is not a utility for the purpose of this section.

Restraint on capitalization

51 A public utility must not do any of the following:

- (a) capitalize a franchise or right to be a corporation;
- (b) capitalize a franchise, licence, permit or concession in excess of the amount that, exclusive of tax or annual charge, is paid to the government, a municipality or other public authority as consideration for the franchise, licence, permit or concession;
- (c) issue a security or evidence of indebtedness against a contract for consolidation, amalgamation, merger or lease.

Restraint on disposition

52 (1) Except for a disposition of its property in the ordinary course of business, a public utility must not, without first obtaining the commission's approval,

- (a) dispose of or encumber the whole or a part of its property, franchises, licences, permits, concessions, privileges or rights, or
- (b) by any means, direct or indirect, merge, amalgamate or consolidate in whole or in part its property, franchises, licences, permits, concessions, privileges or rights with those of another person.

(2) The commission may give its approval under this section subject to conditions and requirements considered necessary or desirable in the public interest.

Consolidation, amalgamation and merger

53 (1) A public utility must not consolidate, amalgamate or merge with another person

- (a) unless the Lieutenant Governor in Council
 - (i) has first received from the commission a report

under this section including an opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, and

(ii) has, by order, consented to the consolidation, amalgamation or merger, and

(b) except in accordance with an order made under paragraph (a).

(2) The Lieutenant Governor in Council may, in an order under subsection (1) (a), include conditions and requirements that the Lieutenant Governor in Council considers necessary or advisable.

(3) An application for consent of the Lieutenant Governor in Council under subsection (1) must be made to the commission by the public utility.

(4) The commission must inquire into the application and may for that purpose hold a hearing.

(5) On conclusion of its inquiry, the commission must,

(a) if it is of the opinion that the consolidation, amalgamation or merger would be beneficial in the public interest, submit its report and findings to the Lieutenant Governor in Council, or

(b) dismiss the application.

(6) If a public utility gives notice to its shareholders of a meeting of shareholders in connection with a consolidation, amalgamation or merger, it must

(a) set out in the notice the provisions of this section, and

(b) file a copy of the notice with the commission at the time of mailing to the shareholders.

Reviewable interests

54 (1) In this section:

"child" includes a child in respect of whom a person referred to in the definition of "spouse" stands in the place of a parent;

"offeree" means a person to whom a take over bid is made;

"offeror" means a person, other than an agent, who makes a take over bid and includes 2 or more persons

- (a) whose bids are made jointly or in concert, or
- (b) who intend to exercise jointly or in concert any voting rights attaching to the shares for which a take over bid is made;

"spouse" means a person who

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years;

"take over bid" has the same meaning as in section 92 of the *Securities Act*;

"voting share" means a share that has, or may under any special rights or restrictions attached to the share have, the right to vote for the election of directors, and for this purpose **"share"** includes

- (a) a security convertible into such a share, and
- (b) options and rights to acquire such a share or such a convertible security.

(2) For the purposes of this section, persons are associates if any of the following apply:

- (a) one of the persons is a corporation
 - (i) of which more than 10% of the shares outstanding of any class of the corporation are beneficially owned or controlled, directly or indirectly, by the other person, or
 - (ii) of which the other is a director or officer;
- (b) each of the persons is a corporation and
 - (i) more than 10% of the shares outstanding of any

class of shares of one are beneficially owned or controlled, directly or indirectly, by the other, or
(ii) more than 10% of the shares outstanding of any class of shares of each are beneficially owned or controlled, directly or indirectly, by the same person;

(c) they are partners or one is a partnership of which the other is a partner;

(d) one is a trust in which the other has a substantial beneficial interest or for which the other serves as trustee or in a similar capacity;

(e) they are obligated to act in concert in exercising a voting right in respect of shares of the utility;

(f) one is the spouse or child of the other;

(g) one is a relative of the other or of the other's spouse and has the same home as the other.

(3) For the purpose of subsection (2), if a person has more than one associate, those associates are associates of each other.

(4) For the purpose of this section, a person has a reviewable interest in a public utility if

(a) the person owns or controls, or

(b) the person and the person's associates own or control,

in the aggregate more than 20% of the voting shares outstanding of any class of shares of the utility.

(5) A public utility must not, without the approval of the commission,

(a) issue, sell, purchase or register on its books a transfer of shares in the capital of the utility or create, or

(b) attach to any shares, whether issued or unissued, any special rights or restrictions,

if the issue, sale, purchase or registration or the creation or attachment of the special rights or restrictions would

(c) cause any person to have a reviewable interest,

(d) increase the percentage of voting shares owned by a

person who has a reviewable interest,

(e) be a registration of a transfer of shares, the acquisition of which was contrary to subsection (7) or (8), or

(f) increase the voting rights attached to any shares owned by a person who has a reviewable interest.

(6) Failure of a public utility to comply with subsection (5) does not give rise to an offence if the public utility acts in the genuine belief based on an enquiry made with reasonable care, that the issue, sale, purchase or registration, or the creation or attachment of the special rights or restrictions, would not have the effects referred to in subsection (5) (c) to (f).

(7) A person must not acquire or acquire control of such numbers of any class of shares of a public utility as

(a) in themselves, or

(b) together with shares already owned or controlled by the person and the person's associates,

cause the person to have a reviewable interest in a public utility unless the person has obtained the commission's approval.

(8) Except if the acquisition or acquisition of control does not increase the percentage of voting shares held, owned or controlled by the person or by the person and the person's associates, a person having a reviewable interest in a public utility and any associate of that person must not acquire or acquire control of any voting shares in the public utility unless the person or associate has obtained the commission's approval.

(9) The commission may give its approval under this section subject to conditions and requirements it considers necessary or desirable in the public interest, but the commission must not give its approval under this section unless it considers that the public utility and the users of the service of the public utility will not be detrimentally affected.

(10) If the commission determines that there has been a contravention of subsection (5), (7) or (8), the commission may, on notice to the public utility and after a hearing, make an order

imposing on the public utility conditions and requirements respecting the management and operation of the utility.

(11) A proceeding must not be brought against the commission or the government by reason of the exercise by the commission of its powers under subsection (9) or (10).

(12) An offeror who makes a take over bid for shares of a public utility must

(a) file with the commission a copy of the take over bid and all supporting or supplementary material within 5 days after the date the material is first sent to offerees, and

(b) include in or attach to the take over bid a notice setting out the provisions of this section and stating the number, without duplication, and designation of any shares of the public utility held by the offeror and the offeror's associates.

(13) Nothing in subsection (12) relieves a person from any requirement under the *Securities Act*.

Appraisal of utility property

55 (1) The commission may

(a) ascertain by appraisal the value of the property of a public utility, and

(b) inquire into every fact that, in its judgment, has a bearing on that value, including the amount of money actually and reasonably expended in the undertaking to provide service reasonably adequate to the requirements of the community served by the utility as that community exists at the time of the appraisal.

(2) In making its appraisal, the commission must have access to all records in the possession of a municipality or any ministry or board of the government.

(3) In making its appraisal under this section, the commission may order

(a) that all or part of the costs and expenses of the

commission in making the appraisal must be paid by the public utility, and

(b) that the utility pay an amount as the work of appraisal proceeds.

(4) The certificate of the chair of the commission is conclusive evidence of the amounts payable under subsection (3).

(5) Expenses approved by the commission in connection with an appraisal, including expenses incurred by the public utility whose property is appraised, must be charged by the utility to the cost of operating the property as a current item of expense, and the commission may, by order, authorize or require the utility to amortize this charge over a period and in the manner the commission specifies.

