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August 10, 2018

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

attention: Commission Secretary

filed online

Dear Mesdames/Sirs:

Re: FortisBC Energy Inc. British Columbia Utilities Commission (the Commission) Decision and Order G-161-15
Application for Removal of the Restriction on the Location of Data Servers Providing Service to FEI (the 2015 Data Order)

Attached please find the submission of MoveUP on the issue of the jurisdiction of the Commission to make the order whose removal is sought in this application.

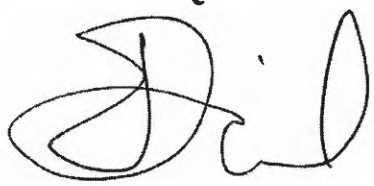
Also attached as a separate electronic file please find the following authorities, which are cited in our submission:

- Public Utilities Act, 1919
- Beaver v Hill
- Colonial Countertops v Maple Terrazzo
- Dunsmuir v New Brunswick
- Edmonton (City) v Edmonton East (Capilano) Shopping Centres
- Kriegman v Wilson
- McGavin Toastmaster v Ainscough
- Rio Tinto Alcan v Carrier Sekani Tribal Council

We have omitted portions of the longer case authorities that are not relevant to the current discussion from these copies.

Yours truly,

ALLEVATO QUAIL & ROY



per **Jim Quail**
Barrister & Solicitor

BRITISH COLUMBIA UTILITIES COMMISSION

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

Application to Exclude Employee Information from 2015 Data Order G-161-15

MoveUP's Submission on Jurisdiction

August 10, 2018

James Quail
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A. INTRODUCTION

This is the submission of MoveUP (also known as the Canadian Office and Professional Employees Union, Local 378), on the issue of the jurisdiction of the Commission in relation to the portions of Order G-161-15 that FEI seeks to vary in this Application. MoveUP is the union representing the "inside" workforce of the Applicant. The union and its members have a direct and pressing interest in this proceeding, as it concerns the measures taken by the utility to safeguard employee personal information.

MoveUP submits that the Commission had the authority to make the impugned order. It was authorized by statute, and in any event FEI attorned to the Commission's jurisdiction and consented to the making of the order.

FEI's arguments seeking to pull its order back from the hands of the Commission, on grounds including the assertion that the subject matter belongs in the realm of employee relations, are not only erroneous but also ironic: the company has never treated the issue as a labour-management question, never consulted the union in any way, never raised the issue until it filed this Application. Its own course of action contradicts its characterization of the appropriate channel for the issue's resolution.

While we say that the Commission's order was properly made, MoveUP proposes by way of process that the Commission suspend the proceeding briefly to afford FEI an opportunity to consult with MoveUP (and the International Brotherhood of Electrical Workers should they choose to participate) and explore the possibility of finding an adequate resolution of the underlying issue of employee information protection. The projected cost of compliance with the current order is of a scale that would have a negligible impact on customer rates. Beyond that , no one other than the company and its employees has a material stake in the outcome and there may well be practicable solutions to the concerns raised by the Application. The proceeding would resume after this short hiatus and the Commission could potentially see a proposed resolution that is supported by the most materially affected parties.

B THE EMPLOYEE DATA AND ITS ROLE IN THE REGULATORY PROCESS

FEI has listed the categories of information held by its pension actuaries in the United States that give rise to this Application, in Exhibit B-1, page 6, table under heading 2.2. It comprises the following items for each of the employees or retirees:

- Identifier (employee number)
- Name
- Social Insurance Number
- Date of birth
- Gender
- Spouse's date of birth
- Spouse's gender
- Date of hire
- Date of plan entry
- Employment type (part time, full time, or temporary)
- Pensionable Earnings
- Hours Worked (for part time employees)
- Member Contributions
- Leave of Absence and/or Disability dates
- Date of retirement, termination, or death
- Address
- Benefit coverage details (other than pension).

This is the data held by the utility's pension actuaries. FEI's assertion that it does not play a role in the Commission's regulatory process, even if one considers only the Commission's "core functions" as described by FEI, is demonstrably incorrect.

Exhibit B-1 outlines how it is used by the actuary, Willis Towers Watson (WTW) at page 5:

2.1.1 CONSULTING SERVICES

FEI has relied on WTW since the 1980s to provide actuarial consulting services necessary to establish and register the pension plans with the Canada Revenue Agency and the Financial Institutions Commission for British Columbia. As both the pension plans and pension legislation evolved over the years, WTW was key in ensuring our pension plan documents and administrative practices were updated to stay current and compliant. In their consulting role, WTW has also been relied on to design and implement a governance schematic for the pension plans that satisfies all statutory requirements and substantively meets best practice guidelines. More specifically, this includes:

- Drafting plan documents and amendments;
- Liaising with pension regulators;
- Drafting governance documents and amendments;
- Development of a de-risking strategy for 3 legacy plans;
- Support in bargaining pension changes for 3 jointly sponsored union plans; and
- Preparing triennial actuarial valuation reports for funding purposes, which provide the information and actuarial opinion required by the Pension Benefits Standards Act (British Columbia) and Regulations and the information required to maintain plan registration under the Income Tax Act (Canada) and Regulations. Part of this requirement includes a reconciliation of the financial

position of the plan from one valuation to the next. These reports also provide the basis for contributions and include additional information required for the administration of the pension plans.

This is the data the pension actuary uses to generate the reports that FEI and the Commission rely upon in proceedings like Revenue Requirements Applications.

To illustrate from just *one* FEI application to this Commission, APPENDIX A to this submission contains several of the references to pension and post-retirement benefit evidence, apparently derived from the data in question, in FEI's 2014-2018 Revenue Requirements Application.

A more recent, and typical, example is the following discussion in Exhibit B-2 of the ongoing FEI Annual Review for 2019 Delivery Rates proceeding, beginning at page 50:

6.3.1 Pension and OPEB Expense

Pension and OPEB expenses for 2019 are based upon actuarial estimates using a range of assumptions as at December 31, 2017 provided by the Company's actuary, Willis Towers Watson. Pension and OPEB expense is segregated amongst O&M, Capital, Asset Removal Costs, and Core Market Administration Expense (CMAE) categories as shown in Table 6-4.

Table 6-4: 2018-2019 Pension and OPEB Expense ($ millions)

Line No.	Description	2018 Approved	2019 Forecast
1	Forecast O&M	17.077	13.795
2	Forecast Capital - Growth	0.795	0.903
3	Forecast Capital - Other	2.334	2.661
4	Deferral - Asset Removal Costs	0.913	1.050
5	Deferral - CMAE	0.278	0.317
6			
7	Total Pension & OPEB Expense	21.397	18.727

Overall, 2019 pension and OPEB expense is forecasted to be $2.670 million lower than the amount approved for 2018. This decrease is primarily due to higher expected return on assets and to a lesser extent by a reduction in expected OPEB claims costs, which is primarily due to a reduction in MSP premiums, partially offset by a decrease in the discount rate.

8 The majority of the pension and OPEB expense variance resides in the allocation to O&M since
9 the variance is primarily attributable to a higher expected return on assets which is recognized
10 in O&M, partially offset by a higher current service cost.

11 The 2018 variance between approved and actual pension and OPEB expense and any variance
12 from these forecasted 2019 amounts is captured in the Pension and OPEB Variance deferral
13 account and amortized into rates over a three year period as approved in by the Commission in
14 Order G-138-14.

Suffice it to say that actuarial evidence concerning FEI employees' pension and OPEB entitlements and projected employer liabilities plays a significant role in the Commission's rate-setting process. The data in issue plays a direct role in the Commission's regulatory process in setting FEI's rates. It plays an analogous role to the customer data in that respect.

One simple way to test FEI's argument that this data is not relevant to the "core functions" is to pose the following question: if FEI's pension actuaries ceased to maintain the personal information in question, would that undermine the reliability of evidence that the Commission requires for ratemaking? The answer is obviously "yes". As FEI itself tells us, this data is needed for the actuarial reports and projections that the company and its regulators rely upon. This data is not extraneous to the Commission's processes. Its maintenance is "necessarily incidental" to the exercise of the Commission's statutory mandate.

We submit that, given that the Commission requires FEI to provide reports for rate-setting and other purposes that is based on data that contain private information of both customers and employees, it would also take reasonable steps to protect that information from improper interception or access. This is a reasonable measure within the general exercise of the Commission's statutory jurisdiction, and is not inconsistent with the provisions of s. 44 of the UCA.

Protection of personal data is an important issue. Because of the very weak legal framework in the United States for the protection of personal information, including the operation of

the USA PATRIOT ACT[1] (which enables US authorities to obtain lawful access to any personal information within their logistical reach and criminalizes the reporting of such searches), the current arrangements leave the employee data vulnerable to clandestine access. All of this was expressly considered by the parties and the Commission throughout the evolution of the current order. That's a key reason why Order G-116-05 was made.

MoveUP intends to probe FEI's assertions regarding the cost of anonymizing the subject records, which we understand would involve manually modifying a few thousand records in the actuary's database.

C. THE ORIGINS OF THE CURRENT ORDER

1. Kinder Morgan Acquisition (2005)

When the Commission approved the acquisition of Terasen Inc. by Kinder Morgan, Inc., its Order G-116-05 adopted the conditions set out in the Commission's reasons, including the following:

> 7.2.3 Location of Functions and Data
>
> In order to address privacy concerns and other concerns, the Commission Panel determines that it would be appropriate to attach a condition to approval of the Transaction that requires KMI not to change the geographic location of any existing functions or data currently in TGI's service area without prior approval of the Commission. [Decision, p. 50]

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[1] "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001." [*sic*]

The privacy concerns were raised in the proceeding by the intervener Council of Canadians, as the Commission recited at page 20 of the Decision:

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

Thus, back in 2005, the Commission made an order concerning the storage of data in British Columbia, and its only explicitly identified reason for so doing was to protect privacy. The utility did not challenge the jurisdictional foundation of that decision, or apply for either reconsideration or Leave to Appeal.

2. Application for Removal of the Restriction on the Location of Data and Servers Providing Service to the FEU, currently Restricted to Canada (2014)

This is the proceeding that produced the order that FEI now seeks to vary. The order that was made at the conclusion of those proceedings was actually proposed by FEI in its Final Reply Submission filed on June 30, 2015:

> 8. The FEU submits that it has addressed the concerns raised regarding the treatment of corporate customer information
>
> ***Sensitive Information***
>
> 9. During the SRP Interveners raised concerns about access to non-customer, but "sensitive" information concerning, for example, the utility's operations.5 In response to this concern, the FEU confirmed that any data that the FEU believe is sensitive will be encrypted or de-identified before leaving the FEU's network.6 The

FEU have modified the alternative relief sought to make this commitment an express provision of the order, which is set out below.

10. FEU submits that it has addressed the concerns raised regarding the treatment of sensitive utility information.

FEU Employee Information

11. During the SRP Commission staff asked whether FEU employee information would be encrypted or de-identified if the order is granted, and the FEU confirmed that it would be. The modified alternative relief sought addresses this commitment as well.

Encryption and De-identification Keys

12. Given the concerns with foreign government and unauthorized access discussed at the SRP, it may be appropriate to make it an express term of the modified alternative relief that encryption and de-identification keys must, at all times, be kept within Canada and within the FEU's network. This modification is set out below.

13. As a result of the feedback describe above, the FEU revised the alternative relief and circulated a draft form of order to interveners for comment prior to filing this submission. Comments were received back from each of CEC, BCOAPO and BCSEA. Whether the comments were provided without prejudice or not, out of an abundance of caution the FEU are not discussing any of the feedback received in this submission, other than to say that the FEU have considered the feedback and incorporated some of the suggested edits.

14. Accordingly, the FEU are now seeking the following modified alternative relief:

(a) Effective the date of this order, the restriction imposed under Orders G-116-05, G-75-06, and G-49-07 that the location of data and servers providing service to the FEI be restricted to Canada, is removed and no longer in effect.

(b) For the purposes of this order:

- **"Customer Information"** means information of or about the FEI's residential, commercial, or industrial customers.

- **"Employee Information"** means information of or about the FEI's employees.

- **"Sensitive Information"** includes:

    - financial, commercial, scientific or technical information, the disclosure of which could result in undue financial harm or prejudice to the FEI; and

    - information that relates to the security of the FEI's critical infrastructure and operations, the disclosure of which could pose a potential threat to the FEI's operations or create or increase the risk of a debilitating impact on the safe and reliable operation of the FEI's system.

- "**Encrypted**" means an encryption methodology using current industry standards for secure encryption.

> • "**De-identified**" means a de-identification methodology consistent with current industry practice for the purpose of protecting personal information.
>
> • "**Encryption keys**" and "**De-identification keys**" mean any information or methodology used to access encrypted or de-identified data.
>
> (c) Effective as the date of this Order, FEI is permitted to store data on servers located outside of Canada, provided that data containing **Customer Information, Employee Information**, or **Sensitive Information**, or any combination thereof, must be either **Encrypted** or **De-identified** if such data is to be stored on servers located outside of Canada.
>
> (d) **Encryption keys** and **De-identification keys** for **Encrypted** or **De-identified** FEI data stored outside of Canada must be stored on servers located within FEI's data centres that are located in Canada.
>
> 15. The different wording in the definitions for "encrypted" and "de-identified" reflects the fact that while encryption has recognized industry "standards", de-identification usually speaks to an industry practice based on legislation or regulatory guidelines or policies.

Thus, not only did FEI *acquiesce* to the order it now challenges; not only did it *consent* to the order; it *proposed* the order *asked the Commission to make it*.

The only intervener in this proceeding other than MoveUP, the Commercial Energy Consumers of BC, also intervened in the 2014 Application, and supported the inclusion of employee information within the scope the Order proposed by FEI:

> The CEC submits that the wording 'stored on servers' is too restrictive and would not apply to information stored elsewhere or transmitted to other parties outside of Canada. The CEC recommends that the Commission adopt the following wording for Section c).
>
> > c) Effective as the date of this Order, FEI is permitted to store data on servers located outside of Canada, provided that data containing **Customer Information, Employee Information**, or **Sensitive Information**, or any combination thereof, must be either **Encrypted** or **De-identified** if such data is to be transmitted to other parties or stored in locations outside of Canada.
>
> (*CEC Final Submission*, July 27 2015, at p. 6. Bold in original).

We will discuss the consequences of this history of attornment, below.

D. THE COMMISSION HAD THE STATUTORY AUTHORITY TO MAKE THE IMPUGNED ORDER

We will address each of the four lines of argument presented by FEI in Exhibit B-2,[2] in turn. They read:

- First, statutory bodies like the Commission derive their jurisdiction exclusively from statute, with statutory powers being either express or implied by necessary implication.

- Second, the text of a broadly-worded statutory provision like section 44 of the *Utilities Commission Act* ("UCA") must be read in light of the purpose and intent of the legislation, not in isolation.

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[2] Ex B page 3 para 4

- Third, under the doctrine of "jurisdiction by necessary implication", the power to regulate privacy or dictate the terms of employment of unionized and nonunionized utility employees could only be implied if it is necessary for the Commission to deliver on the purpose and objects of the UCA.

- Fourth, the UCA exists within a broader framework relating to privacy and labour relations. The rules of statutory interpretation require the Commission to interpret the UCA in a manner that is consistent with the provisions and purpose of those other legislative regimes.

1. "Statutory bodies like the Commission derive their jurisdiction exclusively from statute, with statutory powers being either express or implied by necessary implication."

This is generally true, although it does not tell the whole story. Aside from the further source of authority that arises from a party's voluntary submission to the jurisdiction of a tribunal (which we will discuss later in our submissions regarding attornment), the boundaries of the Commission's powers have been broadened since the *ATCO* decision which is so heavily relied upon by FEI in this proceeding. Most significantly, in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2010] 2 S.C.R. 650 the Supreme Court of Canada recognized broad powers of the Commission to decide questions of law and that this reaches beyond its parent statute, even as far as the power to apply the *Charter of Rights and Freedoms*:

> 69 It is common ground that the ***Utilities Commission Act*** **empowers the Commission to decide questions of law** in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals*

> *Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.
> [bold added]

The UCA is not the sole source of the Commission's jurisdiction, contrary to FEI's submission at para. 7. It has not only the authority but the duty to make whatever legal determinations may necessarily arise in the course of exercising its mandate. Its decisions must be consistent with the laws of Canada and British Columbia.

2. "The text of a broadly-worded statutory provision like section 44 of the *Utilities Commission Act* ("UCA") must be read in light of the purpose and intent of the legislation, not in isolation."

While this proposition is accurate, it is incomplete and the manner in which FEI applies it is erroneous. Understandably, FEI and other utilities are fond of relying on *ATCO* as though the development of the law of the jurisdiction of statutory tribunals came to an abrupt halt with that case.

The law of administrative tribunal jurisdiction, curial deference and the scope of judicial review, was changed fundamentally two years after the *ATCO* decision, in *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190. One of the principal impacts of *Dunsmuir* is that administrative tribunals now possess wider scope to determine the extent of their own powers under their "home statutes." They are free to determine how to interpret those powers and generally to interpret their statutes, so long as their decisions fall within a range of potential reasonable outcomes. The days of courts second-guessing and imposing their own interpretations on these kinds of issues are gone, except in what the Court called "true issues of jurisdiction" –

> 59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. **"Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry.** In other words, true jurisdiction questions arise where the tribunal must explicitly determine **whether its statutory grant of power gives it the authority to decide a particular matter**. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. [bold added]

The *Dunsmuir* principle of "reasonableness" review and deference to tribunals upon judicial review, especially in relation to their home statutes, applies equally where judicial supervision of the tribunal is by way of statutory appeal, like UCA section 101: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.* [2016] 2 S.C.R. 293.[3]

So long as the Commission has "the authority to make the inquiry" – to ask itself the question – the courts recognize its power to determine what the answer will be, so long as the answer is reasonable.

Clearly, the Commission has the authority to ask itself whether UCA s. 44 extends to the electronic records in issue here.

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[3] "As discussed, this Court has often applied a reasonableness standard on a statutory appeal from an administrative tribunal, even when the appeal clause contained a leave requirement and limited appeals to questions of law (see, e.g., Sattva), or to questions of law or jurisdiction (see, e.g., *McLean*, *Smith*, *Bell Canada*). In light of this strong line of jurisprudence — combined with the absence of unusual statutory language like that at issue in Tervita — there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same as in those cases. The presumption of reasonableness is not rebutted." para. 34

But even if the issues are examined exclusively through the narrower lens of the earlier *ATCO* decision, MoveUP submits that the impugned order fell within the Commission's statutory powers.

The Evolving Meaning of the Commission's powers

FEI's essentially "originalist" argument seeks to confine the scope of section 44 to the conditions and concerns that were in place when its ancestral provision was enacted in 1919. Advancing an originalist interpretation of s. 44 based on the technology and societal context in place when it was enacted just shy of a century ago does not provide an adequate understanding of its meaning.

While the original intention underlying a statute plays a significant role in its interpretation, the content of its provisions may grow and evolve as new issues and concerns arise over time, like a vessel whose contents may change over the years. Such has also been the case with the *Utilities Commission Act*. Whatever was in the minds of the legislators who enacted its provisions has been far from the last word in its interpretation.