Depreciation accounts and funds

56 (1) If the commission, after inquiry, considers that it is necessary and reasonable that a depreciation account should be carried by a public utility, the commission may, by order, require the utility to keep an adequate depreciation account under rules and forms of account specified by the commission.

(2) The commission must determine and, by order after a hearing, set proper and adequate rates of depreciation.

(3) The rates must be set so as to provide, in addition to the expense of maintenance, the amounts required to keep the public utility's property in a state of efficiency in accordance with technical and engineering progress in that industry of the utility.

(4) A public utility must adjust its depreciation accounts to conform to the rates fixed by the commission and, if ordered by the commission, must set aside out of earnings whatever money is required and carry it in a depreciation fund.

(5) Without the consent of the commission, the depreciation fund must not be expended other than for replacement, improvement, new construction, extension or addition to the property of the utility.

Reserve funds

57 (1) The commission may, by order, require a public utility to create and maintain a reserve fund for any purpose the commission considers proper, and may fix the amount or rate to be charged each year in the accounts of the utility for the purpose of creating the reserve fund.

(2) The commission may order that no reserve fund other than that created and maintained as directed by the commission may be created by a public utility.

Commission may order amendment of schedules

58 (1) The commission may,

(a) on its own motion, or

(b) on complaint by a public utility or other interested person that the existing rates in effect and collected or any rates charged or attempted to be charged for service by a public utility are unjust, unreasonable, insufficient, unduly discriminatory or in contravention of this Act, the regulations or any other law,

after a hearing, determine the just, reasonable and sufficient rates to be observed and in force.

(2) If the commission makes a determination under subsection (1), it must, by order, set the rates.

(2.1) The commission must set rates for the authority in accordance with

(a) the prescribed requirements, if any, and

(b) the prescribed factors and guidelines, if any.

(2.2) A requirement prescribed for the purposes of subsection (2.1)

(a) applies despite

(a) any other provision of

(i) this Act, including, for greater certainty, section 58.1, or

(ii) the regulations, except a regulation under section 3, or

(b) any previous decision of the commission.

(2.3) Subsections (2.1) (a) and (2.2) are repealed on March 31, 2010.

(2.4) Despite subsection (2.3), a requirement prescribed for the purposes of subsection (2.1) (a) that is in effect immediately before March 31, 2010, continues to apply after that date as though subsection (2.2) were still in force, unless the prescribed requirement is amended or repealed after that date.

(3) The public utility affected by an order under this section must

- (a) amend its schedules in conformity with the order, and
- (b) file amended schedules with the commission.

Rate rebalancing

58.1 (1) In this section, "**revenue-cost ratio**" means the amount determined by dividing the authority's revenues from a class of customers during a period of time by the authority's costs to serve that class of customers during the same period of time.

(2) This section applies despite

- (a) any other provision of
 - (i) this Act, or
 - (ii) the regulations, except a regulation under section 3 or 125.1 (4) (f), or
- (b) any previous decision of the commission.

(3) The following decision and orders of the commission are of no force or effect to the extent that they require the authority to do anything for the purpose of changing revenue-cost ratios:

- (a) 2007 RDA Phase 1 Decision, issued October 26, 2007;
- (b) order G-111-07, issued September 7, 2007;
- (c) order G-130-07, issued October 26, 2007;
- (d) order G-10-08, issued January 21, 2008,

and the rates of the authority that applied immediately before this section comes into force continue to apply and are deemed to be just,

reasonable and not unduly discriminatory.

(4) Nothing in subsection (3) prevents the commission from setting rates for the authority, but the commission may not set rates for the authority for the purpose of changing the revenue-cost ratio for a class of customers.

(5) Subsection (4) is repealed on March 31, 2010.

(6) Nothing in subsection (3) prevents the commission from setting rates for the authority, but the commission, after March 31, 2010, may not set rates for the authority such that the revenue-cost ratio, expressed as a percentage, for any class of customers increases by more than 2 percentage points per year compared to the revenue-cost ratio for that class immediately before the increase.

Discrimination in rates

59 (1) A public utility must not make, demand or receive

(a) an unjust, unreasonable, unduly discriminatory or unduly preferential rate for a service provided by it in British Columbia, or

(b) a rate that otherwise contravenes this Act, the regulations, orders of the commission or any other law.

(2) A public utility must not

(a) as to rate or service, subject any person or locality, or a particular description of traffic, to an undue prejudice or disadvantage, or

(b) extend to any person a form of agreement, a rule or a facility or privilege, unless the agreement, rule, facility or privilege is regularly and uniformly extended to all persons under substantially similar circumstances and conditions for service of the same description.

(3) The commission may, by regulation, declare the circumstances and conditions that are substantially similar for the purpose of subsection (2) (b).

(4) It is a question of fact, of which the commission is the sole judge,

(a) whether a rate is unjust or unreasonable,

(b) whether, in any case, there is undue discrimination, preference, prejudice or disadvantage in respect of a rate or service, or

(c) whether a service is offered or provided under substantially similar circumstances and conditions.

(5) In this section, a rate is "unjust" or "unreasonable" if the rate is

(a) more than a fair and reasonable charge for service of the nature and quality provided by the utility,

(b) insufficient to yield a fair and reasonable compensation for the service provided by the utility, or a fair and reasonable return on the appraised value of its property, or

(c) unjust and unreasonable for any other reason.

Setting of rates

60 (1) In setting a rate under this Act

(a) the commission must consider all matters that it considers proper and relevant affecting the rate,

(b) the commission must have due regard to the setting of a rate that

(i) is not unjust or unreasonable within the meaning of section 59,

(ii) provides to the public utility for which the rate is set a fair and reasonable return on any expenditure made by it to reduce energy demands, and

(iii) encourages public utilities to increase efficiency, reduce costs and enhance performance,

(b.1) the commission may use any mechanism, formula or other method of setting the rate that it considers advisable, and may order that the rate derived from such a mechanism, formula or other method is to remain in effect for a specified period, and

(c) if the public utility provides more than one class of service, the commission must

(i) segregate the various kinds of service into distinct

classes of service,

(ii) in setting a rate to be charged for the particular service provided, consider each distinct class of service as a self contained unit, and

(iii) set a rate for each unit that it considers to be just and reasonable for that unit, without regard to the rates fixed for any other unit.

(2) In setting a rate under this Act, the commission may take into account a distinct or special area served by a public utility with a view to ensuring, so far as the commission considers it advisable, that the rate applicable in each area is adequate to yield a fair and reasonable return on the appraised value of the plant or system of the public utility used, or prudently and reasonably acquired, for the purpose of providing the service in that special area.

(3) If the commission takes a special area into account under subsection (2), it must have regard to the special considerations applicable to an area that is sparsely settled or has other distinctive characteristics.

(4) For this section, the commission must exclude from the appraised value of the property of the public utility any franchise, licence, permit or concession obtained or held by the utility from a municipal or other public authority beyond the money, if any, paid to the municipality or public authority as consideration for that franchise, licence, permit or concession, together with necessary and reasonable expenses in procuring the franchise, licence, permit or concession.

Rate schedules to be filed with commission

61 (1) A public utility must file with the commission, under rules the commission specifies and within the time and in the form required by the commission, schedules showing all rates established by it and collected, charged or enforced or to be collected or enforced.

(2) A schedule filed under subsection (1) must not be rescinded or amended without the commission's consent.

(3) The rates in schedules as filed and as amended in accordance

with this Act and the regulations are the only lawful, enforceable and collectable rates of the public utility filing them, and no other rate may be collected, charged or enforced.