While FEI singles out section 7 of the 1919 *Public Utilities Act*, many of its provisions have been retained, subject to reorganization and modification, into the current UCA, and many of the current legal concepts guiding the Commission trace their origins back to the old PUA. Take for example one of the most fundamental legal constructs in our regulatory regime, the concept of the "public interest", an undefined term in the UCA which is pervasive in the mandate of the Commission:

> 19. No privilege or franchise hereafter granted to any public utility company by any municipality shall be valid until approved by the Commission. The Commission shall not give any approval for the purposes of this section unless, after public

> hearing, it determines that the privilege or franchise proposed to be granted is necessary for the public convenience, and properly conserves the public interest. The Commission in giving its approval may impose such conditions as to construction, equipment, maintenance, rates, or service as the public convenience and interest reasonable require.
> [*complete statute included with submission authorities*]

Here, for example, we have the ancestral form of UCA sections 45(7) and (8), providing that utility franchise are subject to approval by the Commission based whether they are in the "public interest" – a phrase that traces back at least to the 1919 statute. According to the originalist logic of FEI's argument, the meaning of the "public interest" should be determined by considering the range of issues the Commission would be expected to bring to bear 99 years ago, just as (FEI argues) the range of issues and purposes engaged by the current s. 44 should be limited to those present in 1919.

It is very safe to say that in 1919, there was no concept that the Commission, in determining whether a utility franchise was in the "public interest", would be required to decide whether the constitutional entitlements of First Nations had been properly addressed by the Crown. The constitution did not yet enshrine those rights and interests. Nevertheless, in *Rio Tinto* the Supreme Court of Canada determined that the modern principles of First Nations consultation and accommodation are a new category of concerns that are incorporated into the "public interest."

That new category of concerns reaches far beyond the range of issues and functions traditionally associated with the core functions of the Commission and as described in *ATCO*, or "its core functions of fixing just and reasonable rates and protecting the integrity of the supply system" as FEI describes them [page 1 para 2]. The role of the Commission extends beyond those "core functions" even in the absence of any express provision in the UCA. First Nations entitlements in this context are not at all about "fixing just and reasonable rates and

protecting the integrity of the supply system" but they override those considerations, as the Supreme Court explained in *Rio Tinto Alcan*:

> 70 Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the Commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, **surpassing the dominantly economic focus** of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?"
> [bold added]

While it is not true that privacy rights were not a matter of societal concern in 1919, the impact of the USA PATRIOT ACT was not a factor at the time in determining the scope of the Commission's jurisdiction, just as First Nations consultation and accommodation were not recognized constitutional issues a century ago. The technical means by which our privacy may be violated have grown exponentially since then. Our laws are vessels that can be filled with evolving societal needs and concerns.

3. "Under the doctrine of "jurisdiction by necessary implication", the power to regulate privacy or dictate the terms of employment of unionized and nonunionized utility employees could only be implied if it is necessary for the Commission to deliver on the purpose and objects of the UCA."

First, it is important to note that FEI does not challenge the jurisdiction of the Commission to make orders under section 44 for the explicit purposes of *privacy protection* when it comes to *customer data*. To the extent that FEI's argument is that the *protection of personal privacy*

is a subject-matter beyond the authority of the Commission, and specifically that section 44 does not provide that authority, by isolating employee data from the broader privacy protection aspects of the 2015 order but retaining the rest, the utility's argument is inconsistent and contradictory.

Regarding "terms of employment" we have a number of comments to make.

First, the only employment-relationship entitlement that would be limited in any way by maintaining the current order is the right of FEI to deviate from the practices and procedures for managing employee data that FEI itself proposed, without objections from any quarter, barely three years ago.

Second, for what it is worth, nowhere has FEI demonstrated the specific consent of the employees to have their personal information stored physically in the United States.

Third, it is not the case that "extra-provincial storage of data is addressed in employment agreements" as FEI says at B-2 page 21-22. There is no provision in either of the collective agreements between FEI and its employees' unions that authorizes the employer to maintain employees' personal information in an unsecure format subject to clandestine access by American security agencies. The pre-employment instruments relied upon by FEI do not constitute "employment agreements" between FEI and its unionized staff. It is trite that the employer cannot unilaterally modify terms and conditions where a trade union is certified as the employees' bargaining agent (and see *McGavin Toastmaster Ltd. v. Ainscough* [1976] 1 S.C.R. 71).[4] An employee's administrative registration to receive a negotiated benefit like a pension is not a contract of employment.

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[4] "I do not think that in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of a specified unit of employees of the company and in the face of the collective agreement in force between the union and the appellant company, it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships." (at para 8, *per* Laskin CJC)

Fourth, in any event, perfectly valid orders and determinations by the Commission may have a direct or indirect impact on the terms of employment of FEI staff. For example, the Commission made orders authorizing the jobs of all Terasen customer service staff to be contracted out, and subsequently repatriated to the company's own workforce. Order G-23-10 was no more "about" employee terms of employment than is Order G-161-15, but had a far greater impact on those terms of employment than these rules about storing data.

Commission orders governing the FortisBC's codes of conduct over the years have many direct and clear impacts on the workforce, how it is managed, and the way its work is recorded and performed.

As another example, one of the Performance Measures proposed by FEI and ordered by the Commission in FEI's current PBR regime is the All Injury Frequency Rate. Through this device, FEI management is held accountable for workplace safety. No FortisBC utility or any of its ancestral companies has ever challenged the Commission's jurisdiction in this regard.

A host of statutes, regulations, bylaws, boards and regulatory agencies impact the work of FEI employees and their terms of employment. The fact of such an impact does not deprive public agencies, boards and tribunals of jurisdiction.

This is simply not a valid basis to deprive the Commission of jurisdiction.

4. "The UCA exists within a broader framework relating to privacy and labour relations. The rules of statutory interpretation require the Commission to interpret the UCA in a manner that is consistent with the provisions and purpose of those other legislative regimes"

In presenting this argument, FEI contradicts its premise that the Commission did not have jurisdiction to make the impugned order. Here it is not saying that the Commission did not have "*the authority to make the inquiry*" (as per the *Dunsmuir* decision, above), but that it came to the *wrong answer to the question*. It attempts to argue that the substance of the impugned order was not aligned correctly with applicable legal principles.

A "wrong" decision is not the same thing as a decision made without jurisdiction. Pursuing this line of argument is consistent with FEI's general attornment to the Commission's jurisdiction with respect to these issues.

FEI's remedy, if the decision was wrong or inconsistent with legal principles, was to apply for reconsideration or to apply for leave to appeal to the Court of Appeal.

To the extent that FEI appears to argue that there is a conflict between the operation of the impugned order and other applicable legal regimes, and that this deprives the Commission of the power to make the order, that argument is erroneous. There is a conflict between enactments or decisions of competing jurisdictions or tribunals if one frustrates or contradicts the other – for example, if obedience to one regime constitutes the violation of the other, as the *CRTC Reference* decision relied upon by FEI confirms [B-2 para 22].

The main flaw in FEI's argument in this regard is that the role of the other regimes cited by the utility – privacy law and labour relations – are permissive only in this respect, only setting minimum standards. Nothing in the Commission's order "frustrates or contradicts" the operation of these regimes.

The *Personal Information Protection Act* sets out mandatory minimum standards for handling information of the sort in issue here. The relevant provision is s. 34:

Protection of personal information

34 An organization must protect personal information in its custody or under its control by making reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks.

FEI does not attempt to explain concretely how the impugned order "frustrates" PIPA s. 34. It does not try to make the nonsensical argument that compliance with the impugned order would violate section 34. On the contrary, compliance with the current order would obviously represent a measure that is also in compliance with that provision. Essentially, that's why the order was formulated in way it was: to enhance the secure maintenance of the information.

Furthermore, PIPA does not confer exclusive jurisdiction on the Office of the Information and Privacy Commissioner in the enforcement of the rights it creates. It does not oust any powers the Commission or any other tribunal might otherwise have had. If the Commission makes an order that FEI thinks contradicts or violates PIPA, or any other law, the remedy is appeal.

FEI also argues that there is some kind of inconsistency between the impugned order and the standard "management rights" clause in its collective agreement:

1.07 The Company retains the right to manage its business and direct the working forces, provided it does not conflict with the provisions of this Agreement.

The scope of management rights is obviously subject to other restraints than the provisions of the collective agreement. As we have noted, FEI is subject to an array of statutes, regulations, by-laws and other instruments, not the least of which are the Commission's orders. Some, like the *Human Rights Code*, the *Workers Compensation Act* and the *Employment Standards Act*, deal directly with workforce management and direction. To that extent, Article 1.07 plainly under-states the external constraints on management rights. FEI

does not quite argue that this provision in its collective agreement trumps the powers of the Commission.

The UCA confers the authority on the Commission to make orders regarding the storage and maintenance of any records that may be relevant to any regulatory process and specifically to prohibit or regulate the storage of records outside of British Columbia. The impugned portions of Order G-161-15 were made in the exercise of that jurisdiction. If FEI now feels that they should be rescinded, that is an issue within the Commission's jurisdiction and the Application should proceed, subject to MoveUP's proposed modification of the regulatory agenda.

E. FEI ASKED THE COMMISSION TO MAKE THE ORDER THAT IT NOW SAYS WAS MADE WITHOUT JURISDICTION

"Attornment" is the legal term for voluntarily accepting the jurisdiction of a court or tribunal to hear and determine a dispute or other legal matter. It constitutes consent to the process of the court or tribunal and an acknowledgment of its jurisdiction, for the purposes of the particular proceeding, and to be bound by its outcome. "Attornment is a stand-alone basis for the assumption of jurisdiction": *Kriegman v. Wilson* [2016] Carswell BC 681 (BC Court of Appeal) at para 29). "In BC a party who attorns to the jurisdiction cannot ask the court to decline to exercise that jurisdiction": *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Inc.* [2014] Carswell BC 1191 (BC Supreme Court) at para 68.

A party attorns to a tribunal's jurisdiction by acting in a way that is inconsistent with a denial of that jurisdiction. The applicable principles were set out by the Ontario Supreme Court in *Beaver v Hill* [2017] Carswell 19385 at para. 60:

> 60 Consent and attornment are often grouped together as a ground for establishing jurisdiction *simpliciter*. However, they are distinct concepts. Consent

entails voluntary submission to the court's jurisdiction. By contrast, the concept of attornment at common law is not necessarily consensual in nature. Attornment occurs where a litigant takes actions that are inconsistent with a denial of the court's jurisdiction. In such circumstances, the party will be deemed to have accepted and acknowledged the court's jurisdiction to hear and resolve the dispute (*Trylinski-Branson*, at para. 26). Any step taken in a proceeding beyond merely challenging the court's jurisdiction can constitute attornment (*Van Damme v. Gelber*, 2013 ONCA 388 (Ont. C.A.) at paras. 22-24; *Fraser v. 4358376 Canada Inc.*, 2014 ONCA 553 (Ont. C.A.)). Examples of conduct that may result in a finding that a party has attorned include the following:

1. Entering an unconditional appearance or a Notice of Intent to Defend (*Trylinski-Branson*; *Kinch v. Pyle*, [2004] O.J. No. 5232 (Ont. S.C.J.) at paras. 10-15);

2. Delivering a defence which responds to the merits of the claim (*Clinton v. Ford* (1982), 37 O.R. (2d) 448 (Ont. C.A.); *Momentous.ca Corp.*; *Singh v. Kaur*, 2015 ONSC 1279 (Ont. S.C.J.));

3. **Seeking any type of relief** from the court (*Trylinski-Branson*);

4. **Taking advantage of the procedures and protections** of the court (*Trylinski-Branson*);

5. Bringing a motion to challenge jurisdiction in which the party also seeks substantive relief (*Krisko v. Krisko*, 2000 CarswellOnt 3774 (Ont. C.A.)).

[bold added]

The record shows that not only did FEI come to the Commission seeking an order concerning the subject-matter for which it now challenges jurisdiction, and not only did it take advantage of the procedures of the Commission in that process, but FEI was the author of the very words it now says the Commission lacked the power to utter. It not only *consented* to the impugned order: FEI *proposed* it.

Less than thirty-eight months ago.

F. CONCLUSION

The Commission had the authority to make the impugned portions of Order G-161-15. That power flowed from the *Utilities Commission Act* and from the participation and consent of the Applicant. FEI's arguments clutch at a large number of straws and are replete with inconsistencies and logical contradictions.

MoveUP submits that the consideration of the Application should proceed on its merits, subject to our proposal that it be suspended briefly to accommodate discussions between the directly affected parties.

All of which is respectfully submitted.

APPENDIX A

The following comprise illustrative examples of the role of data used by FEI's pension actuaries and the reports generated from it in FEI's 2014-2018 Revenue Requirements Application, by way of illustration of how they come into play in many Commission processes.

All are extracts from Exhibit B-1 in those proceedings:

p. 56:

4. A total of $12.607 million to the Pension and OPEB Variance deferral account. Of this amount, $10.605 million is related to O&M, $1.311 million is related to capital expenditures and has been adjusted in the Base Capital below, and the remaining $691 thousand relates to removal costs (captured in another deferral account).

p. 69:

Pension and OPEB Expenses and Insurance Costs

These items are subject to deferral account treatment. Pension and OPEB expenses, and insurance expenses will be re-forecast at each Annual Review based on the most recent information provided by actuaries and FEI's insurance provider. Projected year-end deferral account balances will also be provided at the Annual Reviews.

p. 127:

3.3.3.4.2 BENEFIT INFLATION

Employee benefits include workers' compensation, long term disability, extended health and dental benefits, group life, Medical Services Plan, Canada Pension Plan, Employment Insurance, employee savings plans, employee incentive plans, share purchase plans, pension and other post-employment benefits (OPEB). Benefit costs, other than pension and OPEB, tend to be relatively consistent with annual increases generally tracking inflation or in the case of some health related benefits, slightly higher.

p. 129:

Pension and OPEB expenses, due to their impact on total benefit costs and the changes being experienced, warrant separate discussion. Pension and OPEB expenses are based upon actuarial estimates provided by the Company's actuaries, Towers Watson and Morneau Sobeco. Both firms have provided actuarial services to FEI for more than twelve years and are very knowledgeable about FEI's pension plans and actuarial forecasting.

The Pension and OPEB expense for 2013 Approved, 2013 Base and the 2014-2018 Forecast, as well as the allocation between O&M and Capital are included in the table below.

Table C3-4: Pension and OPEB O&M and Capital Forecasts

	2013 Approved	2013 Base	2014 Forecast	2015 Forecast	2016 Forecast	2017 Forecast	2018 Forecast
Pension & OPEB Expense							
2013 Allowed	17,485						
True up to revised Actuarial		12,607	(1,426)	(1,954)	(1,221)	(894)	868
Pension & OPEB Expense	17,485	30,092	28,666	26,712	25,491	24,597	25,465
Pension & OPEB allocated to Capital							
2013 Allowed	1,847						
Accounting Change (retiree portion)		930					
True up to revised Actuarial		2,002	(226)	(268)	(135)	(74)	415
Pension & OPEB allocated to Capital	1,847	4,779	4,553	4,286	4,151	4,077	4,492
Pension & OPEB allocated to O&M	15,638	25,313	24,113	22,426	21,340	20,520	20,973
Incremental O&M Impact		9,675	(1,200)	(1,688)	(1,086)	(820)	453

Pension and OPEB expense has been and will continue to be a significant challenge in managing increases in costs for FEI. For 2013, the actuarial estimate that was recently completed is more than 70 percent higher than the actuarial estimate that was done in 2011 to support the 2012-2013 RRA forecasts and approved amounts. The difference between these two amounts is captured in a deferral account in 2013 for recovery from customers in future rates.

p. 265:

Allocation of Retiree Pension and OPEBs

In 2010, FEI separated the current service portion and retiree portion of both pension and OPEB expenses. This change was made in anticipation of the adoption of IFRS which allowed for the capitalization of only direct expenditures into benefits loadings and capital. As a result of the adoption of US GAAP starting January 1, 2012 and the plan to continue using US GAAP as the basis of financial and regulatory accounting during the PBR Period, FEI is requesting to include both the current service and retiree portion of pension and OPEBs in benefit loadings, consistent with the practice prior to 2010. For the 2013 Base, this has the impact of shifting $930 thousand from O&M to capital.

p. 294:

Pension and OPEB Variance 4.2.4

FEI is requesting approval to extend the amortization period of this account from the currently approved three year period to the Expected Average Remaining Service Life ("EARSL") of the benefit plans. The EARSL amortization period more appropriately allocates the costs over the future period to which they are applicable. In its most recent accounting valuation done at December 31, 2012, the EARSL for the defined benefit pension plans is 10 years and the EARSL for OPEBs is 15 years. Using the weighted average of the 2014 through 2018 forecasted pension and OPEB expenses, as shown in Table D4-2 below, the average EARSL amortization period is 12 years70. This amortization period will be used for the term of this PBR and may be adjusted in the next revenue requirement application based on the calculation of EARSL at that time.

Table D4-2: Weighting of FEI Pension and OPEB expenses

	Pension Expense	OPEB Expense
2014 Forecast	20,004	8,662
2015 Forecast	17,725	8,987
2016 Forecast	16,175	9,316
2017 Forecast	14,741	9,856
2018 Forecast	13,438	12,027
Total	$ 82,083	$ 48,848
Weighting	62.69%	37.31%

CHAPTER 71.

An Act to provide for the Regulation of Public Utilities.

[*Assented to 29th March, 1919.*]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Short Title.

1. This Act may be cited as the "Public Utilities Act." Short title.

Interpretation.

2. In this Act— Interpretation.

"Commission" means the Public Utilities Commission constituted under this Act:

"Corporation" includes municipal and other corporations, whether incorporated under a general or special Act of the Legislature or otherwise:

"Costs" includes fees, counsel fees, and expenses:

"Municipality" includes every municipal area known as a city, town, township, or district heretofore incorporated and subsisting as a municipality under any general or special Act of the Legislature, or which may hereafter be incorporated, and, unless inconsistent with the context, includes the corporation and the Council of a municipality:

"Municipal Council" means the Mayor and Aldermen or the Reeve and Councillors of a municipality, and, in a municipality having a Board of Control, includes the Controllers:

"Public utility" means any system, works, plant, equipment, or property used or to be used for or in connection with:—

(*a.*) The transportation of persons or property over a railway, street-railway, tramway, or ferry; or

(*b.*) The transmission of telegraph or telephone messages; or

(*c.*) The production, storage, transmission, sale, delivery, or furnishing of heat, cold, light, power, gas, or electricity to or for the public; or

(*d.*) The conduct of any business declared to be a public utility by any Order of the Lieutenant-Governor in Council pursuant to this Act:

"Public utility company" and "company" mean any corporation, partnership, person, or association of persons that now or at any time hereafter owns, controls, operates, or manages for public use, directly or indirectly, any public utility which is subject to the legislative authority of the Province, and shall include the lessees, trustees, liquidators, and receivers of every such corporation, partnership, person, or association:

"Rate," except where the context otherwise requires, includes every general, individual, or joint rate, fare, toll, charge, rental, or other compensation of any public utility company, and every rule, regulation, practice, measurement, classification, or contract of the company relating thereto, and every schedule or tariff thereof:

"Service" includes the use and accommodation afforded consumers or patrons, and any product or commodity furnished by any public utility company; and the plant, equipment, apparatus, appliances, property, and facilities employed by or in connection with any public utility company in performing any service or in furnishing any product or commodity and devoted to the purposes in which the public utility company is engaged and to the use and accommodation of the public:

"Special Act" includes any special or private Act of the Legislature, whether passed before or after the commencement of this Act:

"Unjust" and "unreasonable" as applied to rates shall be construed to include respectively injustice and unreasonableness, whether arising from the fact that rates are insufficient to yield fair compensation for the service rendered or from the fact that rates are excessive as being more than a fair and reasonable charge for service of the nature and quality furnished by the public utility company, or arising in any other manner.

Duties and Restrictions imposed on Public Utility Companies.

Duty to furnish adequate service.

3. Every public utility company shall maintain its property and equipment in such condition as to enable it to furnish, and shall

furnish, service to the public in all respects adequate, safe, just, and reasonable.

Duty to furnish service without discrimination or delay.

4. Upon reasonable notice, every public utility company shall furnish to all persons who may apply therefor and be reasonably entitled thereto suitable service without discrimination and without delay.

Duty to obey orders of Public Utilities Commission.

5. Every public utility company shall obey all orders of the Public Utilities Commission within its jurisdiction in respect of the business or service of the company, and shall do all things necessary to secure observance of those orders by the company's officers, agents, and employees.

Duty to furnish information.

6. (1.) Every public utility company shall furnish to the Commission all information required by it to carry into effect the provisions of this Act, and shall make specific answers to all questions submitted by the Commission. Every public utility company which receives from the Commission any form of return with directions to fill it out shall cause the return to be properly filled out so as to answer, fully and correctly, each question therein propounded.

Delivery of documents and inventories.

(2.) Whenever required by the Commission, every public utility company shall deliver to the Commission all maps, profiles, contracts, reports of engineers, documents, books, accounts, papers, and records in the possession or control of the company in any way relating to its property or service or affecting its business, or verified copies of the same; and shall deliver to the Commission complete inventories of the property of the company in such form as the Commission may direct.

Duty to keep records in the Province.

7. Every public utility company shall have an office in the Province, in which it shall keep all such books, accounts, papers, and records as are required by the Commission to be kept within the Province. No company shall remove or permit to be removed from the Province any book, account, paper, or record so kept, except upon such conditions as may be prescribed by the Commission.

Duty to file list of administrative officers.

8. Upon request of the Commission, every public utility company shall file with the Commission a statement in writing, verified by the oath of the president or secretary of the company, setting forth the name, title of office or position, post-office address, and the authority, powers, and duties of every member of the board of directors and the executive committee, and of every trustee, superintendent, chief or head of construction or operation, or of any department, branch, division, or line of construction or operation, and other officer of the company, in such form as to disclose the source and origin of each administrative act, rule, decision, order, or

other action of the corporation. Within ten days after any change is made in the title of or the authority, powers, or duties appertaining to any such office or position, or in the person holding the same, the company, without further request, shall file with the Commission a statement, verified in like manner, setting forth the change.

Restrictions as to rates and service.

9. No public utility company shall make, demand, or receive any unjust, unreasonable, unduly discriminatory, or unduly preferential rate for any service furnished by it within the Province, or any rate otherwise in violation of law; and no public utility company shall, as to rates or service, subject any corporation, person, or locality, or any particular description of traffic, to any undue prejudice or disadvantage, or extend to any corporation or person any form of agreement, or any rule or regulation, or any facility or privilege, except such as are regularly and uniformly extended to all corporations and persons under substantially similar circumstances and conditions in respect of service of the same description, and the Commission may by regulations declare what constitutes substantially similar circumstances and conditions.

Reduced rates or rebates prohibited.

10. No public utility company shall, directly or indirectly, furnish to or permit any corporation or person to obtain any service at less than the rate established and in force therefor. No corporation or person shall, directly or indirectly, whether with or without the consent or connivance of a public utility company, obtain or seek to obtain any service at less than the rate then established and in force therefor.

Changes of rates and establishment of new rates prohibited, except with approval of Commission.

11. (1.) Except by the direction of the Commission, or with the approval of the Commission first obtained, no public utility company shall establish any new schedule of rates, or make any change in any rate established under this Act, or in any rate actually and legally charged and collected by the company at the time of the commencement of this Act, whether the rate so charged and collected is fixed by or is the subject of any existing agreement or otherwise, and the rate so charged and collected shall be the lawful rate until changed by the Commission. Every change in rates and every new rate established shall come into force only on a date to be fixed by the Commission.

Burden of proof.

(2.) Where any rate charged at the commencement of this Act is continued in effect by reason of the provisions of this section at an amount greater than would otherwise be legally chargeable by the company, then, upon any inquiry held by the Commission under this Act in respect of that rate, or in respect of any existing agreement, the burden of proof shall be upon the company to show that the rate so charged and continued in effect is in all respects just and reasonable.

(3.) Nothing in subsection (1) contained shall prejudice or affect any company or other party interested in making application or complaint to the Commission pursuant to the provisions of this Act for the change of any rate. Right of application for change of rates preserved.

(4.) Where on any line of electric railway which enters or traverses any portion of the City of Vancouver a rate is charged by the British Columbia Electric Railway Company in respect of passenger traffic, either within or without the city, in excess of a five-cent-fare rate but not exceeding a six-cent-fare rate, the British Columbia Electric Railway Company shall, during the period defined in this subsection, keep a record in respect of the passenger fares received at the rate so charged showing the amount received therefrom in excess of a five-cent-fare rate, and shall be deemed to receive such excess amount in trust and shall keep the same deposited in a special trust account in some chartered bank in the City of Vancouver, to be disposed of as in this subsection provided. Disposition of excess fare.

The period during which such record is to be kept shall begin on or after the ninth day of April, 1919, at the time when the rate charged by the British Columbia Electric Railway Company for passenger traffic in the City of Vancouver is by reason of the provisions of this section maintained at a higher rate than could otherwise be legally charged by reason of any existing agreement, and the period shall continue until the rate fixed by the Commission as provided in this subsection comes into force.

The Commission shall proceed with due diligence to make inquiry to determine the just and reasonable rate to be charged by the British Columbia Electric Railway Company for passenger traffic on the lines of railway referred to in this subsection. If the rate fixed by the Commission in respect of passenger traffic on the said lines is less than the rate so charged during the period defined in this subsection, then the excess amount so received and held in trust shall, to the extent of the amount thereof collected in excess of the rate so fixed, be paid by the British Columbia Electric Railway Company from the said trust account to the Vancouver General Hospital for the general uses of that hospital, and the amount (if any) then remaining in such trust account shall belong to the British Columbia Electric Railway Company freed from the said trust. If such rate is fixed by the Commission at a rate equal to or exceeding the rate so charged during the said period, then the whole of the excess amount so received and held in trust shall belong to the British Columbia Electric Railway Company freed from the said trust.

12. (1.) No public utility company shall issue any stocks, bonds, debentures, securities, or other evidence of indebtedness payable in more than one year from the date thereof unless it has first obtained approval by the Commission of the proposed issue. Upon application and hearing, if the Commission approves of the purpose and Approval by Commission of issue of securities.

amount of the proposed issue, and is satisfied that the issue is to be made in accordance with law, the Commission shall grant its approval of the proposed issue.

Approval subject to conditions.

(2.) The Commission may grant its approval under this section for the proposed issue in the amount applied for, or in any lesser amount, and subject to such conditions as it may deem reasonable and necessary to impose.

Restrictions as to capitalization of franchises.

13. No public utility company shall:—

(*a.*) Capitalize any franchise or right to be a corporation:

(*b.*) Capitalize any franchise in excess of the amount which, exclusive of any tax or annual charge, is actually paid to the Province or to a municipality therein as the consideration for the franchise:

(*c.*) Capitalize any contract for consolidation, amalgamation, merger, or lease:

(*d.*) Issue any security or evidence of indebtedness against or as a lien upon any contract for consolidation, amalgamation, merger, or lease.

Restrictions as to disposal of assets to or merger with other public utility companies.

14. Except in the case of the sale, lease, or other disposition by a public utility company of any of its property in the ordinary course of its business, no public utility company shall, unless the approval of the Commission is first obtained, sell, assign, transfer, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof, or by any means, direct or indirect, merge, amalgamate, or consolidate its property, franchises, privileges, or rights, or any part thereof, with those of any other public utility company.

Amalgamation subject to approval of Commission.

15. Unless an order declaring the approval of the Commission is first obtained and published in the Gazette, no public utility company shall consolidate, amalgamate, or merge with any other public utility company.

Restrictions as to sale of shares to other corporations.

16. Unless the approval of the Commission is first obtained, no public utility company incorporated under the laws of the Province shall issue or sell or make or permit to be made upon its books any transfer of shares in the capital of the company:—

(*a.*) To any other public utility company; or

(*b.*) To any corporation, where the result of the issue, sale, or transfer, in itself or in connection with other previous issues, sales, or transfers, is to vest in the corporation a majority in interest of the outstanding share capital of the public utility company.

Additional conditions imposed on certain companies.

17. (1.) In the case of a public utility company the objects of which include the construction, operation, or maintenance of tele-

graph, telephone, or transmission lines, or the delivery, transmission, sale, or furnishing of heat, cold, light, power, gas, or electricity, the following provisions shall, subject to subsection (2), apply to the company, in addition to all conditions which may be prescribed by the Commission or imposed on the company by virtue of any general or special Act:—

(*a.*) The company shall not interfere with the public right to travel, or in any way obstruct the entrance to any door or gateway or the free access to any building:

(*b.*) The company shall not permit any wire or cable to be less than sixteen feet above any street, highway, square, or other public place, or erect more than one line of poles along any highway:

(*c.*) All poles shall be as nearly as possible straight and perpendicular:

(*d.*) Except as permitted by and in compliance with all safety rules contained in the regulations and orders made by the Commission under this Act, the company shall not run, place, erect, maintain, or use any wire or cable carrying a current of electricity in such a position in relation to the wires, cables, or apparatus of any other public utility company as to materially impair or render impossible the service furnished to the public by that other company, or to endanger the safety of the persons operating or using that service:

(*e.*) The company shall not unnecessarily cut down or mutilate any shade, fruit, or ornamental tree:

(*f.*) The opening-up of the soil of any street, highway, square, or other public place, for the erection of poles or for the carrying of wires, cables, pipes, or conduits underground, shall be subject to the supervision and approval of such person as the Municipal Council (in the case of a municipality) or the Minister of Public Works (in any other case) may appoint, and the company shall, without unnecessary delay, restore to its former condition as far as possible every street, highway, square, or public place so opened up:

(*g.*) If, in the exercise of the public right of travel or in the moving of buildings, it is necessary that the wires, cables, or poles of any company be temporarily removed by cutting or otherwise, the Commission may, in its discretion, without any notice or hearing, order the removal of the wires, cables, and poles, and may order by whom the removal or replacing shall be executed, and by whom the cost of the removal or replacing shall be paid in whole or in part:

(*h.*) The company shall be liable for all unnecessary damage which it causes in carrying out, maintaining, or operating any of its works:

(*i.*) The company, unless compensation is ordered by the Commission, shall not be entitled to compensation on account of its poles, cables, or wires being cut by order of the officer in charge of the fire brigade at any fire:

(*j.*) Every person engaged in erecting or repairing any line or instrument of the company, or engaged in the work of inspection or meter-reading for the company, shall have attached to his dress in a conspicuous place, at all times while so engaged, a badge on which are legibly inscribed the name of the company and a number by which the person can be readily identified.

Power to suspend provisions.

(2.) The Commission, in its discretion, may by order from time to time modify or suspend the application of any of the provisions of clauses (*a*) to (*j*) of subsection (1).

Duty of telegraph and telephone companies to afford interchange of service.

18. Every public utility company operating any telegraph or telephone system shall receive, transmit, and deliver, without discrimination or delay, the messages and conversations of every other telegraph or telephone company or system with which a joint rate has been established, or with whose line a physical connection has been made.

Approval of Commission necessary to validity of franchises.

19. No privilege or franchise hereafter granted to any public utility company by any municipality shall be valid until approved by the Commission. The Commission shall not give any approval for purposes of this section unless, after public hearing, it determines that the privilege or franchise proposed to be granted is necessary for the public convenience, and properly conserves the public interest. The Commission in giving its approval may impose such conditions as to construction, equipment, maintenance, rates, or service as the public convenience and interest reasonably require.

Supervision of Public Utility Companies.

General supervision vested in Commission.

20. The Commission shall have the general supervision of all public utility companies, and may make such regulations and orders regarding equipment, appliances, safety devices, extension of works or systems, filing of schedules of rates, reporting, and other matters as are necessary for the safety, convenience, or service of the public, or for the proper carrying-out of this Act or of any contract, charter, or franchise involving the use of public property or rights.

Duty of Commission to obtain information for purpose of supervision.

21. For the purpose of its supervision of public utility companies, the Commission shall make such examinations and conduct such inquiries as are necessary to keep itself informed as to the manner in which the business of public utility companies is conducted, and as to the compliance by public utility companies with the provisions of law, and as to any matter or thing within the jurisdiction of the Commission.

Supervision of service of transportation companies.

22. Where any public utility company owns or operates any line of steam-railway, street-railway, tramway, or ferry, the Commission may consider all questions relating to the transportation of goods or passengers thereon, and may order the company to carry goods or passengers on its line, or on any part of its line, at such intervals or times and for such period of time and at such rates and on such conditions as the Commission may fix.

Power to order track connections for interchange of traffic.

23. (1.) Whenever the Commission, after inquiry, finds that public convenience and necessity require the making of track connections between any two or more steam-railways, street-railways, or tramways operated by public utility companies, the Commission may make such order as to it seems just and reasonable directing any company to make physical connections of its track with the track of any other company at any crossing, or at any place where a track of one company begins or terminates at or near the track of another company, or in any municipality where the tracks of two or more companies enter the limits of the municipality, so that cars may be readily transferred from the tracks of one company to the tracks of another. The Commission, by the same or any subsequent order, may, in its discretion, apportion the cost of making the track connection, and direct by what companies and in what proportions it shall be borne.

Connections with side-tracks of private shippers.

(2.) In like manner the Commission may direct any public utility company engaged in carrying merchandise to construct, maintain, and operate, upon reasonable terms, a switch connection with the private side-track constructed by any shipper, where in the judgment of the Commission such connection is reasonable and practicable, and can be established with safety, and will furnish sufficient business to justify its construction and maintenance, and the Commission may, in its discretion, apportion the costs of making the switch connection between the public utility company and the shipper, and direct in what proportions it shall be borne.

Provision for telegraph and telephone connections for interchange of service.

24. Whenever the Commission, after inquiry, finds that public convenience and necessity require the making of a physical connection for the establishment of a continuous line of communication for the conveyance of messages or conversations between any two or more telegraph or telephone lines operated by public utility companies, the Commission may make such order as to it seems reasonable directing that the connection be made. The Commission, by the same or any subsequent order, may, in its discretion, apportion the cost of making the connection, and direct by what companies and in what proportions it shall be borne.

Provision for joint use of equipment.

25. (1.) Whenever the Commission, after inquiry, finds that public convenience and necessity require the use by one public utility

company of the conduits, subways, tracks, poles, wires, or other equipment belonging to another public utility company, and that such use will not prevent the owner or other users thereof from performing their duties, or result in any substantial detriment to the service, and if the public utility companies fail to agree upon such use, or the conditions or compensation for the same, the Commission may make such order as to it seems reasonable directing that the use or joint use of the conduits, subways, tracks, poles, wires, or other equipment be permitted, and prescribing the conditions to be observed and the compensation to be paid in respect of the use so permitted.

Provisions for co-operation in the placing and equipment of electrical transmission-lines to prevent impairment of service and protect safety of public.

(2.) Whenever the Commission, after inquiry, finds that the furnishing of adequate service by one public utility company, or the safety of the persons operating or using that service, require that any wires or cables carrying a current of electricity and run, placed, erected, maintained, or used by another public utility company or the corporation be so placed, constructed, altered, insulated, or equipped with safety devices as to prevent the impairment of that service, or to protect the safety of the persons operating or using it or the property of the corporation, the Commission may make such order as to it seems reasonable with respect to the placing, construction, alteration, insulation, or equipment of the wires or cables carrying the current of electricity. The Commission, by the same or any subsequent order, may direct that the cost of the placing, construction, alteration, insulation, and equipment of the wires or cables shall be at the expense of the company whose wire, cable, or apparatus was last placed in point of time, or may, in the discretion of the Commission, apportion the cost, and direct by what companies and in what proportion it shall be borne.

Power to order improvement of service and adjustment of rates.

26. (1.) Whenever it is made to appear to the Commission, upon the complaint of any party interested, that there is reason to believe that the rate charged by any public utility company for any service furnished by it is unjust, unreasonable, unduly discriminatory, or unduly preferential, or is otherwise in violation of law, or that any public utility company, as to rates or service, subjects any corporation, person, or locality, or any particular description of traffic or service, to any undue prejudice or disadvantage, the Commission may proceed to hold such inquiry as it sees fit into all matters relating to the nature and quality of the service, or to the performance of the service, or to the rates charged therefor. The Commission, after inquiry, may disallow or change any such service or rate as in its opinion is unjust, unreasonable, unduly discriminatory, unduly preferential, or unlawful, or which subjects any corporation, person, or locality, or any particular description of traffic, to any undue prejudice or disadvantage; and the Commission may make such order fixing the rates to be charged by the public utility

company for its service, and respecting the improvement of the service, as to the Commission may seem just and reasonable.

Matters for consideration in fixing rates.

(2.) In fixing any rate the Commission shall have due regard, among other things, to giving to the public utility company a fair and reasonable return upon the appraised value of the property of the company, and to the protection of the public from rates that are excessive as being more than a fair and reasonable charge for services of the nature and quality furnished by the company; and the Commission shall consider all matters proper to be considered as affecting the rate, including the circumstances existing at the time any former rate was made or fixed as well as the circumstances existing at the time of the complaint and inquiry; and in any case where the Commission deems it expedient, the Commission may, in readjusting or fixing rates, make the alteration or continuance of any rate conditional upon the performance by the public utility company or any party interested of any act, matter, or thing specified in the order made in respect of that rate.

Power to enforce agreements.

27. Upon the complaint of any party interested that any public utility company has committed a breach of an agreement to which the company is a party, or under which it operates, respecting any service furnished or to be furnished by the company, or upon the complaint of the company that any other party to the agreement has committed a breach of the agreement, the Commission shall hear all matters relating to the alleged breach, and shall make such order as to the Commission may seem reasonable and expedient; and in such order may, in its discretion, direct the company or other party to the agreement to do such things as are necessary for the proper fulfilment of the agreement, or to refrain from doing such things as constitute a breach of the agreement.

Powers extended to agreements ratified by Statute.

28. The powers vested in the Commission by this Act shall apply in respect of service and rates whether fixed by or the subject of any agreement or otherwise, and where the service or rates are fixed by or are the subject of an agreement shall apply whether the agreement is incorporated in or ratified or made binding by any general or special Act or otherwise.

Power to prescribe conditions to be contained in agreements for service.

29. The Commission may make rules and regulations prescribing the conditions to be contained in and to become part of all agreements entered into by public utility companies in respect of their services, or in respect of any class of service.

Adjustment of differences between company and municipality as to use of streets.

30. Where a public utility company, having the right to enter a municipality for the purpose of placing therein, with or without the consent of the municipality, its rails, posts, wires, pipes, conduits, or other appliances upon, along, across, over, or under any public street, lane, square, park, public place, bridge, viaduct, subway, or

watercourse, cannot come to an agreement with the municipality as to the use of the street, lane, square, park, public place, bridge, viaduct, subway, or watercourse for that purpose, or as to the terms and conditions of such use, then, upon application to the Commission, and after such inquiry as it may see fit to make, the Commission may by its order permit the use of the street, lane, square, park, public place, bridge, viaduct, subway, or watercourse by the company for the purpose in question, and prescribe the manner, terms, and conditions of its use.

Permission to cross municipal territory in extending public-utility systems.