(4) A public utility may file with the commission a new schedule of rates that the utility considers to be made necessary by a rise in the price, over which the utility has no effective control, required to be paid by the public utility for its gas supplies, other energy supplied to it, or expenses and taxes, and the new schedule may be put into effect by the public utility on receiving the approval of the commission.

(5) Within 60 days after the date it approves a new schedule under subsection (4), the commission may,

(a) on complaint of a person whose interests are affected,
or

(b) on its own motion,

direct an inquiry into the new schedule of rates having regard to the fixing of a rate that is not unjust or unreasonable.

(6) After an inquiry under subsection (5), the commission may

(a) rescind or vary the increase and order a refund or customer credit by the utility of all or part of the money received by way of increase, or

(b) confirm the increase or part of it.

Schedules must be available to public

62 A public utility must keep a copy of the schedules filed open to and available for public inspection under commission rules.

Schedules must be observed

63 A public utility must not, without the consent of the commission, directly or indirectly, in any way charge, demand, collect or receive from any person for a regulated service provided by it, or to be provided by it, compensation that is greater than, less than or other than that specified in the subsisting schedules of the utility applicable to that service and filed under this Act.

Orders respecting contracts

64 (1) If the commission, after a hearing, finds that under a contract entered into by a public utility a person receives a regulated service at rates that are unduly preferential or discriminatory, the commission may

(a) declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or

(b) make any other order it considers advisable in the circumstances.

(2) If a contract is declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

Part 3.1 — Energy Security and the Environment**Electricity self-sufficiency**

64 . 01 (1) The authority must

(a) by the 2016 calendar year, achieve electricity self-sufficiency according to the prescribed criteria, and

(b) maintain, according to the prescribed criteria, electricity self-sufficiency in each calendar year after achieving it.

(2) A public utility, in planning for

(a) the construction or extension of generation facilities, and

(b) energy purchases,

must consider the government's goal that British Columbia be electricity self-sufficient by the 2016 calendar year and maintain self-sufficiency after that year.

Clean and renewable resources

64 . 02 (1) To facilitate the achievement of the government's goal that at

least 90% of the electricity generated in British Columbia be generated from clean or renewable resources, a person to whom this section applies

- (a) must pursue actions to meet the prescribed targets in relation to clean or renewable resources, and
- (b) must use the prescribed guidelines in planning for
 - (i) the construction or extension of generation facilities, and
 - (ii) energy purchases.

(2) This section applies to

- (a) the authority, and
- (b) a prescribed public utility, if any, and a public utility in a class of prescribed public utilities, if any.

Standing offer

64 . 03 (1) In this section, "**eligible facility**" means a generation facility that

- (a) either
 - (i) has only one generator with a nameplate capacity of 10 megawatts or less or has more than one generator and the total nameplate capacity of all of them is 10 megawatts or less, or
 - (ii) meets the prescribed requirements, and
- (b) either
 - (i) is a high-efficiency cogeneration facility, or
 - (ii) generates energy by means of a prescribed technology or from clean or renewable resources,

but does not include a prescribed generation facility or class of generation facilities.

(2) The authority must establish and maintain a standing offer

- (a) during the times prescribed by and in accordance with the regulations, if any, and
- (b) on the terms and conditions, if any, approved by the

commission under subsection (3),
to enter into an energy supply contract for the purchase of electricity
from eligible facilities.

(3) Subject to regulations made for the purposes of subsection (2)
(a), the commission, by order and on application by the authority,
may approve terms and conditions for the purposes of subsection (2)
(b) if the commission considers that the terms and conditions are in
the public interest.

(4) The commission may not issue an order under section 71 (3) with
respect to a contract entered into in accordance with the regulations
made for the purposes of subsection (2) (a), and exclusively on the
terms and conditions referred to in subsection (2) (b), of this section.

Smart meters

64 . 04 (1) In this section:

"private dwelling" means

- (a) a structure that is occupied as a private residence, or
- (b) if only part of a structure is occupied as a private
residence, that part of the structure;

"smart meter" means a meter that meets the prescribed
requirements, and includes related components, equipment and
metering and communication infrastructure that meet the
prescribed requirements.

(2) Subject to subsection (3), the authority must install and put into
operation smart meters in accordance with and to the extent required
by the regulations.

(3) The authority must complete all obligations imposed under
subsection (2) by the end of the 2012 calendar year.

(4) If a public utility, other than the authority, makes an application
under the Act in relation to advanced meters, the commission, in
considering that application, must consider the government's goal of
having advanced meters and associated infrastructure in use with
respect to customers other than those of the authority.

(5) The authority may, by itself, or by its engineers, surveyors, agents, contractors, subcontractors or employees, enter on any land, other than a private dwelling, without the consent of the owner, for a purpose relating to the use, maintenance, safeguarding, installation, replacement, repair, inspection, calibration or reading of its meters, including smart meters.

Part 4 – Carriers, Purchasers and Processors

Definition

64 . 1 In this Part, "**sufficient notice**" means notice in the manner and form, within the period, with the content and by the person required by the commission.

Common carrier

65 (1) In this section, "**common carrier**" means a person declared to be a common carrier by the commission under subsection (2) (a).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, the commission may

(a) issue an order, to be effective on a date determined by it, declaring a person who owns or operates a pipeline for the transportation of

(i) one or more of crude oil, natural gas and natural gas liquids, or

(ii) any other type of energy resource prescribed by the Lieutenant Governor in Council,

to be a common carrier with respect to the operation of the pipeline, and

(b) in the order establish the conditions under which the common carrier must accept and carry energy resources.

(3) On application by a person that uses or seeks to use facilities operated by a common carrier, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the

commission believes may be affected, may establish the conditions under which the common carrier must accept and carry crude oil, natural gas, natural gas liquids or prescribed energy resources referred to in subsection (2) (a).

(4) A common carrier must not unreasonably discriminate

(a) between itself and persons who apply to the common carrier to transport, in its pipeline, crude oil, natural gas, natural gas liquids or prescribed energy resources referred to in subsection (2) (a) (ii), or

(b) among the persons who so apply.

(5) A common carrier must comply with the conditions in any order applicable to the common carrier that is made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common carrier and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or in a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common carrier and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common carrier referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Common purchaser

66 (1) In this section, "**common purchaser**" means a person declared to be a common purchaser by the commission under subsection (2).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to persons the commission believes may be affected, the commission may issue an order, to be effective on a date determined by it, declaring a person who purchases or otherwise acquires, from a pool designated by the commission, crude oil, natural gas or natural gas liquids to be a common purchaser of the crude oil, natural gas or natural gas liquids.

(3) On application by a person whose crude oil, natural gas or natural gas liquids is or will be purchased by a common purchaser, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common purchaser must purchase crude oil, natural gas or natural gas liquid.

(4) A common purchaser must not unreasonably discriminate

(a) between itself and persons who apply for the services offered by the common purchaser, or

(b) among the persons who so apply.

(5) A common purchaser must comply with the conditions in any order applicable to the common purchaser that is made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common purchaser and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the commission in an order made under this section,

the commission may, in the order or in a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common purchaser and the commission are not

liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common purchaser referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Common processor

67 (1) In this section, "**common processor**" means a person declared to be a common processor by the commission under subsection (2).

(2) On application by an interested person and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, the commission may issue an order, to be effective on a date determined by it, declaring the person that owns or operates a plant for processing natural gas to be a common processor of natural gas.

(3) On application by a person that uses or seeks to use facilities operated by a common processor, the commission, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, may establish the conditions under which the common processor must accept and process natural gas.