31. Where a public utility company, without placing its rails, posts, wires, pipes, conduits, or other apparatus upon, along, across, over, or under some public street, lane, square, park, public place, bridge, viaduct, subway, or watercourse which it cannot lawfully use for that purpose without the consent of the municipal corporation having control of the same, is unable 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, if the company cannot come to an agreement with the municipal corporation as to the use of the street, lane, square, park, public place, bridge, viaduct, subway, or watercourse, then, upon application to the Commission, and after such inquiry as it may see fit to make, the Commission, for the purpose of such extension only, and without unduly preventing the use of the street, lane, square, park, public place, bridge, viaduct, subway, or watercourse by other persons or corporations already lawfully using the same, may by its order permit the use of the street, lane, square, park, public place, bridge, viaduct, subway, or watercourse by the company, notwithstanding any law or contract granting to any other person or corporation exclusive rights with respect thereto, and may by the order prescribe the manner, terms, and conditions of its use.

Power to order extension of service within municipality.

32. Upon the complaint of any municipality that a public utility company doing business in the municipality fails to extend its service to any part of the municipality, and after such inquiry as the Commission may see fit to make, the Commission may order such extension by the company of its service as to the Commission may seem reasonable and expedient; and by the order may, in its discretion, impose conditions under which the extension shall be made, including the expenditure to be incurred for all necessary works, and may apportion the cost between the public utility company and the municipality in such manner as the Commission deems equitable.

Extensions of service generally.

33. Whenever the Commission, after inquiry, finds that an extension by any public utility company of its existing service would in the judgment of the Commission furnish sufficient business to justify the construction and maintenance of the extension, and if in the opinion of the Commission the financial condition of the company

reasonably warrants the capital expenditure required in making the extension, the Commission may order the company to make such extension of its service as to the Commission may seem reasonable and expedient.

Power to prescribe terms governing use of municipal highway or bridge by public utility company.

34. Subject to the terms of any agreement between any public utility company and a municipality, and of the franchise or rights of the company, and after such inquiry as the Commission may see fit to make, the Commission may by order prescribe the terms and conditions upon which the public utility company may for any purpose of its service use any highway within the municipality, or any public bridge, viaduct, or subway constructed or to be constructed by the municipality, or by the municipality jointly with any other municipality, corporation, or Government.

Appraisal of property of public utility company.

35. (1.) Whenever in the opinion of the Commission it is necessary for the purpose of carrying out any of the provisions of this Act, the Commission may by appraisal from time to time ascertain the value of the property of any public utility company, and may inquire into every fact which in its judgment has any bearing on that value, including the condition and value of the undertaking of the company as a going concern, and the amount of money actually and reasonably expended in that undertaking in order to furnish service reasonably adequate to the requirements of the community served by the company, as that community exists at the time of the appraisal; and in making its appraisal or inquiry the Commission shall have access to all books, documents, and records in the possession of any department or board of the Government of the Province or of any municipality.

Costs of appraisal.

(2.) The Commission in making its appraisal or inquiry under this section may order that all costs and expense of counsel, engineers, valuators, clerks, stenographers, and other assistants retained and employed by the Commission in and about the making of the appraisal and inquiry shall be paid by the public utility company whose property is the subject of the appraisal and inquiry. Amounts chargeable under this subsection may by order of the Commission be made payable as the work of appraisal proceeds, and the certificate of the Chairman of the Commission shall be conclusive evidence of the amounts so payable. All expenses in connection with any appraisal or inquiry under this section, including all expenses incurred by the company whose property is the subject of appraisal, may be charged by the company to capital account, and added to the value of its property as shown by the appraisal.

Power to order keeping of depreciation account and to fix rates of depreciation.

36. (1.) Whenever the Commission, after inquiry, considers that it is necessary and reasonable that a depreciation account should be carried by a public utility company for the protection of its stockholders, bondholders, debenture-holders, or creditors, the Commission

may by order require the company to keep an adequate depreciation account in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission shall from time to time ascertain and by order, after inquiry, fix proper and adequate rates of depreciation of the property of the company, which rates shall be sufficient to provide the amounts required in addition to the expense of maintenance to keep the company's property in a state of efficiency corresponding to the progress of the arts in relation to the industry of the company.

Management of depreciation fund.

(2.) The public utility company shall conform its depreciation accounts to the rates fixed by the Commission, and shall set aside all moneys required out of earnings, and carry them in a depreciation fund. The income from investments of moneys in the depreciation fund shall also be carried in and form part of that fund. The depreciation fund shall not be expended otherwise than for depreciation, improvements, new constructions, extensions, or additions to the property of the company.

Power of Commission to order:—

37. The Commission may by order require every public utility company:—

Keeping of accounts.

(*a.*) To keep such books, records, and accounts of the conduct of its business as the Commission may prescribe, and in the case of every public utility company of the same class, to adopt a uniform system of accounting prescribed by the Commission:

Furnishing of financial reports.

(*b.*) To furnish periodically, and at such other times as the Commission may require, a detailed report of finances and operations, in such form and containing such matters and verified in such manner as the Commission may prescribe:

Filing of accident reports.

(*c.*) To file with the Commission, at such times and in such form and manner as the Commission may prescribe, a report of every accident occurring to or upon the plant, equipment, or other property of the company, which accident is of such a nature as to endanger the safety, health, or property of any person:

Application to Railway Commission of Canada, etc.

(*d.*) To apply to the Railway Commission of Canada, or such other tribunal or municipal or other body or official having jurisdiction or authority in the premises, for permission, where necessary, to undertake or carry on any work or service ordered by the Public Utility Commission contingently on such permission being granted.

Provision for appointment of supervisors and inspectors over public utility companies.

38. Where the Commission is of opinion that the appointment of a supervisor or inspector is necessary and expedient for the purpose of supervision or inspection, continuous or otherwise, of the system, works, plant, equipment, or service of any public utility company with a view to prescribing and carrying out measures for the safety of the public and of the users of the company's service, or for

adequacy of service, the Commission may appoint a supervisor or inspector over the public utility company, and may prescribe his duties. The Commission may fix the salary and expenses of any supervisor or inspector appointed under this section, and may order that the amount of the salary and expenses so fixed shall be borne by the municipality within which the operations of the company are carried on or its service is furnished, or shall be borne or apportioned in such manner as the Commission deems equitable.

Public Utilities Commission.

Constitution of Commission.

39. There shall be a Commission, known as the "Public Utilities Commission," consisting of one member appointed by the Lieutenant-Governor in Council. The Commission shall have an official seal which shall be judicially noticed.

Tenure of office.

40. The Commissioner shall hold office during good behaviour for a period of ten years from the date of his appointment, but may be removed at any time for cause. The Commissioner on the expiration of his term of office shall be eligible for reappointment.

Duty of Commissioner as to occupation and residence.

41. Except as provided in any Order of the Lieutenant-Governor in Council, the Commissioner shall devote the whole of his time to the performance of his duties under this Act, and shall reside in such places as the Lieutenant-Governor in Council from time to time determines.

Salary of Commissioner.

42. The salary of the Commissioner shall be fixed by the Lieutenant-Governor in Council, and shall not be less than seven thousand dollars nor more than eight thousand dollars per annum, and shall be payable monthly out of the Consolidated Revenue Fund.

Appointment of person to act in the stead of Commissioner who is interested or unable to act.

43. If in the opinion of the Lieutenant-Governor in Council the Commissioner is interested in any matter before the Commission, or if the Commissioner is unable to act by reason of illness, absence, or other cause, the Lieutenant-Governor in Council may appoint a person to act as Commissioner in his stead for that occasion, or until the termination of the disability, and may fix the remuneration of the person so appointed; and any person so appointed may complete any unfinished business of the Commission in which he has taken part, even if the Commissioner in whose stead he has acted has become able to act.

Office and sittings of the Commission.

44. The Commission shall maintain its principal office at such place as is fixed by the Lieutenant-Governor in Council, and shall hold its sittings at the principal office, except, when the Commission deems it expedient to hold a sitting elsewhere, it may hold the sitting in any part of the Province.

Proceedings of Commission.

45. The Commission shall sit at such times and conduct its proceedings in such manner as it may deem most convenient for the proper discharge and speedy dispatch of business, and may make rules and regulations respecting its sittings and for regulating procedure in respect of all matters and business coming before the Commission, including the giving of notices authorized or required to be given under the provisions of this Act.

Appointment of experts to advise.

46. Upon the recommendation of the Commission, the Lieutenant-Governor in Council may appoint experts, or persons having technical or special knowledge of the matter in question, to assist in an advisory capacity in respect of any matter before the Commission.

Appointment of staff.

47. The Lieutenant-Governor in Council may appoint a Secretary and such other officers, clerks, and servants as may be necessary for the purposes of the Commission, and may fix their salaries.

Payment of salaries and expenses.

48. The salaries of all officers, clerks, and servants of the Commission, and all expenses of the Commission incidental to the carrying-out of this Act and such duties as are assigned to the Commission by any other Act, or by any Order in Council, including all actual and reasonable travelling expenses of the Commissioner and the Secretary, and of such members of the staff of the Commission as may be required by the Commission to travel, necessarily incurred in attending to the duties of their office, shall be paid monthly out of moneys provided by the Legislature, or in the absence of any special appropriation of the Legislature available for that purpose shall be paid from the Consolidated Revenue Fund.

Duties of Secretary.

49. (1.) The Secretary shall:—

(*a.*) Attend all sessions of the Commission:

(*b.*) Keep a record of all proceedings conducted before the Commission or any Commissioner under this Act:

(*c.*) Have every rule, regulation, and order of the Commission drawn pursuant to the direction of the Commission, signed by the Commissioner, sealed with the official seal of the Commission, and filed in the office of the Secretary:

(*d.*) Have the custody of all records and documents belonging to the Commission or filed in its office:

(*e.*) Obey all rules and directions made or given by the Commission touching his duties or office.

Provision for obtaining certified copies of orders.

(2.) Upon the application of any person, and on payment of the fees prescribed under this Act, the Secretary shall prepare and deliver to the applicant a certified copy of any rule, regulation, or order of the Commission.

Acting-Secretary.

50. In the absence of the Secretary, the Commission may appoint from its staff an Acting-Secretary, who shall perform the duties of the Secretary and exercise his powers.

Commissioner and officers of Commission prohibited from holding certain interests.

51. (1.) No Commissioner or officer of the Commission shall, directly or indirectly:—

(*a.*) Hold, acquire, or become interested in any share, stock, bond, debenture, or other security of any public utility company or municipality:

(*b.*) Have any interest in any device, appliance, machine, article, patent, or patented process, or any part thereof, which is required or used by any public utility company for the purpose of its equipment or service:

(*c.*) Have any interest in any contract or agreement for the construction of any works or the furnishing of any service for or by any public utility company.

Provision for disposal of interest.

(2.) If at the time of the appointment to office of any Commissioner or officer of the Commission any property or interest mentioned in subsection (1) is vested in him, or after his appointment becomes vested in him by succession or by will, he shall within three months after the appointment or subsequent acquisition, as the case may be, alienate the property or interest so vested.

Certain interests permitted.

(3.) The fact of the Commissioner or officer of the Commission being the user or lessee of a telephone, or the user or purchaser for personal or domestic purposes of water, gas, heat, light, power, electric current, transportation, or service from any public utility company, shall not constitute a violation of the provisions of this section, nor disqualify him from acting in any matter affecting the public utility company.

Duty of employees to keep information secret.

52. Every officer and every employee of the Commission shall keep secret all information coming to his knowledge during the course of any inspection, examination, or investigation of any return, account, record, memorandum, book, or paper of a public utility company under this Act, except in so far as his public duty requires him to report upon or take official action regarding the affairs of the company, or except in so far as he may be authorized by the Commission to publish or make known the information.

Privilege extended to information officially obtained.

53. No member, officer, or employee of the Commission shall be required to give testimony in any civil action to which the Commission is not a party, with respect to information obtained by him in the discharge of his official duty.

Annual report.

54. (1.) The Commission shall, on or before the first day of February in each year, make to the Lieutenant-Governor in Council, through the Attorney-General, a report for the next preceding calendar year, showing briefly:—

(*a.*) All applications and complaints to the Commission under this Act, and summaries of the findings of the Commission thereon:

(*b.*) Summaries of the findings of the Commission in regard to any matter respecting which the Commission has acted of its own motion or upon the request of the Attorney-General:

(*c.*) Such other matters as appear to the Commission to be of public interest in connection with the public utility companies subject to this Act; and

(*d.*) Such matters as the Lieutenant-Governor in Council directs.

Laying of report before Legislature.

(2.) If the Legislature is then in session, the report shall be laid before it forthwith, otherwise the report shall be laid before the Legislature within fifteen days after the opening of the next session.

General Jurisdiction and Powers of Commission.

Transfer of powers of Minister of Railways.

55. (1.) Whenever, by or under any general or special Act heretofore enacted by the Legislature, or any document heretofore made, the Minister of Railways is given any power or authority or charged with any duty in respect of any public utility company or its service, the Commission shall have and may exercise the power and authority so given to the Minister of Railways, and shall be charged with the duty with which he is so charged.

Power of Commission to act without consent of Lieut.-Governor in Council.

(2.) Where the Act giving the Minister of Railways any power or authority referred to in this section provides that the exercise of that power or authority or the taking effect of any act of the Minister of Railways thereunder is subject to the approval or consent of the Lieutenant-Governor in Council, by Order in Council or otherwise, then, notwithstanding the provisions of that Act, the Commission may exercise the power and authority, and all acts of the Commission thereunder shall take effect without the approval or consent of the Lieutenant-Governor in Council.

Power of Commission to vary existing orders of Minister of Railways.

(3.) Where in pursuance of any power or authority referred to in this section, given to the Minister of Railways by or under any Act, any orders, rules, or regulations have been made and are in force at the commencement of this Act, the Commission shall have the like powers to alter or revoke such orders, rules, and regulations, as in the case of similar orders, rules, or regulations made by the Commission pursuant to this section and to the Act by or under which such power or authority is given to the Minister of Railways.

Jurisdiction of Commission extended to other Acts.

56. (1.) In addition to the jurisdiction conferred on the Commission by the other provisions of this Act, the jurisdiction of the Commission shall extend to the performance of all duties and the exercise of all powers which by or under any Act of the Legislature are imposed on or vested in the Commission.

Appointment of Commissioner to serve on other Commissions.

(2.) The Lieutenant-Governor in Council may appoint the Commissioner, either alone or with other persons, as members of any Commission or Board constituted under any Act of the Legislature.

Hearing of complaints.

57. The Commission shall have full jurisdiction to inquire into, hear, and determine any application by or on behalf of any party

interested, complaining that any company, corporation, or person constructing, maintaining, operating, or having the control of any public utility service, within the meaning of this Act, or charged with the performance of any duty or the exercise of any power in relation to that service:—

(*a.*) Has failed to do any act, matter, or thing required to be done by this Act, or any other general or special Act, or by any regulation, order, by-law, or direction made thereunder; or

(*b.*) Has done or is doing any act, matter, or thing contrary to this Act, or any other general or special Act, or to any regulation, order, by-law, or direction made thereunder.

Granting of orders, directions, and approvals.

58. The Commission shall have full jurisdiction to inquire into, hear, and determine any application by or on behalf of any party interested, requesting the Commission to make any order or give any direction, leave, sanction, or approval which by law it is authorized to make or give, or with respect to any act, matter, or thing which by this Act or any other general or special Act to which the jurisdiction of the Commission extends is or may be prohibited, sanctioned, or required.

Mandatory and restraining orders.

59. The Commission may order and require any company, corporation, or person to do forthwith, or within or at any specified time, and in any manner prescribed by the Commission, so far as is not inconsistent with this or any other Act, any act, matter, or thing which the company, corporation, or person is or may be required or authorized to do under this Act, or under any other general or special Act to which the jurisdiction of the Commission extends; and may forbid and restrain the doing or continuing of any act, matter, or thing which is contrary to or which may be forbidden or restrained under this Act, or any other general or special Act to which the jurisdiction of the Commission extends.

Commission vested with certain powers of Supreme Court.

60. The Commission, in respect of the attendance and examination of witnesses, the taking of depositions of witnesses residing within or without the Province, the production and inspection of documents, the entry on and inspection of property, the enforcement of its orders, and other matters necessary or proper for the due exercise of its jurisdiction under this or any other Act, or otherwise for carrying into effect this Act or any other Act to which its jurisdiction extends, shall have all such powers, rights, and privileges as are vested in the Supreme Court.

Decision on merits.

61. The Commission shall make its decision upon the real merits and justice of the case, and shall not be bound to follow strict legal precedent.

Jurisdiction of Commission as to receivers.

62. The fact that a liquidator, receiver, manager, or other official of any public utility company, or a sequestrator of the property thereof, has been appointed by any Court in the Province, or is managing or operating a public utility company or its service under the authority of any such Court, shall not prevent the exercise by the Commission of any jurisdiction conferred by this Act; but the liquidator, receiver, manager, official, or sequestrator shall be bound to manage and operate the public utility company and its service in accordance with this Act and with the orders and directions of the Commission thereunder, whether general or referring particularly to the public utility company; and the liquidator, receiver, manager, official, or sequestrator, and any person acting under him, shall obey all orders of the Commission within its jurisdiction in respect of the public utility company and its service, and be subject to have them enforced against him by the Commission, notwithstanding the fact that the liquidator, receiver, manager, official, or sequestrator is appointed by or acts under the authority of any Court.

Power to grant extension of time.

63. Where any work, act, matter, or thing is by any rule, regulation, order, or decision of the Commission required to be done, performed, or completed within a specified time, the Commission, if the circumstances of the case in its opinion so require, may upon notice and hearing, or, in its discretion, upon ex parte application, extend the time so specified.

Power of Commission to act on report of its officers.

64. (1.) The Commission, in its discretion, may accept and act upon evidence by affidavit or written affirmation or by the report of any of its officers. Any inquiry which the Commission deems necessary to make may be made by any officer of the Commission, or by any person appointed by it to make the inquiry, and the Commission may act on his report as to the result of the inquiry.

Powers of Commission extended to officers holding inquiries.

(2.) Every officer and every person appointed to make an inquiry shall for the purposes of the inquiry have all the powers conferred on the Commission by section 60.

Expenses of inquiries.

(3.) Where any person has been appointed by the Commission to make an inquiry and report upon any matter, the Commission may order by whom and in what proportion the costs incurred in making the inquiry and report shall be paid, and may fix the amount of the costs.

Findings of Commission conclusive in certain cases.

65. The finding or determination of the Commission upon any question of fact within its jurisdiction, and as to whether any company, corporation, or person is or is not a party interested within the meaning of this Act, shall be binding and conclusive upon all companies, corporations, and persons, and in all Courts.

Effect of judgment of other Courts.

66. In determining any question of fact, the Commission shall not be concluded by the finding, order, or judgment of any other Court in any suit, prosecution, or proceeding involving the determination

of that fact, but the finding, order, or judgment shall, in proceedings before the Commission, be prima facie evidence only.

Effect of pending litigation.

67. The pendency of any suit, prosecution, or proceeding in any other Court involving questions of fact shall not deprive the Commission of jurisdiction to hear and determine the same questions of fact.

Power of Commission to act on own motion.

68. Of its own motion the Commission may, and upon the request of the Attorney-General the Commission shall, inquire into, hear, and determine any matter or thing which under this Act it may inquire into, hear, or determine upon application or complaint, and with respect thereto the Commission shall have the same powers as upon application or complaint are vested in it by this Act.

Continuing jurisdiction.

69. Where any power or authority is vested in the Commission under this Act, the Commission may exercise that power and authority from time to time, or at any time, as occasion requires; and may at any time alter, suspend, or revoke any rule or regulation made by it, and make others.

General powers not limited by specific enumeration.

70. The enumeration in any provision of this Act of any specific power or authority given to the Commission shall not be held to exclude or limit any power or authority otherwise in this Act conferred on the Commission.

Orders and Enforcement.

Notice and hearing where orders involve outlay.

71. Except in case of urgency, as to which the Commission shall be the sole judge, the Commission shall not make any order involving any outlay, loss, or deprivation to any public utility company without inquiry held after due notice and with full opportunity to all parties interested to appear and be heard at a public sitting of the Commission; and where an order is made in case of urgency and without notice or public hearing, the Commission, on the application of any party interested, shall as soon as practicable thereafter rehear and reconsider the matter, and make such further order as seems just.

Recital of jurisdiction unnecessary.

72. The Commission, in making any order, need not recite or show upon 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 to make the order.

Application of orders.

73. The Commission, in making any order, rule, or regulation under this Act, may make it to apply to all cases, or to any particular case or class of cases, or to any particular district, or to any public utility company or service. The Commission may exempt any public utility company or service from the operation of any order, rule, or regulation made under this Act for such time as the Commission deems expedient.

Partial relief.

74. Upon any application under this Act, the Commission may make an order granting the whole or part only of the relief applied for, or may grant such further or other relief, in addition to or in substitution for that applied for, as to the Commission may seem just and proper, as fully in all respects as if the application had been for such partial, further, or other relief.

Commencement of orders.

75. (1.) Every order made by the Commission directing the continuation of any service or rate in effect at the time the order is made shall come into operation immediately. All other orders made by the Commission shall come into operation upon the date specified therein, which shall in each case be at least twenty days after the date on which the order is made, unless the Commission, in its discretion, specially provides for an earlier coming into operation.

Terms and conditions as to operation of orders.

(2.) In any order, the Commission may direct that the order or any part of it shall come into operation at a future time, or upon the happening of any event specified in the order, or upon the performance to the satisfaction of the Commission, or person named by it, of any term or condition imposed by the order; and the Commission may direct that the whole or any part of the order shall have force for a limited time, or until the happening of a specified event. Instead of making an order final in the first instance, the Commission may make an interim order, and reserve further directions either for an adjourned hearing or for further application.

Interim ex parte orders.

76. If the special circumstances of any case so require, the Commission may make an interim ex parte order authorizing, requiring, or forbidding anything to be done which the Commission, on application, notice, or hearing, is empowered to authorize, require, or forbid; but the Commission shall not make an interim order for any longer time than it deems necessary to enable the matter to be heard and determined. Any party interested may, at any time before final order or decision, apply to have an interim ex parte order modified or set aside.

Service of orders.

77. Every order made by the Commission shall be served upon every company, corporation, or person named therein and affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof in a sealed package, postage prepaid and registered, to the person named, or, in case of a company or corporation, to any officer, attorney, or agent thereof upon whom a summons affecting the company or corporation may be lawfully served in an action at law.

Duty of public utility company to notify employees of orders.

78. Upon the receipt by any public utility company or the service upon it of any order made by the Commission, the company shall forthwith notify the same to each of its officers and servants affected by the order, by delivering to him a copy of the order, or by posting

up a copy in some conspicuous place where his work or duties or some of them are to be performed.

Orders as to construction of works.

79. When, in the exercise of any power conferred upon the Commission by this or any other Act, the Commission directs any structure, appliance, equipment, or works to be carried out, that is to say, provided, constructed, reconstructed, removed, altered, installed, operated, used, or maintained, the Commission may, except as otherwise provided in the Act conferring the power, order by what company, corporation, or person interested, and at or within what time, and at whose cost and expense, and upon what terms and conditions, including conditions as to payment of compensation, and under what supervision, the structure, appliance, equipment, or works shall be carried out.

Enforcement of orders by Sheriff.

80. Where an order is made by the Commission for the payment of any money, costs, or penalty, if a written direction for enforcement of the order addressed to any Sheriff in the Province, stating the amount due and payable and sought to be recovered under the order, and stating the company, corporation, or person by whom the same is payable, is endorsed upon or annexed to a certified copy of the order and signed by the Chairman of the Commission, the Sheriff, upon receipt of the direction, shall levy the amount with his costs in like manner and with the same powers as if the direction were an execution against the goods of the company, corporation, or person by whom the amount is payable issued out of the Supreme Court.

All peace officers ex-officio officers of Commission.

81. All Sheriffs, Deputy Sheriffs, bailiffs, constables, and other peace officers shall be ex-officio officers of the Commission, and shall, whenever requested, aid, assist, and obey the Commission in the exercise of its jurisdiction conferred by this or any other Act, and, upon the certificate of the Secretary of the Commission as to the fees payable and the party by whom they are payable, shall be paid the like fees as for similar services in the Supreme Court.

Registration of order against lands.

82. Where an order is made by the Commission for payment of any money, costs, or penalty, then, upon the deposit in any Land Registry Office in the Province of a copy of the order certified by the Secretary of the Commission, the order shall be registered in that office in the like manner, and shall form a lien and charge on all the lands of the company, corporation, or person ordered to make the payment in the land registry district in which the order is registered to the like extent and with the like effect as a judgment of the Supreme Court registered under the "Execution Act," chapter 78 of the "Revised Statutes of British Columbia, 1911." The amount ordered to be paid by any order so registered may be realized in the same manner and by similar proceedings as the

amount of a registered judgment of the Supreme Court may be realized.

Provision for carrying out orders of Commission at expense of company in default.

83. In case any company, corporation, or person makes default in the doing of any act, matter, or thing directed by any order of the Commission under this Act to be done, the Commission may authorize such person as it sees fit to do the act, matter, or thing; and the person so authorized may do the act, matter, or thing authorized to be done, and may recover from the company, corporation, or person in default the expense incurred in the doing of the act, matter, or thing, as money paid for and at the request of that company, corporation, or person. The certificate of the Commission of the amount so expended shall be conclusive evidence thereof.

Enforcement of orders by taking possession and managing business of public utility company.

84. (1.) The Commission may take such steps and employ such persons as are necessary for the enforcement of any order made by it, and for that purpose may forcibly or otherwise enter upon, seize, and take possession of the whole or any part of the movable or immovable property of any public utility company affected by the order, together with the books, documents, and offices of the company, and may until the order has been enforced assume and take over the management of the business of the company for and in the interest of its shareholders and creditors and of the public; and for such time as the Commission continues to manage or direct the management of the company, the Commission may exercise all or any of the powers, duties, rights, and functions of the directors and officers of the company in all respects, including the employment and dismissal of officers and servants of the company.

Duty of employees of company to obey Commission.

(2.) Upon the Commission so taking possession of the property and business of the public utility company, every officer and employee of the company shall obey the orders of the Commission and of any person placed by the Commission in authority in the management of any department of the company's undertaking or service.

Power of Commission to disburse moneys.

(3.) The Commission, upon so taking possession of the property and business of a public utility company, may determine, receive, and pay out all moneys due to or owing by the company, and give cheques, acquittances, and receipts for moneys to the same extent and with a like effect as the proper officers of the company could do if no possession had been taken by the Commission.

Costs.

(4.) The costs incurred in any proceedings taken by the Commission under this section shall be in the discretion of the Commission, and the Commission may order by whom and in what amount or proportion they shall be paid.

Enforcement of order by making it an order of Supreme Court.

85. (1.) Any order made by the Commission under this Act may be made an order of the Supreme Court. For that purpose, a copy of the order of the Commission may be made and certified by its Secretary, and endorsed with an endorsement signed by the Com-

missioner and sealed with the official seal of the Commissioner, as follows:—

Make the within an order of the Supreme Court of British Columbia.

Dated this day of , 19 .

[L.S.] *(Signature.)*.....

Public Utilities Commission.

Upon the filing of the copy of the order so certified and endorsed with any District Registrar of the Supreme Court, the order shall become an order of the Supreme Court, and shall be enforceable in like manner as any order or judgment of that Court.

Effect of rescission of order by Commission.

(2.) Where an order of the Commission has been made an order of the Supreme Court, any subsequent order of the Commission rescinding or varying its order shall be deemed to rescind or vary the order of the Court, and may in like manner be made an order of the Court.

Method of enforcement optional with Commission.

(3.) The Commission, at its option, either before or after its order has been made an order of the Court, may enforce its order by its own action.

Dissolution of public utility company in default.

86. Where a public utility company incorporated by or under any Act of the Legislature has failed to comply with any order made by the Commission, if the Commission is of opinion that no effectual means exist of compelling the company to comply with the order, the Commission, in its discretion, may transmit to the Attorney-General a certificate, signed by its Chairman and Secretary, setting forth the nature of the order and the default of the company in respect thereof. Upon publication in the Gazette of a public notice of the receipt of the certificate by the Attorney-General, the default of the company so established by the certificate of the Commission shall be ground for an action to dissolve the public utility company.

Review and Appeal.

Review by Commission of its decisions.

87. The Commission may review, vary, or rescind any decision, order, rule, or regulation made by it, and may rehear any application before deciding it.

Appeal on questions of jurisdiction and law.

88. Upon application to a Judge of the Court of Appeal within twenty-eight days after the making of any decision, order, rule, or regulation of the Commission sought to be appealed from, or within such further time as the Judge under special circumstances allows, if the Judge upon hearing such parties as appear and desire to be heard grants leave to appeal, an appeal shall lie to the Court of Appeal from the order, decision, rule, or regulation of the Commission upon any question as to its jurisdiction, or upon any question of law. The granting of leave to appeal and the costs of the application shall be in the discretion of the Judge.

Appeal on questions which are not questions of jurisdiction or of law.

89. (1.) An appeal shall also lie from the Commission to the Court of Appeal upon any question which in the opinion of the Commission is not a question of jurisdiction or of law, upon leave therefor being first obtained from the Commission by application within twenty-eight days after the making of the decision, order, rule, or regulation sought to be appealed from, or within such further time as the Commission under special circumstances may allow. Subject to the provisions of subsection (2), the granting of leave to appeal under this section shall be in the discretion of the Commission.

Power of Lieut.-Governor in Council to grant leave to appeal.

(2.) Where on any application to the Commission pursuant to this section leave to appeal is refused, the Lieutenant-Governor in Council may grant leave to appeal for the purposes of this section.

Notice of application for leave to appeal.

90. The party appealing shall give notice of the application for leave to appeal, stating the grounds of appeal, to the Commission and to the adverse party interested at least two clear days before the hearing of the application.

Notice of appeal and procedure.

91. Where leave to appeal has been granted, the appellant shall, within fifteen days from the granting of the leave, give notice of appeal to the Commission and to the adverse party interested, and the Commission may be heard by counsel upon the argument of the appeal.

Costs of appeal.

92. Payment of the costs incurred in respect of any application or appeal may be enforced in the same manner as payment of costs ordered by the Commission to be paid. Neither the Commission nor any officer, employee, or agent of the Commission shall be liable for any costs in respect of any application or appeal under this section.

Stay of proceedings on appeal.

93. No appeal to the Court of Appeal shall of itself stay or suspend the operation of the decision, order, rule, or regulation of the Commission appealed from; but the Judge granting leave to appeal or the Court of Appeal may stay or suspend, in whole or in part, the operation of the decision, order, rule, or regulation of the Commission, during the pendency of the appeal, upon such terms as the Judge or Court may think fit. The Commission may, in its discretion, stay or 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 rendered.

Jurisdiction and practice on appeal.

94. In respect of all appeals under this Act the Court of Appeal shall have the same jurisdiction and powers as are vested in it in respect of appeals from judgments, orders, or decrees of the Supreme Court or a Judge thereof; and except as in this Act otherwise provided, all appeals shall be in conformity, as nearly as may be,

with the provisions governing appeals to the Court of Appeal from the Supreme Court or a Judge thereof.

Determination of questions by Court of Appeal.

95. On the hearing of an appeal and the determination of the questions involved under the appeal, the Court of Appeal shall certify its opinion to the Commission, and the Commission shall make an order in accordance with that opinion..

Case stated upon question of law.

96. (1.) The Commission may, upon the application of any party, and upon such security being given as the Commission directs, or may of its own motion, and shall upon the request of the Attorney-General, state a case in writing for the opinion of the Court of Appeal upon any question which in the opinion of the Commission or of the Attorney-General is a question of law.

Determination by Court of Appeal.

(2.) The Court of Appeal shall hear and determine all questions of law arising on any case stated for its opinion by the Commission, and shall remit the matter to the Commission with the opinion of the Court of Appeal thereon, which opinion shall be binding on the Commission and on all parties.

Jurisdiction of Commission exclusive, and decisions not subject to review except as provided in Act.

97. The Commission shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other Act, and, save as in this Act is otherwise provided, no order, decision, or proceeding of the Commission shall be questioned, reviewed, or restrained by injunction, prohibition, or other process or proceeding in any Court, or be removed by certiorari or otherwise into any Court.

Offences and Penalties.

Disobedience of orders of Commission.

98. (1.) Every public utility company and every corporation which fails or refuses to obey any order of the Commission made under the provisions of this Act shall be liable, on summary conviction, to a penalty of not less than twenty dollars and not more than one thousand dollars.

Liability of officers of public utility company.

(2.) Wherever it is proved that a public utility company has failed or refused to obey any order of the Commission made under the provisions of this Act, the president and every vice-president, director, managing director, and superintendent of that company shall each be liable, on summary conviction, to a penalty of not less than twenty dollars and not more than one thousand dollars, unless he proves that, according to his position and authority, he took all necessary and proper means in his power to obey and carry out and to procure obedience to and the carrying-out of the order of the Commission, and that he was not at fault for the failure or refusal to obey the order.

Liability of officers of municipality or corporation.

(3.) Whenever it is proved that any corporation has failed or refused to obey any order of the Commission made under the provisions of this Act, the Mayor, Reeve, or other head of that corpora-

tion, and every member of the Council or other ruling or executive body of that corporation, shall each be liable, on summary conviction, to a penalty of not less than twenty dollars and not more than one thousand dollars, unless he proves that, according to his position and authority, he took all necessary and proper means in his power to obey and carry out and to procure obedience to and the carrying-out of the order of the Commission, and that he was not at fault for the failure or refusal to obey the order.

Other liabilities protected.

(4.) Nothing in or done under this section shall lessen or affect any liability of any public utility company, corporation, or person otherwise existing, or prevent or prejudice the enforcement of any order of the Commission in any way otherwise available.

Failure of company to furnish information.

99. Every public utility company that fails or refuses to prepare and furnish to the Commission, within the time and in the manner and form, and with such particulars and verification as by or under this Act are required or intended:—

(*a.*) Any return of information required in the forms of returns furnished by the Commission; or

(*b.*) Any answer to any question submitted by the Commission; or

(*c.*) Any information required by the Commission under this Act,—

shall be liable, on summary conviction, to a penalty not exceeding twenty dollars for each offence.

Making false returns.

100. Every public utility company that wilfully or negligently makes any return or furnishes any information to the Commission which is false in any particular shall be liable, on summary conviction, to a penalty not exceeding one thousand dollars.

Penalties for certain defaults by employees of public utility company.

101. (1.) Every officer, agent, or employee of any public utility company who:—

(*a.*) Fails or refuses to fill out and furnish to the Commission any report or form of return as required under this Act; or

(*b.*) Fails or refuses to answer any question contained in the report or form of return so required; or

(*c.*) Wilfully gives a false answer to any question so contained; or

(*d.*) Evades the question or gives an evasive answer to any question so contained, where he has the means of ascertaining the fact inquired of; or

(*e.*) Upon proper demand under this Act, fails or refuses to exhibit to the Commission, or any person authorized to examine the same, any book, paper, account, record, or memorandum of the public utility company which is in his possession or under his control; or

(*f.*) Fails to properly use and keep the system of accounting of the public utility company as prescribed by the Commission under this Act; or

(*g.*) Refuses to do any act or thing in connection with that system of accounting when so directed by the Commission or its authorized representative,—

shall be liable, on summary conviction, to a penalty of not more than two hundred dollars for each offence.

Penalty where company directs commission of offence.

(2.) Where any officer, agent, or employee of a public utility company is convicted of an offence under this section, if in committing the offence he acted in obedience to the direction, instruction, or request of the public utility company or any general officer thereof, the public utility company shall be liable, on summary conviction, to a penalty of not less than two hundred dollars and not more than one thousand dollars.

Wilful default by officer of company in furnishing information.

102. If the Commission at any time, by notice served upon any officer, employee, or agent of any public utility company, directs him to furnish to the Commission any information or return which the company under this Act may be required to furnish, and if the officer, employee, or agent wilfully refuses or fails to furnish the information or return to the utmost of his knowledge, or means of knowledge, in the manner directed by the Commission, and at or within the time stated in the notice, the public utility company and every officer, employee, or agent so in default shall each be liable, on summary conviction, to a penalty not exceeding five hundred dollars.

General penalty for violation of Act by public utility company.

103. Every public utility company which does, causes, or permits to be done, any act, matter, or thing contrary to the provisions of this Act or to any order of the Commission made under this Act, or omits to do any act, matter, or thing required to be done on the part of the company by any provision of this Act or any order of the Commission made under this Act, shall, if no other penalty is provided therefor in this Act, be liable, on summary conviction, to a penalty of not less than ten dollars and not more than one thousand dollars.

Obstructing officer of Commission in discharge of duties.

104. Every person who obstructs or interferes with any Commissioner, officer, or person in the exercise of the rights conferred or duties imposed by or under this Act in respect of the supervision of any public utility company or its service, or in respect of the access to and the inspection of any books or property of any public utility company, shall be liable, on summary conviction, to a penalty of not less than fifty dollars and not more than five hundred dollars; but the penalty provided by this section shall not apply where the Commissioner, officer, or person is requested at the time of the

obstruction or interference to produce and exhibit a certificate of his appointment or authority and fails to comply with the request.

Penalty for soliciting or accepting rebate.

105. Every person or corporation that knowingly solicits, accepts, or receives, directly or indirectly, any rebate, concession, or discrimination in respect of any service of any public utility company, whereby that service is furnished or received in violation of any provision of this Act, shall be liable, on summary conviction, to a penalty of not less than twenty dollars and not more than five hundred dollars.

Disclosure of information without authority of Commission.

106. Except in so far as his public duty requires him to report upon or take official action regarding the affairs of a public utility company, every officer or employee of the Commission, or person having access to or knowledge of any return made to the Commission, or of any information procured or evidence taken pursuant to this Act other than at a public inquiry or hearing, who, without the authority of the Commission first obtained, publishes or makes known any information, having obtained the information or knowing it to have been derived from that return, information, or evidence, shall be liable, on summary conviction, to a penalty not exceeding five hundred dollars.

Power to provide penalties for violation of regulations.

107. The Commission may by regulations impose penalties, not exceeding fifty dollars for each offence, for violation of or failure to comply with any rule or regulation made under this Act.

Continuing offences.

108. Where the violation of or failure to comply with any provision of this Act, or with any rule, regulation, or order of the Commission, is made by this Act or any regulation thereunder an offence subject to penalty, each day's continuance of such violation or failure to comply shall constitute a new and distinct offence.

General Provisions.

Power to declare business a public utility within meaning of Act.

109. The Lieutenant-Governor in Council may from time to time, by order published in the Gazette, declare any business or any part or department of any business to be a public utility within the meaning of this Act.

Substantial compliance with Act sufficient.

110. A substantial compliance with the requirements of this Act shall be sufficient to give effect to all the orders, rules, regulations, and acts of the Commission, and none of them shall be declared inoperative, illegal, or void for want of form or for any error or omission of a technical or clerical nature.

Liability of company for acts and omissions of employee.

111. In construing and enforcing the provisions of this Act, or of any rule, regulation, order, or direction of the Commission made under this Act, the act, omission, or failure of any officer, agent, or

person acting for or employed by a public utility company shall, if within the scope of his employment, be also deemed in every case to be the act, omission, or failure of the company.

Power of public utility company to make complaint.