(4) A common processor must not unreasonably discriminate

(a) between itself and persons who apply for the services offered by the common processor, or

(b) among the persons who so apply.

(5) A common processor must comply with the conditions in any order applicable to the common processor made under this section.

(6) The commission may, by order and after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary an order made under this section.

(7) If an agreement between a common processor and another person

(a) is made before an order is made under this section, and

(b) is inconsistent with the conditions established by the

commission in an order made under this section, the commission may, in the order or a subsequent order, after a hearing, sufficient notice of which has been given to all persons the commission believes may be affected, vary the agreement between the parties to eliminate the inconsistency.

(8) Subject to subsection (9), if an agreement is varied under subsection (7), the common processor and the commission are not liable for damages suffered as a result of that variation by the other party to the agreement.

(9) Subsection (8) does not apply to a common processor referred to in that subsection in relation to anything done or omitted by that person in bad faith.

Part 5 — Electricity Transmission

Definitions

68 In this Part:

"electricity transmission facilities" means conductors, circuits, transmission towers, substations, switching stations, transformers and any other equipment or facilities that are necessary for the purpose of transmitting electricity;

"energy" means electricity or natural gas;

"energy supply contract" means a contract under which energy is sold by a seller to a public utility or another buyer, and includes an amendment of that contract, but does not include a contract in respect of which a schedule is approved under section 61 of this Act;

"gas marketer" means a person who holds a gas marketer licence issued under section 71.1 (6) (a);

"low-volume consumer" has the meaning ascribed to it under rules made by the commission under section 71.1 (10);

"natural gas" means any methane, propane or butane that is sold for consumption as a domestic, commercial or industrial fuel or

as an industrial raw material;

"public utility" means a public utility to which Part 3 applies;

"seller" means a person who sells or trades in energy.

Repealed

69 [Repealed 2003-46-10.]

Use of electricity transmission facilities

70 (1) On application and after a hearing, the commission may make an order directing a public utility to allow a person, other than a public utility, to use the electricity transmission facilities of the public utility if the commission finds that

(a) the person and the public utility have failed to agree on the use of the facilities or on the conditions or compensation for their use,

(b) the use of the facilities will not prevent the public utility or other users from performing their duties or result in any substantial detriment to their service, and

(c) the public interest requires the use of the facilities by the person.

(2) An order under subsection (1) may contain terms and conditions the commission considers advisable, including terms and conditions respecting the rates payable to the public utility for the use of its electricity transmission facilities.

(3) After a hearing, the commission may, by order, vary or rescind an order made under this section.

(4) Any interested person may apply to the commission for an order under this section, and the application must contain the information the commission specifies.

Energy supply contracts

71 (1) Subject to subsection (1.1), a person who, after this section comes into force, enters into an energy supply contract must

- (a) file a copy of the contract with the commission under rules and within the time it specifies, and
- (b) provide to the commission any information it considers necessary to determine whether the contract is in the public interest.

(1.1) Subsection (1) does not apply to an energy supply contract for the sale of natural gas unless the sale is to a public utility.

(2) The commission may make an order under subsection (3) if the commission, after a hearing, determines that an energy supply contract to which subsection (1) applies is not in the public interest.

(2.1) In determining under subsection (2) whether an energy supply contract is in the public interest, the commission must consider

- (a) the government's energy objectives,
- (b) the most recent long-term resource plan filed by the public utility under section 44.1, if any,
- (c) whether the energy supply contract is consistent with requirements imposed under section 64.01 or 64.02, if applicable,
- (d) the interests of persons in British Columbia who receive or may receive service from the public utility,
- (e) the quantity of the energy to be supplied under the contract,
- (f) the availability of supplies of the energy referred to in paragraph (e),
- (g) the price and availability of any other form of energy that could be used instead of the energy referred to in paragraph (e), and
- (h) in the case only of an energy supply contract that is entered into by a public utility, the price of the energy referred to in paragraph (e).

(2.2) Subsection (2.1) (a) to (c) does not apply if the commission considers that the matters addressed in the energy supply contract filed under subsection (1) were determined to be in the public

interest in the course of considering a long-term resource plan under section 44.1.

(2.3) A public utility may submit to the commission a proposed energy supply contract setting out the terms and conditions of the contract and a process the public utility intends to use to acquire power from other persons in accordance with those terms and conditions.

(2.4) If satisfied that it is in the public interest to do so, the commission, by order, may approve a proposed contract submitted under subsection (2.3) and a process referred to in that subsection.

(2.5) In considering the public interest under subsection (2.4), the commission must consider

- (a) the government's energy objectives,
- (b) the most recent long-term resource plan filed by the public utility under section 44.1,
- (c) whether the application for the proposed contract is consistent with the requirements imposed on the public utility under sections 64.01 and 64.02, if applicable, and
- (d) the interests of persons in British Columbia who receive or may receive service from the public utility.

(2.6) If the commission issues an order under subsection (2.4), the commission may not issue an order under subsection (3) with respect to a contract

- (a) entered into exclusively on the terms and conditions, and
- (b) as a result of the process

referred to in subsection (2.3).

(3) If subsection (2) applies, the commission may

- (a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or
- (b) make any other order it considers advisable in the

circumstances.

(4) If an energy supply contract is, under subsection (3) (a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section.

(5) An energy supply contract or other information filed with the commission under this section must be made available to the public unless the commission considers that disclosure is not in the public interest.

Gas marketers

71.1 (1) A person must not perform a gas marketing activity within the meaning of subsection (2) unless

(a) the person is a public utility and the public utility performs the gas marketing activity within any area in which it is authorized to provide service, or

(b) the person holds a gas marketer licence issued to the person under subsection (6) (a).

(2) For the purposes of subsection (1), a person performs a gas marketing activity if the person

(a) sells or offers to sell natural gas to a low-volume consumer,

(b) acts as the agent or broker for a seller in a sale of natural gas to a low-volume consumer, or

(c) acts or offers to act as the agent or broker of a low-volume consumer in a purchase of natural gas.

(3) A gas marketer must comply with the commission rules issued under subsection (10) and the terms and conditions, if any, attached to the gas marketer licence held by the gas marketer.

(4) A gas marketer must not carry on or offer to carry on business as a gas marketer in a name other than the name in which it is licensed unless authorized to do so in the licence.

(5) If a person is not in compliance with subsection (1), (3) or (4),

the commission may do one or more of

(a) declare an energy supply contract between the person and a low-volume consumer unenforceable, either wholly or to the extent the commission considers proper, in which event the contract is enforceable to the extent specified, and

(b) if the person is a gas marketer,

(i) amend the terms and conditions of, or impose new terms and conditions on, the gas marketer licence, and

(ii) suspend or cancel the gas marketer licence.

(6) The commission may

(a) on application, issue a gas marketer licence to any person who is not a public utility,

(b) impose, in respect of any gas marketer licence issued by the commission, terms and conditions that the commission considers appropriate,

(c) amend any of the terms and conditions imposed in respect of a gas marketer licence, and

(d) suspend or cancel a gas marketer licence.

(7) The commission may require, as a condition of granting a gas marketer licence, that the gas marketer post security in a form, and in accordance with such terms and conditions, as the commission considers appropriate.

(8) The commission may order that some or all of the security posted by a gas marketer in accordance with a requirement imposed under subsection (7) be paid out to those persons who the commission considers have been or may be affected by an act or omission of the gas marketer.

(9) Section 43 applies to each gas marketer as if that gas marketer were a public utility.

(10) The commission may make the following rules:

(a) defining "low-volume consumer";

(b) respecting the process by which application may be made for a gas marketer licence and specifying the form and content of applications for that licence;

(c) respecting the imposition of terms and conditions on gas marketer licences;

(d) requiring an applicant for a gas marketer licence to obtain a bond, letter of credit or other specified security and requiring the filing with the commission of proof, satisfactory to the commission, of that security;

(e) respecting the form and content of security that may be required under paragraph (d) and the person by whom and the terms on which it is to be held;

(f) respecting the circumstances in which and the persons to whom disbursement of some or all of the security required under paragraph (d) is to be made.

Part 6 — Commission Jurisdiction

Jurisdiction of commission to deal with applications

72 (1) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, complaining that a person constructing, maintaining, operating or controlling a public utility service or charged with a duty or power relating to that service, has done, is doing or has failed to do anything required by this Act or another general or special Act, or by a regulation, order, bylaw or direction made under any of them.

(2) The commission has jurisdiction to inquire into, hear and determine an application by or on behalf of any party interested, requesting the commission to

(a) give a direction or approval which by law it may give, or

(b) approve, prohibit or require anything to which by any general or special Act, the commission's jurisdiction extends.

Mandatory and restraining orders

73 (1) The commission may order and require a person to do immediately or by a specified time and in the way ordered, so far as is not inconsistent with this Act, the regulations or another Act, anything that the person is or may be required or authorized to do under this Act or any other general or special Act and to which the commission's jurisdiction extends.

(2) The commission may forbid and restrain the doing or continuing of anything contrary to or which may be forbidden or restrained under any Act, general or special, to which the commission's jurisdiction extends.

Inspections and depositions

74 For the purposes of this Act, the commission may

- (a) enter on and inspect property, and
- (b) require the taking of depositions inside or outside of British Columbia.

Commission not bound by precedent

75 The commission must make its decision on the merits and justice of the case, and is not bound to follow its own decisions.

Jurisdiction as to liquidators and receivers

76 (1) The fact that a liquidator, receiver, manager or other official of a public utility, or other person engaged in the petroleum industry, or a person seizing a public utility's property has been appointed by a court in British Columbia, or is acting under the authority of a court, does not prevent the exercise by the commission of any jurisdiction conferred by this Act.

(2) A liquidator, receiver, manager, official or person seizing must act in accordance with this Act and the orders and directions of the commission, whether the orders are general or particular.

(3) The liquidator or other person referred to in subsection (1), and any person acting under that person, must obey the orders of the

commission, within its jurisdiction, and the commission may enforce its orders against the person even though the person is appointed by or acts under the authority of a court.

Power to extend time

77 If a work, act, matter or thing is, by order or decision of the commission, required to be performed or completed within a specified time, the commission may, if the circumstances of the case in its opinion so require, extend the time so specified

(a) on notice and hearing, or

(b) in its discretion, on application, without notice to any person.

Evidence

78 (1) [Repealed 2004-45-169.]

(2) An inquiry that the commission considers necessary may be made by a member or officer or by a person appointed by the commission to make the inquiry, and the commission may act on that person's report.

(3) Each member, officer and person appointed has, for the purpose of the inquiry, the powers conferred on the commission by section 74 of this Act and section 34 (3) and (4) of the *Administrative Tribunals Act*.

(4) If a person is appointed to inquire and report on a matter, the commission may order by whom, and in what proportion, the costs incurred must be paid, and may set the amount of the costs.

Findings of fact conclusive

79 The determination of the commission on a question of fact in its jurisdiction, or whether a person is or is not a party interested within the meaning of this Act, is binding and conclusive on all persons and all courts.

Commission not bound by judicial acts

80 In determining a question of fact, the commission is not bound by the

finding or order of a court in a proceeding involving the determination of that fact, and the finding or order is, before the commission, evidence only.

Pending litigation

81 The fact that a suit, prosecution or other proceeding in a court involving questions of fact is pending does not deprive the commission of jurisdiction to hear and determine the same questions of fact.

Power to inquire without application

82 (1) The commission

(a) may, on its own motion, and

(b) must, on the request of the Lieutenant Governor in Council,

inquire into, hear and determine a matter that under this Act it may inquire into, hear or determine on application or complaint.

(2) For the purpose of subsection (1), the commission has the same powers as are vested in it by this Act in respect of an application or complaint.

Action on complaints

83 If a complaint is made to the commission, the commission has powers to determine whether a hearing or inquiry is to be had, and generally whether any action on its part is or is not to be taken.

General powers not limited

84 The enumeration in this Act of a specific commission power or authority does not exclude or limit other powers or authorities given to the commission.

Hearings to be held in certain cases

85 (1) Except in case of urgency, of which the commission is sole judge, the commission must not, without a hearing, make an order involving an outlay, loss or deprivation to a public utility.

(2) If an order is made in case of urgency without a hearing, on the application of a person interested, the commission must as soon as practicable hear and reconsider the matter and make any further order it considers advisable.

Public hearing

86 If this Act requires that a hearing be held, it must be a public hearing whenever, in the opinion of the commission or the Lieutenant Governor in Council, a public hearing is in the public interest.

Repealed

86.1 [Repealed 2004-45-170.]

When oral hearings not required

86.2 (1) Despite any other provision of this Act, in any circumstance in which, under this Act, a hearing may or must be held, the commission may conduct a written hearing.

(2) The commission may make rules respecting the circumstances in which and the process by which written hearings may be conducted and specifying the form and content of materials to be provided for written hearings.

Recitals not required in orders

87 In making an order, the commission is not required to recite or show on the face of the order the taking of any proceeding, the giving of any notice or the existence of any circumstance necessary to give the commission jurisdiction.

Application of orders

88 (1) In making an order, rule or regulation, the commission may make it apply to all cases, or to a particular case or class of cases, or to a particular person.

(2) The commission may exempt a person from the operation of an order, rule or regulation made under this Act for a time the commission considers advisable.

(3) The commission may, on conditions it considers advisable, with the advance approval of the Lieutenant Governor in Council, exempt a person, equipment or facilities from the application of all or any of the provisions of this Act or may limit or vary the application of this Act.

(4) The commission has no power under this section to make an order respecting a person, or a person in respect of a matter, who has been exempted under to section 22.

Withdrawal of application

88.1 If an applicant withdraws all or part of an application or the parties advise the commission that they have reached a settlement of all or part of an application, the commission may order that the application or part of it is dismissed.

Partial relief

89 On an application under this Act, the commission may make an order granting the whole or part of the relief applied for or may grant further or other relief, as the commission considers advisable.

Commencement of orders

90 (1) In an order or regulation, the commission may direct that the order or regulation or part of it comes into operation

(a) at a future time,

(b) on the happening of an event specified in the order or regulation, or

(c) on the performance, to the satisfaction of the commission, by a person named by it of a term imposed by the order.

(2) The commission may, in the first instance, make an interim order, and reserve further direction for an adjourned hearing or further application.

Orders without notice

91 (1) If the special circumstance of a case so requires, the commission

may, without notice, make an interim order authorizing, requiring or forbidding anything to be done that the commission is empowered to authorize, require or forbid on application, notice or hearing.

(2) The commission must not make an interim order under subsection (1) for a longer time than it considers necessary for a hearing and decision.

(3) A person interested may, before final decision, apply to modify or set aside an interim order made without notice.