112. Any public utility company may make application or complaint to the Commission as to any matter affecting the company, with like effect as if the application or complaint were made by any other party interested.

Hearing of parties in person or by counsel.

113. Every party interested may appear and be heard in person or be represented by counsel on any application or hearing before the Commission.

Municipality as complainant before Commission.

114. Whenever a Municipal Council is of opinion that the interests of the public in the municipality, or in any part of the municipality, are sufficiently concerned, the Municipal Council may by resolution authorize the municipality to become an applicant, complainant, or intervenant in any matter within the jurisdiction of the Commission, and for that purpose the Municipal Council may take any proceedings or incur any expense necessary to submit the matter in question to the decision of the Commission, or to oppose any application or complaint before the Commission, and, if necessary, to become a party to any proceedings or appeal under this Act in the Court of Appeal.

Evidence of documents.

115. A copy of any rule, regulation, order, or other document in the custody of the Secretary of the Commission or of record with the Commission, certified by the Secretary to be a true copy, and sealed with the seal of the Commission, shall be evidence of the rule, regulation, order, or document without proof of the signature of the Secretary.

Evidence that no order has been made.

116. A certificate of the Secretary of the Commission, sealed with its seal, stating that no rule, regulation, or order respecting any specified matter or thing has been made by the Commission, shall be evidence of the fact stated therein without proof of the signature of the Secretary.

Appointment of counsel to represent class.

117. Upon the approval of the Attorney-General, the Commission may appoint counsel to represent any class of persons interested in any matter concerning the service of any public utility company for the purpose of instituting or attending upon an application or hearing before the Commission or any other tribunal or authority. The Commission may fix the costs of the counsel so appointed, and may order by whom the costs shall be paid.

Costs in discretion of Commission.

118. The costs of and incidental to any proceeding before the Commission shall be in the discretion of the Commission, and may in any case be fixed at a sum certain, or may be taxed. The Com-

mission may prescribe a scale under which costs shall be taxed. The Commission may order by whom and to whom the costs in any case are to be taxed and allowed.

Fees.

119. The Commission, with the approval of the Lieutenant-Governor in Council, may make regulations prescribing a tariff of fees to be taken for the use of His Majesty in respect of any matter within the jurisdiction of the Commission. All fees received by the Commission shall be paid into the Treasury and accounted for as part of the general revenue of the Province.

Other rights and penalties protected.

120. Nothing in this Act shall have the effect to release or waive any right of action by the Commission or by any company, corporation, or person for any right, penalty, or forfeiture which has arisen, or which arises, under any law of the Province; and no penalty enforceable under this Act shall be a bar to or affect the recovery for any right, or affect or bar any action at law or prosecution against any public utility company, its directors, officers, agents, or employees.

Jurisdiction of officials under "Water Act, 1914," preserved.

121. Nothing in this Act shall affect any jurisdiction, power, or duty vested in or imposed on any person, official, board, or company by or under the provisions of the "Water Act, 1914," so far as that jurisdiction, power, or duty relates to the acquisition or holding of any licence or any certificate of approval of an undertaking within the meaning of that Act, or to the observance or performance by the licensee of the terms and conditions of the licence or certificate, or to the enforcement of the terms and conditions of the licence or certificate, or to the completion by a company of its works or undertakings as licensee under the licence: Provided that the Lieutenant-Governor in Council may from time to time, by Order published in the Gazette, declare any body corporate authorized to sell water for waterworks purpose within a municipality to be, in respect of the sale of water and subject to this section, a public utility within the meaning of this Act.

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1910.

2017 ONSC 7245
Ontario Superior Court of Justice

Beaver v. Hill

2017 CarswellOnt 19385, 2017 ONSC 7245, 290 A.C.W.S. (3d) 226, 4 R.F.L. (8th) 53

Brittany Beaver (Applicant) and Kenneth Hill (Respondent)

Deborah L. Chappel J.

Heard: April 25; May 23-26; June 27-28; September 7, 2017
Judgment: December 8, 2017*
Docket: FS-15-963

MOTION by mother for various relief; MOTION by father for stay of family law application and order granting leave to amend Notice of Constitutional Question.

***Deborah L. Chappel J.*:**

PART I: INTRODUCTION

1 The Applicant Brittany Beaver ("the Applicant") and the Respondent Kenneth Hill ("the Respondent") are the parents of Brody Kenneth Ryan Hill Beaver, born August 24, 2009 ("Brody"). They were in a relationship which began in 2008 and ended in November, 2013. The Respondent is a Haudenosaunee person and a member of the Six Nations of the Grand River ("the Six Nations"). He lives on the Six Nations Reserve. The Applicant and Brody are also Haudenosaunee and members of the Six Nations, but they live off reserve, in the city of Waterloo.

2 The Applicant commenced an application in this court on December 8, 2015, seeking *inter alia* custody, child support for Brody and spousal support. The Respondent filed an Answer and Claim in response to the application on February 4, 2016. However, on March 31, 2016, he served and filed a Notice of Constitutional Question in which he gave notice that he intended to challenge the jurisdiction of this court and the applicability of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended to his Family Law dispute with the Applicant. The grounds for these constitutional challenges, as set out in the Notice of Constitutional Question, were as follows:

1. With respect to the challenge to this court's jurisdiction to deal with the Family Law

claims in this case, the Respondent stated that the Haudenosaunee people (hereinafter referred to as "the Haudenosaunee") and the people of the Six Nations have an inherent aboriginal right protected by section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (hereinafter referred to as "s. 35(1)") to govern themselves with respect to the care and support of children and the resolution of disputes within and between families concerning such care and support.

2. He asserted that this inherent right of the Haudenosaunee and the Six Nations to govern themselves includes the right to have inter and intra-familial disputes decided through Haudenosaunee governance processes and protocols and according to Haudenosaunee laws.

3. He claimed that this inherent right of self-government with respect to disputes between and within families has never been ceded by treaty or extinguished by any valid constitutional or other instrument.

4. The Respondent further claimed that as a Haudenosaunee person and a member of the Six Nations, he has an individual right flowing from the general right of the Haudenosaunee to be governed by Haudenosaunee governance processes and laws with respect to inter and intra-familial disputes. In this regard, he submitted that he has a broad personal right "to have the within dispute resolved within and pursuant to the jurisdiction and authority of his own government, rather than by or pursuant to the Province of Ontario, a provincially or federally mandated adjudicative body, and provincial and federal law" (at paragraph 5).

5. According to the Respondent, Ontario's *Family Law Act*, attendant regulations and related statutes infringe upon his aboriginal rights, including with respect to the jurisdiction that they purport to confer on this court.

6. The Respondent further claimed that this infringement of his aboriginal rights is not justified. As a result, he claimed that this court lacks jurisdiction to hear this case, and that the *Family Law Act* is of no force and effect with respect to this Family Law dispute.

3 On June 8, 2016, the Respondent filed a Fresh as Amended Answer and Claim ("the Amended Answer"). In the Amended Answer, he seeks an order dismissing the application in its entirety, or in the alternative, that the application be stayed, based on his constitutional challenges respecting the jurisdiction of this court and the applicable law. The wording of the Amended Answer differs in some respects from that of the Notice of Constitutional Question. However, as in the Notice of Constitutional Question, the Respondent advances the following general claims:

1. He states that the Haudenosaunee and the people of the Six Nations have an aboriginal right to be governed with respect to inter and intra-familial disputes according to their own distinct system of governance and laws.

2. He alleges that this broad right includes the right of the Haudenosaunee and the people of the Six Nations to have inter and intra-familial disputes dealt with through their own governance and dispute resolution processes and protocols, as well as the right to have such disputes resolved according to Haudenosaunee laws.

3. The Respondent asserts that as a Haudenosaunee person and a member of the Six Nations, he has an individual right to have the Family Law disputes with the Applicant resolved according to the governance system and laws of the Haudenosaunee and the people of the Six Nations.

4. In describing the aboriginal right that he is relying on, the Respondent claims that the Haudenosaunee and the people of the Six Nations have had, since prior to the arrival of European settlers and colonization, "a robust law, a dispute resolution system, which, among other things, determined how disputes within and between families were to be resolved." He states that this system of law and governance "has been practiced continuously since the time of contact with European settlers, despite the operation of other, colonial legal systems." In addition, he indicates that this system of governance and law is "distinct to the Haudenosaunee and the Iroquois people of the Six Nations of the Grand River" and that it is "comprehensive and exclusive, in its application to the Haudenosaunee and the people of the Six Nations of the Grand River within their lands and territory."

5. The Respondent repeats his assertion as set out in the Notice of Constitutional Question that the imposition of the *Family Law Act* and associated laws, regulations and legal processes to this dispute infringes his right "to be governed, and to have this dispute resolved, according to the laws and governance of the Haudenosaunee and the people of the Six Nations of the Grand River" (at paragraph 17). He states that this infringement is not justified.

6. Having regard for the foregoing, the Respondent alleges that this court has no jurisdiction to deal with the Family Law disputes between him and the Applicant, and that the issues should be resolved according to the dispute resolution processes of the Haudesonaunee. Furthermore, he states that the disputes should be governed by the laws that bind the Haudenosaunee and the people of the Six Nations.

4 The filing of the Amended Answer prompted two motions which are the subject of this decision. The first motion was filed by the Respondent and was originally returnable on November 10, 2016. In this motion, the Respondent seeks the following relief:

1. An order that the Family Law application be stayed pending the hearing and outcome of the constitutional questions raised in the Notice of Constitutional Question;

2. An order setting timelines relating to the hearing of the Respondent's constitutional case;

and

3. An order granting leave to amend the Notice of Constitutional Question to include the application of the *Children's Law Reform Act*, R.S.O. 1990 c. C-12, as amended in relation to its infringement on the Respondent's aboriginal rights as a Haudenosaunee person and a member of the Six Nations.

5 The second motion was brought by the Applicant and was originally returnable on November 30, 2016. However, it is apparent from the evidence before me that counsel for the Applicant had been attempting from May 2016 onward to schedule a mutually agreeable Long Motion date for the hearing of the Applicant's motion. The Respondent served and filed his motion materials in the midst of those discussions. In her motion, the Applicant requests the following relief:

1. A temporary order requiring the Respondent to pay her child support in the amount of $33,183.00 per month and 100% of Brody's section 7 expenses, retroactive to the date of separation;

2. A temporary order requiring the Respondent to pay her spousal support in the amount of $85,701.00 per month, retroactive to the date of separation;

3. A temporary order requiring the Respondent to designate her as the beneficiary of his life insurance policy or policies to secure child and spousal support, in the amount of $4,300,000.00;

4. An order directing that the Respondent's liability to pay child and spousal support be binding on his estate;

5. A temporary order requiring the Respondent to maintain and/or obtain medical, dental and extended health care benefits for Brody;

6. Orders respecting financial disclosure;

7. An order requiring the Respondent to retain a chartered business valuator and to produce an income determination report;

8. An order requiring the Respondent to attend for questioning;

9. An order requiring the Respondent to pay the Applicant interim disbursements and interim costs in connection with the application in the amount of $125,000.00 for legal fees and $75,000.00 for accounting fees;

10. An order striking the Amended Answer;

11. A order striking the affidavit of Michael Chalupovitsch, sworn October 26, 2016, which

the Respondent had filed in support of his motion;

12. A declaration that the Ontario Superior Court of Justice court has jurisdiction to deal with the Family Law issues raised by the parties;

13. An order staying the Respondent's constitutional case as against the Applicant and reconstituting it as a proceeding between the Haudenosaunee Confederacy Chiefs' Council, the Attorney General of Ontario and the Ontario General of Canada; and

14. If the Respondent's constitutional case is not stayed, an order for advance costs of $150,000.00 payable forthwith and such further and other funds as may be required to fund the Applicant's involvement in the constitutional case.

6 In the Factum which the Respondent filed in relation to his motion, he again describes the aboriginal rights that he is relying on to challenge the jurisdiction of this court and the application of Ontario Family Law legislation to him in this case. At paragraph 29 of the Factum, he indicates that the issues raised in the Notice of Constitutional Question concern the general "Haudenosaunee right to be subject, sole [stet] and exclusively, to the family law and child support and parenting processes under Haudenosaunee law." He adds that this right is "characterized as the exercise of an inherent right to self-government, which is recognized and affirmed as an Aboriginal and Treaty right by section 35 of the *Constitution Act, 1982*." He further states at paragraph 38 of his Factum that the Haudenosaunee, including himself, "have not accepted the imposition of Canadian laws that touch on matters central to their society, namely governance and the application of provincial and federal statutory regimes that infringe on their core identity as a people."

7 The two motions were adjourned several times on consent and eventually came before me for a hearing on April 25, 2017. The motions had been scheduled for only one day. However, protracted discussions occurred at the outset of the hearing regarding the appropriate order for dealing with the various heads of relief requested in the two motions, and rights of response and reply. These discussions included submissions on whether the substantive issues raised in the Applicant's motion should be addressed prior to the court deciding the jurisdiction and stay issues. At the appearance on April 25, 2017, counsel for the Applicant advised that the Applicant was abandoning her request in paragraph 15 of her Notice of Motion for an order reconstituting the case as a proceeding between the Haudenosaunee Confederacy Chiefs' Council, the Attorney General of Ontario and the Attorney General of Canada.

8 At the conclusion of the appearance on April 25, 2017, I decided that the Applicant's substantive child and spousal support claims could not proceed until the issue of this court's jurisdiction to hear the application was resolved. I concluded that it was necessary to proceed first with the Applicant's claims to strike the Amended Answer, for a declaration that this court has jurisdiction to hear the case and for an order staying the Respondent's constitutional case, as

well as the Respondent's request for a stay of the application pending the determination of the constitutional issues. Although the parties' respective claims for stays involved inter-related issues and arguments, I noted that fairness to both parties required that both be given appropriate rights of reply. Having regard for these considerations, I ordered that the hearing of the motions would proceed as follows:

> 1. I would first deal with the Applicant's claims to strike the Amended Answer, for a declaration that this court has jurisdiction to hear the case, for an order staying the Respondent's constitutional case, and for advance costs in the event that the constitutional case is allowed to proceed. On this motion, I would hear Submissions from the Applicant, Response from the Respondent and Reply Submissions from the Applicant on these issues.
>
> 2. I would then deal with the Respondent's motion. I indicated that I would first address the Applicant's preliminary objection in that motion to the admissibility of the affidavit of Michael Chalupovitsch sworn October 26, 2016. I would then proceed to hear Submissions from the Respondent on the merits of the motion, Response from the Applicant and Reply Submissions from the Respondent.
>
> 3. I indicated that the substantive claims set out in paragraphs 3 to 11, 17 and 18 of the Applicant's Notice of Motion would be adjourned, and that I would give further directions regarding the scheduling of a hearing on those issues once I released my Reasons for Judgment on the preliminary issues.

9 Based on the roadmap that I set out on April 25, 2017 for handling the claims in the parties' respective motions, and the arguments advanced by the parties, the issues to be determined at this point are as follows:

> 1. What is the appropriate analytical framework for determining the question of jurisdiction in this case? In this regard:
>
> > a) Do the standard rules respecting jurisdiction apply, subject to necessary modifications required to account for the constitutional issues raised in this situation, or should jurisdiction be decided exclusively according to the s. 35(1) jurisprudence for determining the existence of aboriginal rights and whether breaches are justified?
> >
> > b) If the standard rules apply, should they be adapted to take into consideration the special constitutional aspects of this case, and if so, what is the appropriate analytical framework for addressing the jurisdiction issue in this case? In this regard,
> >
> > > i. Are consent or attornment to the court's jurisdiction grounds for establishing jurisdiction *simpliciter* in this case;
> > >
> > > ii. If so, does the court nonetheless have the discretion to decline jurisdiction in

the face of consent or attornment? and

iii. If there is a discretion to decline jurisdiction in the face of consent or attornment, what are the factors that the court should consider in exercising its discretion?

2. In dealing with the preliminary issue of jurisdiction, is the court entitled to entertain motions to dispose of the constitutional challenge to the court's jurisdiction on a summary basis, such as a motion to strike, suspend or dismiss the claim? If the answer is yes, then the following issues arise:

a) Should the Amended Answer be struck on the basis that it fails to set out the material facts in support of the aboriginal rights claims that the Respondent is advancing and fails to identify the specifics of the laws that the Respondent alleges should apply in this case?

b) Should the Respondent's constitutional case be dismissed on the basis that the Respondent lacks standing to advance the aboriginal rights claims outlined in the pleading?

c) Should the Amended Answer be struck and the Respondent's constitutional case dismissed on the ground that the pleading fails to set out a reasonable claim or defence in law?

3. If the Respondent's constitutional case is not disposed of on a summary basis on one of the grounds set out above, the following questions arise:

a) Can the court nonetheless take jurisdiction at this stage, or is it necessary to proceed to a full hearing of the Respondent's constitutional challenge to the court's jurisdiction? In this regard, did the Respondent consent or attorn to this court's jurisdiction so as to establish jurisdiction *simpliciter*?

b) If the Respondent consented or attorned to the court's jurisdiction, does the fact that the Applicant consented to the Respondent filing the Amended Answer disputing jurisdiction on constitutional grounds negate the effect of the attornment for the purposes of the jurisdiction analysis?

c) If jurisdiction *simpliciter* has been established by the Respondent attorning to the jurisdiction of this court, should the court nonetheless exercise its discretion to decline to take jurisdiction?

4. If the court determines that it should take jurisdiction in this case, does it have the

authority to grant declaratory relief respecting the jurisdiction issue?

5. Has the Respondent satisfied the test for obtaining a stay of the Family Law proceeding pending a full hearing of his constitutional case?

6. Should the Respondent be granted leave to amend his Notice of Constitutional Question to include the application of the *Children's Law Reform Act* in relation to its infringement on the Respondent's aboriginal rights as a Haudenosaunee person and a member of the Six Nations?

7. Finally, in the event that the Amended Answer is not struck, and the application is stayed so that the Respondent can advance his constitutional case, should an order issue requiring the Respondent to pay the Applicant advance costs and disbursements to fund the Applicant's defence in the Respondent's constitutional case?

10 For the reasons that follow, I have concluded as follows:

1. The general conflict of laws principles respecting jurisdiction apply as a starting point to the jurisdiction analysis in this case, but they must be modified to take into account the important constitutional issues that the Respondent has raised in this proceeding.

2. Attornment or consent to the court's jurisdiction is a basis upon which jurisdiction *simpliciter* may be established in this case. The analytical approach to the determination of the jurisdiction issue differs depending on whether or not the Respondent consented/attorned to the jurisdiction of the court.

3. Even if attornment or consent to the court's jurisdiction is established, the court has the discretion to decline to take jurisdiction.

4. In addressing the jurisdiction issue, the court is entitled to entertain preliminary motions to strike out the Amended Answer either in part or in its entirety and to dismiss the Respondent's aboriginal rights claims on a summary basis. I have decided that the Amended Answer should be struck in its entirety, and that the constitutional claims set out in the pleading should be dismissed, based on my conclusions that the Amended Answer fails to satisfy the basic rules of pleading, that the Respondent lacks standing to advance the aboriginal rights claims set out in the Amended Answer, and that the pleading fails to set out a reasonable claim or defence in law. My decision on these issues disposes of the Respondent's constitutional challenge to both the jurisdiction of this court to hear and decide the Family Law issues between the parties and to the application of the *Family Law Act* and the *Children's Law Reform Act* in this proceeding.

5. I have concluded that even if I had not struck the Amended Answer and dismissed the Respondent's constitutional case, I would have determined based on the appropriate framework for addressing jurisdiction in this case that the court should take jurisdiction at

this point, having regard for all of the circumstances in the case. Accordingly, I have dismissed the Respondent's request that the Family Law proceeding be stayed on the ground that the court lacks jurisdiction.