Directions

92 If, in the exercise of a commission power under an Act, the commission directs that a structure, appliance, equipment or works be provided, constructed, reconstructed, removed, altered, installed, operated, used or maintained, the commission may, except as otherwise provided in the Act conferring the power, order

(a) by what person interested at or within what time,

(b) at whose cost and expense,

(c) on what terms including payment of compensation, and

(d) under what supervision,

the structure, appliance, equipment or works must be carried out.

Repealed

93–94 [Repealed 2004-45-170.]

Lien on land

95 (1) If the commission makes an order for payment of money, costs or a penalty, the commission may register a copy of the order certified by the commission's secretary in a land title office.

(2) On registration in a land title office, an order is a lien and charge on all the land of the person ordered to make the payment that is in the land title district in which the order is registered, to the same extent and with the same effect and realizable in the same way as a judgment of the Supreme Court under the *Court Order Enforcement Act*.

Substitute to carry out orders

96 (1) If a person defaults in doing anything directed by an order of the commission under this Act,

(a) the commission may authorize a person it considers suitable to do the thing, and

(b) the person authorized may do the thing authorized and may recover from the person in default the expense incurred in doing the thing, as money paid for and at the request of that person.

(2) The certificate of the commission of the amount expended is conclusive evidence of the amount of the expense.

Entry, seizure and management

97 (1) The commission may take the steps and employ the persons it considers necessary to enforce an order made by it, and, for that purpose, may forcibly or otherwise enter on, seize and take possession of the whole or part of the business and the property of a public utility affected by the order, together with the records, offices and facilities of the utility.

(2) The commission may, until the order has been enforced or until the Lieutenant Governor in Council otherwise orders, assume, take over and continue the management of the business and property of the utility in the interest of its shareholders, creditors and the public.

(3) While the commission continues to manage or direct the management of the utility, the commission may exercise, for the business and property, the powers, duties, rights and functions of the directors, officers or managers of the utility in all respects, including the employment and dismissal of officers or employees and the employment of others.

(4) On the commission taking possession of the business and property of the utility, each officer and employee of the utility must obey the lawful orders and instructions of the commission for that business and property, and of any person placed by the commission in authority in the management of the utility or a department of its

undertaking or service.

(5) On taking possession of the business and property of a public utility, the commission may determine, receive or pay out all money due to or owing by the utility, and give cheques and receipts for money to the same extent and to the same effect as the utility or its officers or employees could do.

(6) The costs incurred by the commission under this section are in the discretion of the commission, and the commission may order by whom and in what amount or proportion costs are to be paid.

Defaulting utility may be dissolved

98 (1) If a public utility incorporated under an Act of the Legislature fails to comply with a commission order, and the commission believes that no effective means exist to compel the utility to comply, the commission, in its discretion, may transmit to the Attorney General a certificate, signed by its chair and secretary, setting out the nature of the order and the default of the public utility.

(2) Ten days after publication in the Gazette of a notice of receipt of the certificate by the Attorney General, the Lieutenant Governor in Council may, by order, dissolve the public utility.

Part 7 – Decisions and Appeals

Reconsideration by commission

99 The commission may reconsider, vary or rescind a decision, order, rule or regulation made by it, and may rehear an application before deciding it.

Requirement for hearing

100 If a hearing is held or required under this Act before a rule or regulation is made, the rule or regulation must not be altered, suspended or revoked without a hearing.

Appeal to Court of Appeal

101 (1) An appeal lies from a decision or order of the commission to the

Court of Appeal with leave of a justice of that court.

(2) The party appealing must give notice of the application for leave to appeal, stating the grounds of appeal, to the commission, to the Attorney General and to any party adverse in interest, at least 2 clear days before the hearing of the application.

(3) If leave is granted, within 15 days from the granting, the appellant must give notice of appeal to the commission, to the Attorney General, and to any party adverse in interest.

(4) The commission and the Attorney General may be heard by counsel on the appeal.

(5) On the determination of the questions involved in the appeal, the Court of Appeal must certify its opinion to the commission, and an order of the commission must conform to that opinion.

No automatic stay of proceedings while matter appealed

102 (1) An appeal to the Court of Appeal does not of itself stay or suspend the operation of the decision, order, rule or regulation appealed from, but the Court of Appeal may grant a suspension, in whole or in part, until the appeal is decided, on the terms the court considers advisable.

(2) The commission may, in its discretion, suspend the operation of its decision, order, rule or regulation from which an appeal is taken until the decision of the Court of Appeal is given.

Costs of appeal

103 (1) Payment of the costs incurred for an application or appeal to the Court of Appeal may be enforced in the same way as payment of costs ordered by the commission.

(2) Neither the commission nor an officer, employee or agent of the commission is liable for costs in respect of an application or appeal referred to in subsection (1).

Case stated by commission

104 (1) The commission may, on its own motion or on the application of a

party who gives the security the commission directs, and must, on the request of the Attorney General, state a case in writing for the opinion of the Court of Appeal on a question that, in the opinion of the commission or of the Attorney General, is a question of law.

(2) The Court of Appeal must hear and determine all questions of law arising on the stated case and must remit the matter to the commission with the court's opinion.

(3) The court's opinion is binding on the commission and on all parties.

Jurisdiction of commission exclusive

105 (1) The commission has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act.

(2) Unless otherwise provided in this Act, an order, decision or proceeding of the commission must not be questioned, reviewed or restrained by or on an application for judicial review or other process or proceeding in any court.

Part 8 – Offences and Penalties

Offences

106 (1) The following persons commit an offence:

(a) a person who fails or refuses to obey an order of the commission made under this Act;

(b) a person who does, causes or permits to be done an act, matter or thing contrary to this Act or omits to do an act, matter or thing required to be done by this Act;

(c) a public utility

(i) that fails or refuses to prepare and provide to the commission in the time, manner and form, and with the particulars and verification required under this Act, an information return, the answer to a question submitted by the commission or information required

by the commission under this Act,

(ii) that willfully or negligently makes a return or provides information to the commission that is false in any particular,

(iii) that gives, or an officer of which gives, to an officer, agent, manager or employee of the utility a direction, instruction or request to do or refrain from doing an act referred to in paragraph (d) (i) to (vii) and in respect of which the officer, agent, manager or employee is convicted under paragraph (d) (i) to (vii), or

(iv) an officer, agent, manager or employee of which is convicted of an offence under paragraph (d) (viii);

(d) an officer, agent, manager or employee of a public utility

(i) who fails or refuses to complete and provide to the commission a report or form of return required under this Act,

(ii) who fails or refuses to answer a question contained in a report or form of return required under this Act,

(iii) who willfully gives a false answer to a question contained in a report or form of return required under this Act,

(iv) who evades a question or gives an evasive answer to a question contained in a report or form of return required under this Act, if the person has the means to ascertain the facts,

(v) who, after proper demand under this Act, fails or refuses to exhibit to the commission or a person authorized by it an account, record or memorandum of the public utility that is in the person's possession or under the person's control,

(vi) who fails to properly use and keep the system of accounting of the public utility specified by the commission under this Act,

(vii) who refuses to do any act or thing in that system of accounting when directed by the commission or its representative,

(viii) on whom the commission serves notice directing the person to provide to the commission information or a return that the utility may be required to provide under this Act and who willfully refuses or fails to provide the information or return to the best of the person's knowledge, or means of knowledge, in the manner and time directed by the commission, or

(ix) who knowingly registers or causes to be registered on the books of the public utility any issue or transfer of shares that has been made contrary to section 54 (5), (7) or (8);

(e) the president, and each vice president, director, managing director, superintendent and manager of a public utility that fails or refuses to obey an order of the commission made under this Act;

(f) the mayor and each councillor or member of the ruling body of a municipality that fails or refuses to obey an order of the commission made under this Act;

(g) [Repealed 2003-46-15.]

(h) a person who obstructs or interferes with a commissioner, officer or person in the exercise of rights conferred or duties imposed under this Act;

(i) a person who knowingly solicits, accepts or receives, directly or indirectly, a rebate, concession or discrimination for service of a public utility, if the service is provided or received in violation of this Act;

(j) except so far as the person's public duty requires the person to report on or take official action, an officer or employee of the commission, or person having access to or knowledge of a return made to the commission or of information procured or evidence taken under this Act,

other than a public inquiry or public hearing, who, without first obtaining the authority of the commission, publishes or makes known information, having obtained or knowing it to have been derived from the return, information or evidence;

(k) a person who applies to a public utility to register on its books any issue or transfer of shares that has been made contrary to section 54 (5), (7) or (8).

(2) Subsection (1) (e) and (f) does not apply if the person proves

(a) that, according to the person's position and authority, the person took all necessary and proper means in the person's power to obey and carry out, and to procure obedience to and the carrying out of the order, and

(b) that the person was not at fault for the failure or refusal.

(3) Subsection (1) (h) does not apply if the commissioner, officer or person does not, on request at the time, produce a certificate of his or her appointment or authority.

(4) A person convicted of an offence under this section is liable to a penalty not greater than \$10 000.

(5) If this Act makes anything an offence, each day the offence continues constitutes a separate offence.

(6) Nothing in or done under this section affects the liability of a public utility otherwise existing or prejudices enforcement of an order of the commission in any way otherwise available.

Restraining orders

107 (1) If a person, to or in respect of whom

(a) [Repealed 2003-46-16.]

(b) a certificate of public convenience and necessity,

(c) an order under section 22, 53 or 54 (10), or

(d) an approval given under section 50 or 54 (5), (7) or (8),

is issued, contravenes a condition or requirement of the certificate, order or approval, the contravention may be restrained in a proceeding brought by the minister in the Supreme Court.

(2) [Repealed 2003-46-16.]

Revocation of certificates

108 If a person contravenes a condition or requirement of an order made under section 22,

- (a) the Lieutenant Governor in Council may revoke
 - (i) the energy project certificate or energy operation certificate in respect of which the contravention occurred, and
 - (ii) any approval, licence or permit given or issued, in association with the certificate, or
- (b) the minister responsible for the administration of the *Hydro and Power Authority Act* may revoke the order.

Remedies not mutually exclusive

109 If a person contravenes

- (a) [Repealed 2003-46-18.]
- (b) a condition or requirement of an order made under section 22, 53 or 54 (10),
- (c) the conditions of an approval given under section 50 or 54 (5), (7) or (8), or
- (d) a condition or requirement of a certificate of public convenience and necessity,

the penalties for the contravention provided for in section 106, the remedies for the contravention provided for in section 107 and, if applicable, the remedies provided for in section 108 are not mutually exclusive, and any or all of them may be applied in the one case.

Part 9 – General

Powers of commission in relation to other Acts

110 The powers given to the commission by this Act apply

(a) even though the subject matter about which the powers are exercisable is the subject matter of an agreement or another Act,

(b) in respect of service and rates, whether fixed by or the subject of an agreement or other Act, or otherwise, and

(c) if the service or rates are governed by an agreement, whether the agreement is incorporated in, or ratified, or made binding by a general or special Act, or otherwise.

Substantial compliance

111 Substantial compliance with this Act is sufficient to give effect to the orders, rules, regulations and acts of the commission, and they must not be declared inoperative, illegal or void for want of form or an error or omission of a technical or clerical nature.

Vicarious liability

112 In construing and enforcing this Act, or a rule, regulation, order or direction of the commission, an act, omission or failure of an officer, agent or other person acting for or employed by a public utility, if within the scope of the person's employment, is deemed in every case to be the act, omission or failure of the utility.

Public utilities may apply

113 A person who is subject to regulation under this Act may make application or complaint to the commission about a matter affecting a public utility, as if made by another party interested.

Municipalities may apply

114 (1) In this section, "**municipality**" includes a regional district.

(2) If a municipality believes that the interests of the public in the municipality or a part of it are sufficiently concerned, the municipality may, by resolution, become an applicant, complainant or intervenant

in a matter within the commission's jurisdiction.

(3) The municipality may, for subsection (2), take a proceeding or incur expense necessary

(a) to submit the matter to the commission,

(b) to oppose an application or complaint before the commission, or

(c) if necessary, to become a party to a proceeding or appeal under this Act.

Certified documents as evidence

115 (1) A copy of a rule, regulation, order or other document in the commission secretary's custody, purporting to be certified by the secretary to be a true copy, is evidence of the document without proof of the signature.

(2) A certificate purporting to be signed by the commission secretary stating that no rule, regulation or order on a specified matter has been made by the commission, is evidence of the fact stated without proof of the signature.

Class representation

116 (1) With the approval of the Attorney General, the commission may appoint counsel to represent a class of persons interested in a matter for the purpose of instituting or attending on an application or hearing before the commission or another tribunal or authority.

(2) The commission may fix the costs of the counsel and may order by whom and in what amount or proportion they be paid.

Costs of commission

117 (1) In this section, "**costs of the commission**" includes costs incurred by the commission for the services of consultants and experts engaged in connection with the proceeding.

(2) The commission may order that the costs of the commission incidental to a proceeding before it are to be paid by one or more participants in the proceeding in such amounts and proportions as the

commission may determine.

Participant costs

118 (1) The commission may order a participant in a proceeding before the commission to pay all or part of the costs of another participant in the proceeding.

(2) If the commission considers it to be in the public interest, the commission may pay all or part of the costs of participants in proceedings before the commission that were commenced on or after April 1, 1993 or that are commenced after June 18, 1993.

(3) Amounts paid for costs under subsection (2) must not exceed the limits prescribed for the purposes of this section.

Tariff of fees

119 With the advance approval of the Lieutenant Governor in Council, the commission may prescribe a tariff of fees for a matter within the commission's jurisdiction.

No waiver of rights

120 (1) Nothing in this Act releases or waives a right of action by the commission or a person for a right, penalty or forfeiture that arises under a law of British Columbia.

(2) No penalty enforceable under this Act is a bar to or affects recovery for a right, or affects or bars a proceeding against or prosecution of a public utility, its directors, officers, agents or employees.

Relationship with *Local Government Act*

121 (1) Nothing in or done under the *Community Charter* or the *Local Government Act*

(a) supersedes or impairs a power conferred on the commission or an authorization granted to a public utility, or

(b) relieves a person of an obligation imposed under this Act or the *Gas Utility Act*.

(2) In this section, "**authorization**" means

(a) a certificate of public convenience and necessity issued under section 46,

(b) an exemption from the application of section 45 granted, with the advance approval of the Lieutenant Governor in Council, by the commission under section 88, and

(c) an exemption from section 45 granted under section 22, only if the public utility meets the conditions prescribed by the Lieutenant Governor in Council.

(3) For the purposes of subsection (2) (c), the Lieutenant Governor in Council may prescribe different conditions for different public utilities or categories of public utilities.

Repealed

122 [Repealed 2004-45-172.]

Service of notice

123 (1) A notice that the commission is empowered or required to give to a person under this Act must be in writing and may be served either personally or by mailing it to the person's address.

(2) If a notice is mailed, service of the notice is deemed to be effected at the time at which the letter containing the notice, properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.

Reasons to be given

124 (1) If an application to the commission is opposed, the commission must prepare written reasons for its decision.