6. Furthermore, even if I had not struck the Respondent's Amended Answer, I would have dismissed his request that the Family Law proceeding be stayed pending a hearing of his constitutional challenge to the applicability of the *Family Law Act*, the *Children's Law Reform Act* and their associated regulations to his Family Law dispute.

7. Having regard for all of the conclusions set out above, I have dismissed the Respondent's request for an order amending his Notice of Constitutional Question to include a constitutional challenge to the applicability of the *Children's Law Reform Act* to him.

PART II: BACKGROUND

11 As I have already noted, the parties were in a relationship from October 2008 until November 2013. They disagree as to whether they ever cohabited as spouses. The Applicant acknowledges that she has not cohabited with the Respondent since July 2009. However, she states that she and the Respondent continued to have a relationship until November 2013. Both parties confirm that in September 2009, the Respondent purchased a home located at 6 Sandwell Court, Kitchener, Ontario for the Applicant and Brody to live in. The parties are joint owners of this home, and the Applicant and Brody lived there from September 2009 until July 2014. The Respondent has paid the property taxes associated with this home, some utilities expenses and some repair expenses for the property since September 2009. In July 2014, the Respondent purchased the Applicant a new home located at 517 Lee Avenue, Waterloo Ontario for $895,000.00. Title to the property was put in the Applicant's name alone. The Applicant, her new partner, Brody and the Applicant's child from her new partner continue to reside in this home. The parties have both indicated that the Applicant holds this property in trust for Brody. The child Brody has been in the primary care of the Applicant since birth. The Respondent has had minimal contact with him.

12 The Respondent is a co-founder and owner of a company called Grand River Enterprises ("GRE"), which manufactures cigarettes. GRE is located on the Six Nations Reserve in the Grand River Territory, Ontario. The Respondent is an extremely successful and wealthy businessman. He has indicated in these proceedings that he earns an income of $2,109,504.00 per year, which is not subject to income tax. He has also acknowledged that he holds various business interests on the Six Nations Reserve, but states that those interests cannot be freely transferred and have a nominal value.

13 The Applicant has not worked outside of the home since December 2008. She alleges that

the Respondent has at times since the parties' separation been inconsistent in supporting her and Brody, and especially since she began her new relationship in mid-2014. However, she acknowledges that since 2012, the Respondent has made cash payments of approximately $10,000.00 per month. She states that until April 2016, she had to contact the Respondent on a monthly basis to request and obtain any financial support from him. However, she indicates that since April 2016, the Respondent has been consistently paying monthly child support in the amount of $10,000.00. The Respondent denies that he has been inconsistent in paying child support for Brody. He states that he has been paying the Applicant approximately $10,000.00 per month since approximately 2012, prior to the parties' separation, and that he paid her smaller but nonetheless significant monthly amounts from 2010 until 2012. The Respondent also asserts that he has been paying additional expenses for Brody totalling on average $4,058.00 per month.

14 The Applicant retained counsel in January 2014, within a few weeks after the parties' separation. She and her counsel attempted to negotiate a Separation Agreement with the Respondent to address the Family Law issues between the parties. The Applicant's counsel sent correspondence to the Respondent on January 29, 2014, seeking to begin the negotiation process. The Respondent did not retain his counsel until late March 2014. The parties then attempted to resolve the issues directly with each other from April 2014 until April 2015. Those efforts were unsuccessful, and this prompted the Applicant to involve her lawyer once again. Further settlement negotiations between counsel were unsuccessful in resolving the issues, and therefore the Applicant finally issued her application on December 8, 2015. As of that date, the Respondent had still not provided supporting documentation relating to his income and overall financial situation.

15 The Respondent requested an extension of the time for him to serve and file his Answer and Claim, and the Applicant consented to an extension until the end of January 2016. However, the Respondent then requested another extension until February 6, 2016. The Applicant agreed to this further extension on the condition that the case conference be scheduled for April 1, 2016.

16 As stated above, the Respondent issued his Answer and Claim on February 4, 2016. He also filed a Financial Statement sworn February 4, 2016. Upon being served with the Answer and Claim, the Applicant scheduled a case conference for April 1, 2016 as had been agreed upon between counsel. Notwithstanding this agreement, counsel for the Respondent subsequently advised on February 22, 2016 that the April 1, 2016 date was no longer available to him. Counsel for the Applicant proceeded to make several attempts through correspondence and telephone to arrange another case conference date. On March 11, 2016, counsel for the Respondent finally advised that the case conference could not proceed until sometime in June 2016. The reason for the delay became apparent on March 24, 2016. On that date, counsel for the Respondent indicated for the first time that the Respondent intended to file a Notice of Constitutional Question and Amended Answer, as well as a motion, challenging the jurisdiction

of this court and the applicability of Ontario Family Law legislation based on his alleged aboriginal rights. As I have noted, the Respondent did in fact serve and file his Notice of Constitutional Question on March 31, 2016. The Notice of Constitutional Question was served and filed without the Respondent having advanced his constitutional aboriginal rights claims in his original pleading.

17 The Attorney Generals of Ontario and Canada confirmed on April 22, 2016 that they would not be taking a position on the constitutional issues. Furthermore, the Respondent gave notice of his constitutional claims in this proceeding to the Chief of the Six Nations, and the band has not taken steps to intervene or otherwise participate in the hearing of the constitutional issues. In addition, the Respondent has confirmed that a copy of the Notice of Constitutional Question was delivered to Chief Jock Hill, Secretary to the Haudenosaunee Confederacy Council, on or about April 7, 2016. The Confederacy has likewise not taken any steps to intervene or otherwise participate in this proceeding. However, in a Memorandum from the Respondent's counsel, Ms. Hensel, to Six Nations Chief Ava Hill and the Six Nations Council dated April 5, 2016, Ms. Hensel noted that the Confederacy has objected to an Ontario court making a determination as to whether the Confederacy has jurisdiction over the dispute, and whether it has authority granted under the Great Law which governs the Haudenosaunee people.

18 The Applicant insisted that the case conference scheduled for April 1, 2016 proceed, and the parties appeared before Sloan J. on that date. Sloan J. declined a request by the Respondent to adjourn the conference, but simply endorsed "case conference held," so that the parties could bring their respective motions. The Applicant filed her Reply to the Respondent's original Answer and Claim on April 18, 2016, since the Respondent had not prepared an Amended Answer by that time. In fact, although the Respondent filed his Notice of Constitutional Question on March 31, 2016, he did not sign his Amended Answer until over two months later, on June 8, 2016. This is so despite the fact that his counsel, Ms. Hensel, had advised in correspondence dated March 31, 2016 to which she had attached the Notice of Constitutional Question that the Respondent would be serving an Amended Answer shortly.

19 On June 20, 2016, counsel for the Applicant, Ms. Strathopolous, confirmed in correspondence to the Respondent's counsel, Mr. Halpern, that the Applicant consented to the filing of the Respondent's Amended Answer, and to Mr. Halpern executing the consent on her behalf. On June 21, 2016, further to this correspondence, Mr. Halpern executed a Consent on behalf of the Applicant's counsel to extend the time for the Respondent to file his Amended Answer until June 24, 2016. On the same date, he executed a Consent as agent for Ms. Strathopolous to the amendments contained in the Amended Answer. The Respondent finally filed his Amended Answer on June 23, 2016.

20 Counsel for both parties advised during the hearing of these motions that the consents given by the Applicant referred to above were given on the condition that they would be "without prejudice to either party's position on the constitutional issues." However, the parties

disagree regarding the content and general meaning of this condition. Counsel for the Applicant alleged that the intention was that the consents were given without prejudice to the Applicant's right to raise any issues and defences in relation to the constitutional issues raised in the Amended Answer, including defences regarding the sufficiency of the pleadings on the constitutional issues and attornment as a bar to advancing the constitutional challenges to this court's jurisdiction. The Respondent's understanding was that the Applicant's consent to the amendments was subject only to the right of both parties to argue the constitutional issues on their actual merits in the context of a full hearing.

21 As I have already noted, the Amended Answer simply contested the jurisdiction of this court to deal with the Family Law issues between the parties and the applicability of the *Family Law Act* and associated laws, regulations and legal processes to the Respondent, on the basis of his aboriginal rights claims as described above. In the Amended Answer, the Respondent undertook "on a without prejudice basis, and subject to 60 days' written notice of any intention to the contrary," to continue paying the Applicant $10,000.00 per month in child support, and to permit the Applicant and Brody to remain in the home at 516 Lee Avenue, Waterloo. Subsequently, on September 16, 2016, counsel for the Respondent confirmed in writing that the Respondent would also continue to pay for Brody's extra expenses for tuition, bus fees, lunch fees, school trips, school uniforms, extracurricular activities, summer camp and tutoring, totalling approximately $48,700.00 per year, on condition that the expenses are paid directly to the institution or person to whom they are owed.

22 The Respondent has retained two experts, Joanne Holmes and Estelle Simard, to address the existence of Haudenosaunee and Six Nations laws and legal processes governing family relations and child welfare, practiced continuously prior to and since European contact and distinct to the Haudenosaunee. He has hired these experts in order to satisfy the test that the Supreme Court of Canada has established for proving the existence of an aboriginal right that is recognized and affirmed pursuant to section 35(1) of the *Constitution Act, 1982.* As of the commencement of the hearing of these motions, the expert reports of Ms. Holmes and Ms. Simard had not been completed.

23 In an affidavit sworn January 17, 2017, the Respondent states that it has been transmitted to him by the oral tradition of his people that he is obligated to abide by Haudenosaunee law to the exclusion of Ontario and Canadian Family Law, that the operation of Ontario and Canadian Family Law is inconsistent with his culture and that of his community, and that extending Ontario and Canadian Family Law is not in the best interests of Brody, his family or Haudenosaunee children generally. He states that he has been advised through his oral tradition that "Ontario and Canadian legal processes have harmed and continue to harm Haudenosaunee children, families and communities." With respect to the content of the Haudenosaunee law that he relies on, he stated in that affidavit that Haudenosaunee culture and law "prioritize the interests of children and consider the collective community to be responsible for the care, protection and well-being of children." The Respondent acknowledged in this affidavit that the

Applicant and Brody do not live on the Six Nations Reserve. However, he emphasized that they reside within the Haldimand Tract, which he describes as "lands originally granted to the people of the Six Nations of the Grand River and never legally surrendered by said people." He asserted that he has been advised through the oral tradition of his people that Haudenosaunee law and legal processes are binding upon Haudenosaunee people living within the Haldimand Tract, and not only to those who live on the reserve.

24 In response to the Respondent's affidavit sworn January 16, 2017, the Applicant noted that although she and Brody are Tuscarora and therefore ethnically Haudenosaunee, they are not "culturally Haudenosaunee." She asserted that in order to be considered culturally Haudenosaunee or "traditional Haudenosaunee," one must have a clan, a ceremony in which they are given a Native name by a Clan Mother through the Long House, attend Long House regularly, live a peaceful, respectful and humble way of life and take care of their family physically, emotionally and financially. She stated that neither she nor Brody have a Clan Mother or a Native name, and that she does not attend at Long House. Furthermore, she noted that she has never observed the traditional native practices of the Haudenosaunee culture or the "Great Law," and that the Respondent did not do so either during their 5 year relationship. With respect to the Haudenosaunee processes, protocols and laws that the Respondent relies on as the basis for his constitutional challenge to this court's jurisdiction and the application of Ontario Family Law, she notes that she is personally unaware of anyone obtaining an adjudication of their Family Law dispute under such processes. She indicates that all of the aboriginal people who she knows from the Six Nations have resolved their Family Law issues through the Ontario courts and according to Ontario Law.

PART III: THE PARTIES' POSITIONS

I. THE APPLICANT'S POSITION

A. The Request for a Declaration that the Ontario Superior Court of Justice has Jurisdiction to Hear This Case

25 The Applicant seeks four general remedies: a declaration that this court has jurisdiction to hear her application, an order striking the Respondent's Answer and Claim, a dismissal of the Respondent's constitutional claims and a stay of the Respondent's constitutional case set out in his Answer and Claim.

26 In regard to the issue of jurisdiction, the Applicant submits that the starting point for the analysis should be the general statutory and common law rules respecting jurisdiction. Counsel for the Applicant submitted that even though the Respondent's jurisdiction challenge is based on claims involving constitutionally protected aboriginal rights, this does not dictate that the general principles respecting jurisdiction should be abandoned altogether. Counsel rejected the

proposition which counsel for the Respondent advanced that the analysis of the jurisdiction question must occur solely within the framework that the Supreme Court of Canada has established for the determination of aboriginal rights pursuant to section 35(1) of the *Constitution Act, 1982*, and whether any infringement of those rights is justified. In support of their position that the traditional jurisdiction rules should be the starting point for the jurisdiction analysis, counsel for the Applicant relied on case-law respecting the principle of constitutional restraint, which has established that cases should generally be decided on non-constitutional grounds if possible. They also relied on the Supreme Court of Canada cases that have emphasized that reconciliation between Canada's indigenous and non-indigenous peoples must take into consideration the aboriginal perspective while at the same time taking into account the perspective of the common law.

27 The Applicant relied primarily on the traditional ground of attornment as the basis for the assumption of jurisdiction in this case. Her position is that the Respondent clearly attorned to the jurisdiction of this court by serving and filing an Answer and Claim in which he responded to the Applicant's claims on the merits and advanced his own Family Law claims in reliance on Ontario legislation. She states that the Respondent's attornment is a complete answer to the jurisdiction question, and that the Respondent should not in the face of this attornment be permitted to launch a complex and protracted constitutional jurisdictional challenge based on alleged aboriginal rights. In the alternative, the Applicant argues that the Respondent's filing of his Answer and Claim in which he responded to the Applicant's claims on the merits and advanced his own separate claims pursuant to Ontario law amounted to an admission of jurisdiction, which can only be withdrawn pursuant to Rule 22(5) of the *Family Law Rules*, O. Reg. 114/99, as amended with the Applicant's consent or with the court's permission. She states that neither of these conditions precedent have been satisfied, and that the test for allowing the Respondent to withdraw this admission cannot be satisfied on the facts of this case.

28 Counsel for the Applicant acknowledged that the Applicant consented to the Respondent's amendments to his Answer and Claim, but noted that this consent was given without prejudice to the Applicant's position on the constitutional issues. They submitted that this proviso preserved the Applicant's right to pursue remedies aimed at disposing of the constitutional challenges on a summary basis, including a declaration that this court has jurisdiction and a motion to strike the Answer and Claim in its entirety. Counsel argued that consenting to amendments to a pleading does not equate to an admission that the amendments are appropriate and well-founded in law.

29 The Applicant's counsel submitted as an alternative to the attornment position that jurisdiction *simpliciter* is established in this case under principles of private international law. They argued that even if the people of the Six Nations or the Haudenosaunee are considered to be akin to a sovereign nation with their own laws, jurisdiction *simpliciter* is established on the basis that there is a real and substantial connection between the parties and Ontario. Although the court can decline to assume jurisdiction in such circumstances on the basis that another

forum is clearly the more appropriate one to hear the proceeding (the doctrine of "*forum non conveniens*"), the Applicant submitted that there is no evidence to support such a conclusion in this case.

30 The Applicant submits that a declaration that this court has jurisdiction to hear this case is the appropriate remedy for addressing the jurisdiction issue. She relied on the court's inherent jurisdiction to grant this relief as well as section 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended, which provides that the Ontario Superior Court of Justice may make binding declarations of right.

B. The Requests to Strike the Amended Answer and Dismiss the Constitutional Case on a Summary Basis

31 Turning to the Applicant's requests for an order striking the Amended Answer and dismissing the Respondent's constitutional case on a summary basis, counsel for the Applicant advanced the following grounds in support of these claims:

1. First, the Applicant argued that the Amended Answer should be struck on the ground that it fails to comply with the fundamental principle that a pleading must set out the material facts in support of each claim. She relied on the Supreme Court of Canada case-law respecting the test for proving the existence of an aboriginal right, and submitted that the Respondent has not articulated the material facts required to satisfy this test. She also argued that a party who seeks to rely on another system of laws must plead the basic elements of the laws which they are relying on, and that the Respondent has failed to do so.

2. Second, counsel for the Applicant argued that the Respondent's constitutional case should be dismissed because the Respondent lacks standing to advance the aboriginal rights claims that he is pursuing. They submitted that the Respondent is essentially arguing that the Haudenosaunee or the people of the Six Nations have an inherent right of self-government with respect to the adjudication and resolution of inter and intra-familial disputes. Their position is that such a right, if it is cognizable in law and if it were established, would be a collective right of the Haudenosaunee or the people of the Six Nations, rather than a right that an individual can advance in their personal capacity.

3. Third, counsel for the Applicant argued that the Amended Claim should be struck and the Respondent's s. 35(1) claims dismissed because the Amended Answer fails to set out a reasonable claim or defence in law. In this regard, the Applicant submitted as follows:

a) First, she argued that the broadly framed aboriginal rights that the Respondent is advancing are non-justiciable because they are fundamentally incompatible with the assertion of Crown sovereignty and the core principles that underlie Canada's constitutional framework. Counsel for the Applicant argued that such claims are

properly decided through political avenues, which allow for meaningful negotiations, consultation and input from all critical stakeholders, rather than through the judicial process.

b) Second, the Applicant argued that the Amended Answer fails to set out a reasonable claim for the existence of an aboriginal right in law, based on the test that the Supreme Court of Canada has articulated for establishing the existence of aboriginal rights. Counsel for the Applicant relied on the Supreme Court of Canada case-law that has established that an aboriginal rights claimant must identify precisely the nature of the aboriginal claim being advanced, and that claims asserting widespread rights of self-government are not cognizable in law.

4. Finally, the Applicant submitted that the Amended Answer should be struck pursuant to Rule 1(8.2) of the *Family Law Rules*, which allows the court to strike out all or part of any document that "may delay or make it difficult to have a fair trial or that is inflammatory, a waste of time, a nuisance or an abuse of the court process." She maintained that the court has the authority to strike the Amended Answer pursuant to this Rule on the basis of all of the reasons set out above. Furthermore, she argued that the Answer and Claim is a waste of time, since the constitutional claims set out therein are purely theoretical in relation to the parties and will not affect them. Her reasoning on this point is that even if the Respondent established that Ontario's Family Law adjudicative processes, legislation and related regulations are unconstitutional, the remedy would inevitably be a suspension of any declaration of invalidity to allow the government an opportunity to craft an appropriate response to the constitutional infringement and the court's reasons. Finally, counsel for the Applicant argued that an order disposing of the constitutional case on a summary basis under this Rule would be consistent with the court's obligation to promote substantive equality pursuant to s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 1 (the *"Charter"*). They submitted that indigenous women and children are entitled to the equal protection and benefit of the law, and that allowing the Respondent's constitutional case to proceed to a full and protracted hearing would deny the Applicant and Brody, and potentially other women and children, access to basic and critical Family Law remedies and cause significant uncertainty.