(2) If an application is unopposed, the commission may, and at the request of the applicant must, prepare written reasons for its decision.

(3) Written reasons must be made available by the secretary to any person on payment of the fee set by the commission.

(4) [Repealed 2003-46-20.]

Regulations

125 (1) The Lieutenant Governor in Council may make regulations as referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may, for the purpose of recovering the expenses arising out of the administration of this Act in a fiscal year, make regulations as follows:

(a) setting, or authorizing the commission to set, by order of the commission, and to collect fees, levies or other charges from

(i) public utilities, a class of public utility or a particular public utility, and

(ii) other persons to whom a provision of this Act applies or a class of those persons;

(b) setting, or authorizing the commission to set, the fees, levies or other charges payable by the members of the different classes referred to in paragraph (a) in different amounts;

(c) exempting, or authorizing the commission to exempt, a public utility or other person, or a class of either of them, from the payment of a fee, levy or other charge;

(d) authorizing the commission to retain all or part of any fees, levies or other charges collected by the commission under a regulation.

(3) The commission may make regulations on a matter for which it is empowered by this Act to make regulations.

Minister's regulations

125.1 (1) In this section, "**minister**" means the minister responsible for the administration of the *Hydro and Power Authority Act*.

(2) The minister may make regulations respecting the government's energy objectives, as defined in section 1, including, without

limitation, regulations as follows:

- (a) defining a word or phrase used in the definition;
- (b) prescribing actions and goals for the purposes of paragraph (f) of the definition;
- (c) establishing factors or guidelines the commission must use in considering the government's energy objectives, including guidelines regarding the relative priority of the objectives referred to in paragraphs (a) to (f) of the definition.

(3) A regulation under subsection (2) may be made with respect to the government's energy objectives generally or with respect to their application in any particular case.

(4) The minister may make regulations as follows:

- (a) making declarations for the purposes of section 5 (7);
- (b) respecting exemptions under section 22;
- (c) respecting reports to be provided to the commission by the authority under section 43 (1.1), including, without limitation, respecting the jurisdictions with which comparisons are to be made, the rate classes to be considered, the factors to be used in making the comparisons and conducting the assessments, and the meaning to be given to the word "competitive";
- (d) prescribing, for the purposes of paragraph (a) (i) of the definition of "demand increase" in section 44.1 (1), an amount representing an increase in resource requirements of the authority not related to an estimated increased demand referred to in section 44.1 (4) (b);
- (e) for the purposes of section 44.1 and 44.2,
 - (i) prescribing rules for determining whether a demand-side measure, or a class of demand-side measures, is adequate, cost-effective or both,
 - (ii) declaring a demand-side measure, or a class of demand-side measures, to be cost effective and necessary for adequacy,

- (iii) prescribing rules or factors a public utility must use in making the estimate referred to in section 44.1 (2) (a), and
 - (iv) prescribing rules or factors the authority must use in making the estimate referred to in section 44.1 (4) (b);
- (f) prescribing requirements for the purposes of section 58 (2.1) (a);
- (g) prescribing factors and guidelines for the purposes of section 58 (2.1) (b), including, without limitation, factors and guidelines to encourage
 - (i) energy conservation or efficiency,
 - (ii) the use of energy during periods of lower demand,
 - (iii) the development and use of energy from clean or renewable resources, or
 - (iv) the reduction of the energy demand a public utility must serve;
- (h) defining a term or phrase used in section 58.1 and not defined in this Act;
- (i) identifying facts that must be used in interpreting the definition in section 58.1;
- (j) defining a term or phrase used in Part 3.1 and not defined in that Part;
- (k) prescribing criteria respecting self-sufficiency for the purposes of section 64.01 (1) (a) and (b);
- (l) prescribing targets for the purposes of section 64.02 (1) (a), guidelines for the purposes of section 64.02 (1) (b) and public utilities and classes of public utilities for the purposes of section 64.02 (2) (b);
- (m) for the purposes of section 64.03, respecting eligible facilities, including prescribing generation facilities and classes of generation facilities, and respecting the standing offer to be established and maintained under that section;

- (n) for the purposes of section 64.04, respecting smart meters and their installation, including, without limitation,
 - (i) the types of smart meters to be installed, including the features or functions each meter must have or be able to perform, and
 - (ii) the classes of users for whom smart meters must be installed, and requiring the authority to install different types of smart meters for different classes of users;
- (o) prescribing standard-making bodies for the purposes of section 125.2 (1) and matters for the purposes of section 125.2 (3) (d);
- (p) prescribing owners, operators, direct users, generators and distributors, or classes of any of them, for the purposes of section 125.2 (8).

- (5) In making a regulation under this section, the minister may
 - (a) make regulations of specific or general application, and
 - (b) make different regulations for different persons, places, things, measures, transactions or activities.

Adoption of reliability standards, rules or codes

125.2 (1) In this section:

"reliability standard" means a reliability standard, rule or code established by a standard-making body for the purpose of being a mandatory reliability standard for planning and operating the North American bulk power system, and includes any substantial change to any of those standards, rules or codes;

"standard-making body" means

- (a) the North American Electric Reliability Corporation,
- (b) the Western Electricity Coordinating Council, and
- (c) a prescribed standard-making body.

- (2) For greater certainty, the commission has exclusive jurisdiction to

determine whether a reliability standard is in the public interest and should be adopted in British Columbia.

(3) The transmission corporation must review each reliability standard and provide to the commission, in accordance with the regulations, a report assessing

- (a) any adverse impact of the reliability standard on the reliability of electricity transmission in British Columbia if the reliability standard were adopted under subsection (6),
- (b) the suitability of the reliability standard for British Columbia,
- (c) the potential cost of the reliability standard if it were adopted under subsection (6), and
- (d) any other matter prescribed by regulation or identified by order of the commission for the purposes of this section.

(4) The commission may make an order for the purposes of subsection (3) (d).

(5) If the commission receives a report under subsection (3), the commission must

- (a) make the report available to the public in a reasonable manner, which may include by electronic means, and for a reasonable period of time, and
- (b) consider any comments the commission receives in reply to the publication referred to in paragraph (a).

(6) After complying with subsection (5), the commission, subject to subsection (7), must adopt the reliability standards addressed in the report if the commission considers that the reliability standards are required to maintain or achieve consistency in British Columbia with other jurisdictions that have adopted the reliability standards.

(7) The commission is not required to adopt a reliability standard under subsection (6) if the commission determines, after a hearing, that the reliability standard is not in the public interest.

(8) A reliability standard adopted under subsection (6) applies to every

(a) prescribed owner, operator and direct user of the bulk power system, and

(b) prescribed generator and distributor of electricity.

(9) Subsection (8) applies to a person prescribed for the purposes of that subsection despite any exemption issued to the person under section 22 or 88 (3).

(10) The commission may make orders providing for the administration of adopted reliability standards.

(11) The commission, on its own motion or on complaint, may

(a) rescind an adoption made under subsection (6), or

(b) adopt a reliability standard previously rejected under subsection (7)

if the commission determines, after a hearing, that the rescission or adoption is in the public interest.

(12) The commission, without the approval of the minister responsible for the administration of the *Hydro and Power Authority Act*, may not set a standard or rule under section 26 of this Act with respect to a matter addressed by a reliability standard assessed in a report submitted to the commission under subsection (3) of this section.

Intent of Legislature

126 If a provision of this Act is held to be beyond the powers of British Columbia, that provision must be severed from the remainder of the Act, and the remaining provisions of the Act have the same effect as if they had been originally enacted as a separate enactment and as the only provisions of this Act.