C. The Request for a Stay of the Constitutional Case

32 In addition, the Applicant seeks an order staying the Respondent's constitutional case as set out in his Amended Answer. She also opposes the Respondent's motion to stay the hearing of her application. The Applicant relies on the court's inherent jurisdiction to grant a stay of proceedings, as well as section 106 of the *Courts of Justice Act*, which permits the court to stay

any proceeding on such terms as are considered just. The Applicant submitted that the test that applies with respect to the parties' respective requests for a stay is that which the Supreme Court of Canada articulated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), which involves a determination of whether there is serious question to be tried, whether the party seeking the stay would suffer irreparable harm if the stay were denied, and which party would suffer greater harm from the granting or refusal of the stay. Counsel for the Applicant submitted that the Amended Answer does not set out a reasonable claim or defence, and that this satisfies the first branch of the test. They argued that the Applicant would suffer irreparable harm if the constitutional case were allowed to proceed, as she would be forced to remain in a situation where there is no clarity respecting which Family laws and processes apply to her and Brody. She indicated that the present situation, in which the Respondent is refusing to recognize the application of Ontario law or processes to him, has led to late payments of support in the past, the payment of support in large bundles of $20.00 bills which are difficult to manage and the Respondent making arrangements respecting access directly with Brody, without consulting with her. She submitted that all of these considerations are also relevant to the third branch of the test. In addition, in regard to the third branch, she emphasized that refusing the stay that she is requesting would force her to remain embroiled in an extremely protracted, complex and expensive court case that she has no interest in whatsoever and cannot afford, that this would seriously undermine her right to fair and affordable access to justice, and that the Respondent is unwilling to assist her in financing her defence if the constitutional case were to proceed. Her position is that any potential prejudice to the Respondent of his aboriginal rights being infringed would be far outweighed by the prejudice to her of being compelled to accept aboriginal processes, protocols and laws that she is not aware of, that have not been clearly articulated by the Respondent or anyone on his behalf to date, and which she does not wish to have applied to her.

33 In response to the Respondent's request for a stay of the application pending the outcome of his constitutional case, counsel for the Applicant submitted that the Respondent cannot meet the test for obtaining this relief. She submitted that there is no serious issue to be tried with respect to the Respondent's claims, and that the Respondent would not suffer irreparable harm if he were denied a stay, since he would still have the full benefit of Ontario law and its processes, which are presumed to be in the public interest.

II. THE RESPONDENT'S POSITION

A. Response to the Request for a Declaration that this Court has Jurisdiction

34 The Respondent opposes the relief which the Applicant has requested, and seeks a stay of the application pending the hearing of his constitutional case. With respect to the jurisdiction issue, he rejects the Applicant's argument that the general common law rules respecting jurisdiction apply where the challenge to jurisdiction is founded on an alleged aboriginal right

that is constitutionally protected by section 35(1). Counsel for the Respondent maintained that in this type of situation, the question of jurisdiction can only be determined on the basis of the tests that the Supreme Court of Canada has articulated for the determination of aboriginal rights pursuant to s. 35(1), whether those rights have been infringed, and if so, whether the infringement is justified. Their position on these issues is based on two arguments. First, they submitted that the general common law rules respecting jurisdiction which the Applicant relies on are intended to apply to foreign litigants, legal processes and laws. Counsel submitted that extending these principles to the Respondent is offensive, since he is not a foreigner and the laws of the Haudenosaunee and the people of the Six Nations are part and parcel of Ontario law. The Respondent's second argument is that the constitutional protection that section 35(1) affords to aboriginal rights supersedes the common law, including the laws respecting jurisdiction. Accordingly, counsel argued that the concepts of attornment, real and substantial connection and *forum non conveniens* which the Applicant relies on are not germane to the jurisdiction analysis, except to the extent that they may provide some guidance within the context of the section 35(1) analysis. Ms. Hensel submitted that adopting the common law rules as the starting point for the jurisdiction analysis would render the Respondent's constitutional rights subordinate to the common law.

35 As an alternative argument, the Respondent submitted that even if the common law principles respecting jurisdiction apply and the court concludes that he attorned, his attornment was nullified when the Applicant consented to him filing his Amended Answer in which he squarely raised the constitutional challenge to the court's jurisdiction. The Respondent's position is that the Applicant's consent to this amendment essentially estops her from now attempting to summarily dispose of the case based on attornment. Ms. Hensel suggested that the Respondent moved promptly to advance his constitutional rights once he fully appreciated the proper avenue for doing so.

36 With respect to the Applicant's request for a declaration that this court has jurisdiction to hear this case, the Respondent understood that the Applicant was requesting an interim declaration that the court has jurisdiction to hear her motion for interim relief only, and a stay of the constitutional case until after the determination of the interim motion for child and spousal support. Counsel for the Respondent submitted that this is not a logical approach, given that the constitutional case goes to the very issue of whether the court has jurisdiction to make any order, including an interim order. Ms. Hensel referred me to case-law that establishes that it is generally inappropriate to grant interim declaratory relief where the effect of doing so would essentially decide the dispute between the parties. In fact, as counsel for the Applicant clarified, the relief that the Applicant seeks is a final declaration respecting this court's jurisdiction, and a final stay of the constitutional case, with the goal of completely disposing of the Respondent's claims in his Amended Answer.

37 The Respondent further argued that it would be inappropriate for the court to issue a declaration respecting jurisdiction at this stage, since such relief should only be granted where

the court has a complete factual record upon which to decide the dispute between the parties. Given his position that jurisdiction must be decided solely according to the law respecting aboriginal rights and justification for infringement of such rights, he submitted that the jurisdiction issue can only be settled after a full and fair hearing of the Respondent's aboriginal rights case on the merits. Counsel for the Respondent emphasized that a full and fair hearing can only occur in this case if the court has the benefit of a complete evidentiary record respecting relevant current and pre-European contact practices, customs and traditions of the Haudenosaunee and the people of the Six Nations. She emphasized that the Respondent is still in the process of gathering critical historical evidence to support his jurisdictional challenge, and that declaratory relief at this point would prematurely dispose of the case without the requisite factual record.

B. Response to the Request to Strike the Amended Answer and Dismiss the Constitutional Claims on a Summary Basis

38 With respect to the Applicant's request for an order striking the Answer and Claim and dismissing the constitutional case outright on a summary basis, counsel for the Respondent raised concerns about the adequacy of notice to the Respondent. They indicated that the Applicant did not specifically plead Rule 16 of the *Family Law Rules* in her Notice of Motion. Ms. Hensel suggested that there was insufficient notice of the extent to which the Applicant was seeking to have the constitutional issues in this case finally determined and disposed of on a summary basis. She asserted that if she had fully appreciated this based on the Applicant's Motion materials, the Respondent would have created a much more extensive summary judgment record and would have pursued cross-examination on affidavits, with the goal of proving that there is a genuine issue requiring a full hearing for its determination.

39 Counsel for the Respondent submitted that even if there had been proper notice regarding the Applicant's request to dispose of the constitutional case on a final and summary basis, it would be inappropriate for the court to grant such relief. In response to the Applicant's request that the Amended Answer be struck on the basis that it fails to set out the material facts to support the Respondent's constitutional case, counsel for the Respondent submitted that the Respondent articulated the relevant facts as fully as can be expected at this point. Ms. Hensel emphasized that the Respondent is not a clan mother, chief or expert in Haudenosaunee protocols, processes and laws relating to the resolution of inter and intra-familial disputes, and that it would place him at an unfair disadvantage to require him to provide more specifics than he has at the pleading stage. She further submitted that it would be unwise for the Respondent to elaborate further upon the material facts in his pleading without the benefit of the expert evidence that he is in the process of gathering. Counsel referred to the Report of the Truth and Reconciliation Commission and the concerns outlined in that report respecting the impact of government policies over the decades which sought to eradicate and which threatened the survival of aboriginal customs, practices and traditions. She highlighted the portions of the

Report that stressed the need to support aboriginal peoples in regaining knowledge about and revitalizing those traditional customs, practices and traditions, and argued that any request to strike the Respondent's pleading in this case must be decided against the backdrop of these important considerations.

40 With respect to the standing argument, Ms. Hensel insisted that the Respondent is not advancing a collective right on behalf of all Haudenosaunee and the peoples of the Six Nations. Rather, she submitted that he is only seeking to have the claimed aboriginal rights extend to him in the context of his personal Family Law dispute. Alternatively, she relied on case-law that has commented on the difficulties involved in attempting to characterize aboriginal rights as either individual or collective in nature, and argued that a full and fair hearing, with a complete evidentiary record, is necessary to determine whether the rights that the Respondent is advancing are collective and whether he has standing to advance them. The Respondent's position is that these issues cannot be properly addressed on a summary basis as requested by the Applicant.

41 In regard to the request to strike the Amended Answer as showing no reasonable claim or defence, and to dismiss the Respondent's constitutional case on this basis, Ms. Hensel commented generally on the heavy burden that an indigenous person faces in attempting to establish an aboriginal right. She highlighted the need for oral and expert evidence respecting traditions and practices, and the challenges involved in amassing this information. She argued that stopping an aboriginal rights case such as this one summarily in its tracks, without allowing the Respondent a reasonable opportunity to gather the evidence required to meet his case, would seriously undermine the objectives of section 35(1) of the *Constitution Act, 1982* and the goal of achieving reconciliation between Canada's indigenous and non-indigenous peoples. Ms. Hensel acknowledged that the Respondent is still in the process of obtaining the evidence required to meet his case, but emphasized that he has been diligent in attempting to accumulate that evidence.

42 In response to the argument that the aboriginal rights claimed are not cognizable in law on the ground of sovereign incompatibility, counsel for the Respondent argued that this line of reasoning is based on outdated European concepts regarding sovereignty. She submitted that these concepts are inappropriate in the context of Canada, and are at odds with the constitutional imperative of achieving reconciliation between the indigenous and non-indigenous peoples of Canada. She emphasized that constitutional law is evolving with respect to the manner in which Crown sovereignty should be reconciled with the reality that indigenous communities, laws and processes existed prior to European contact. She also relied on the case-law that has established that the Constitution is a living tree that must evolve in response to contemporary insight and analysis. The Respondent's position is that the aboriginal peoples of Canada have inherent rights of self-government that were not extinguished by the assertion of Crown sovereignty, and that any arguments based on sovereignty must start from the proposition that Canada was formed based on a partnership between Canada's aboriginal peoples and the non-aboriginal peoples who

later settled here. The Respondent submits that the rights that he is claiming flow from the general, inherent self-governance rights of the Haudenosaunee people that existed prior to European contact.

43 Counsel for the Respondent disputed the assertion that the Amended Answer does not set out a reasonable cause of action for the establishment of any aboriginal rights. Ms. Hensel argued that the Respondent's pleading does in fact properly characterize the rights claimed, and that it addresses each of the elements required to prove an aboriginal right protected by s. 35(1), with the degree of particularity that is required at the pleading stage.

44 The Respondent also opposes the Applicant's request that his Amended Answer be struck on the basis that it is a waste of time, a nuisance or an abuse of the court process. With respect to the argument that the constitutional case is a waste of time since the remedy would inevitably be a suspension of any declaration of invalidity, Ms. Hensel clarified that the Respondent is not seeking to have any Ontario law declared invalid; rather, he simply seeks an order exempting him for the operation of Ontario Family Law legislation on the basis of his individual right to be governed by the adjudicative processes, protocols and laws of the Haudenosaunee and the people of the Six Nations. Counsel for the Respondent further rejected the proposition that the court should dispose of the Respondent's constitutional challenge in furtherance of its obligation pursuant to s. 15 of the *Charter* to promote substantive equality. Ms. Hensel noted that the Applicant did not refer to s. 15 or this argument in her Notice of Motion, and that in any event, the argument inappropriately presumes that the application of Haudenosaunee processes, protocols and laws would impair the equality rights of aboriginal women and children. Counsel for the Respondent further responded to this argument by relying on s. 25 of the *Charter*, which stipulates that the guarantee in the *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada. Ms. Hensel submitted that this provision requires that any equality analysis that relates to claimed aboriginal rights must give equal consideration and weight to the aboriginal perspective and the importance of the claimed rights to the aboriginal person or community involved.

C. The Respondent's Requests for a Stay of the Application and an Amendment to the Notice of Constitutional Question

45 The Respondent opposes the Applicant's request for a stay, and seeks this remedy in his favour to stay the hearing of the application so that his constitutional case can proceed. With respect to the Applicant's request for a stay of the constitutional case, Ms. Hensel submitted that it was improper for the Applicant to request a stay at all, and that she should be simply responding to the Respondent's request for a stay of the Family Law proceeding. Furthermore, she submitted that even if the Applicant could seek a stay, the Applicant's argument on the first branch of the test incorrectly focussed on whether there is a serious issue to be tried from the

perspective of the Respondent's constitutional case. She submitted that the first part of the test for a stay requires that the Applicant identify whether there is a serious issue to be tried with respect to her motion.

46 The Respondent's position is that he has satisfied the test for obtaining a stay of the application. He asserts that there is a serious question to be tried regarding the existence of the aboriginal rights that he is claiming, and that he would suffer irreparable harm if he were denied the right to a fair and full hearing respecting his constitutional claims. Counsel for the Respondent submitted that neither the Applicant nor the child Brody would suffer irreparable harm if the stay were granted, since the Respondent has undertaken to continue to provide a significant amount of financial support to them pending the outcome of the constitutional case, including the provision of a home for them. By contrast, the Respondent emphasized the harm to him if the court compelled him to submit to a legal process and laws which he considers to be foreign and inapplicable to him. With respect to the balance of convenience analysis, the Respondent argued that the balance tips in favour of allowing the constitutional case to proceed in a fair manner on the merits, rather than dismissing it summarily on an inadequate record. In addressing the balance of convenience issue, Ms. Hensel proposed a timetable for advancing the constitutional case forward which she submitted would not result in protracted delay. This timetable envisioned the Respondent serving the Applicant with any oral and community-based evidence by no later than September 30, 2017, and the Applicant filing responding material by 30 days after the release of this decision. Counsel for the Applicant's position was that the latter time frame would be completely unrealistic, and that the Applicant would require a considerable amount of time to properly respond.

47 Finally, the Respondent requests an order permitting him to amend his Notice of Constitutional Question to include a claim that the *Children's Law Reform Act* is inapplicable to him on the basis that the application of that legislation to his custody and access dispute with the Applicant would violate his aboriginal right to be governed by Haudenosaunee laws and protocols.

PART IV: ANALYSIS

I. ISSUE #1: THE APPROPRIATE FRAMEWORK FOR THE JURISDICTION ANALYSIS

A. Overview

48 The first issue that I must determine in this case is whether the court has jurisdiction to deal with the Family Law dispute between the parties. Specifically, is the Applicant correct that the question of jurisdiction should be decided purely on the basis of conflict of laws principles respecting jurisdiction, or should I accept the Respondent's position that the jurisdictional analysis must be governed exclusively by the legal principles that have evolved respecting the

determination of aboriginal rights claims pursuant to s. 35(1) of the *Constitution Act, 1982*? Alternatively, is there a middle ground that must be carved out in the unique circumstances of this case? In addressing this issue, I rely on Rule 16(12) of the *Family Law Rules*, which permits the court to decide a question of law before trial if the decision may dispose of all or part of the case, substantially shorten the trial or save substantial costs.

49 In this section, I outline my conclusions regarding the general principles that should apply to the jurisdiction issue in a case such as this one, where a Respondent challenges jurisdiction based on an alleged aboriginal right that is protected by s. 35(1). For the reasons that follow, I conclude that the appropriate analytical path for the determination of the jurisdiction issue in this situation starts from traditional conflict of laws principles, but must be adapted in response to the constitutional recognition of aboriginal rights through s. 35(1). Against the backdrop of this framework, however, I conclude that the court may entertain motions to dispose of such a constitutional challenge to the court's jurisdiction on a summary basis. The success of any such motions would pave the way for the application of the standard rules respecting jurisdiction. Accordingly, after outlining the general framework for approaching the jurisdiction question, I have addressed the Applicant's requests to strike the Amended Answer and dismiss the constitutional case on a summary basis, and outlined my reasons for granting this relief. However, even if I had not struck the Amended Answer and dismissed the Respondent's constitutional case on a summary basis I would have concluded based on the jurisdictional framework which I have described below that this court should take jurisdiction. Accordingly, I have outlined my reasons on this point following my discussion of the Applicant's claims to strike the Amended Answer and dismiss the constitutional case.

B. Do Conflict of Laws Jurisdiction Principles Apply?

50 The first issue that I must address in discussing the appropriate framework for the jurisdiction analysis is the Respondent's argument that conflict of laws principles have no rightful part in the analysis because they are intended to apply to foreign litigants and processes, and not to Ontario residents and aboriginal laws and processes that form part of Ontario law. This discussion requires consideration of the basic purposes of this branch of the law.

51 By way of general overview, conflict of laws, also referred to in the case-law as "private international law," concerns three broad areas of inquiry. First, it addresses whether a court has jurisdiction to hear a dispute. Second, it deals with the law the court should apply in resolving the dispute between the parties. Finally, it provides principles for determining whether a court should recognize and enforce a decision of a court in another jurisdiction (Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws*, 2nd ed. Toronto: Irwin Law Inc., 2016, at p. 1; *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.), at para. 21). As in this case, situations in which conflict of laws questions arise often engage the first two issues. Conflict of laws principles require two separate analyses for the issues of jurisdiction and choice of law. A

determination that the court has jurisdiction to hear and resolve a case does not necessarily mean that the laws which typically govern that court must be applied. It is for this reason that I deal with the issues of jurisdiction and choice of law separately in these Reasons.

52 In Ontario and the other common law provinces, conflict of laws rules derive from the Constitution, public international law, legislation, the common law and equity. Conflict of laws principles form part of domestic law, rather than international law. The need to rely on this area of the law usually arises in cases involving foreign litigants who argue that the courts and laws of their own country should govern the dispute. However, the scope of conflict of laws principles is not limited to situations involving a foreign party. This branch of the law is relevant in any situation where the parties seek to rely on competing legal systems and systems or sets of law. The notion of a "foreign element' for conflict of laws purposes relates to an adjudicative system and laws other than the court in question and the laws that typically govern that court's decision-making (Dicey and Morris, *Conflict of Laws*, 13th ed., Vol. 1, London: Sweet and Maxwell, 2000, at p. 3). By way of example, conflict of laws principles apply to disputes between litigants from different provinces within Canada regarding the jurisdiction of the courts of the different provinces and the laws of those provinces (Pitel and Rafferty, *Supra.*, at p. 3).

53 One of the novel issues that this case raises is whether general conflict of laws jurisdiction principles are also relevant on a more "micro-level," to an intra-provincial jurisdiction dispute between two Ontario citizens. In my view, these principles remain relevant in this case, even though the dispute has arisen at the intra-provincial level. Although the Respondent is not alleging that the Haudenosaunee or the Six Nations constitute a sovereign nation or other type of territorial entity within Ontario, his jurisdictional challenge is based on an alleged right to be governed by a complete system of dispute resolution, adjudicative processes and laws for handling Family Law matters that is independent of Ontario's court system, processes and laws. This broad claim has raised basic preliminary issues about the appropriate forum for decision-making and the applicable laws. These are precisely the types of disputes that conflict of laws principles are intended to address.

54 The added layer of complexity in this case is that the Respondent's jurisdiction challenge is based on an alleged constitutionally protected aboriginal right. The Respondent asserts that this fact takes the dispute out of the realm of conflict of laws and requires the court to determine jurisdiction exclusively based on the law respecting s. 35(1) and the test for determining if the infringement of aboriginal rights is justified. I do not agree that advancing a jurisdictional challenge based on an alleged s. 35(1) right triggers an automatic immunity from all conflict of laws jurisdiction principles. Rather, I conclude that conflict of laws jurisprudence is the appropriate starting point for the analysis, but that the general conflicts principles regarding jurisdiction must be fine-tuned and adapted so as to ensure that appropriate protection is accorded to aboriginal rights. Conflict of laws principles are amenable to such modifications. The Supreme Court of Canada has in a number of jurisdiction cases emphasized that conflicts principles are not cast in stone, and that they can and should be adapted when necessary to

accord with constitutional values and imperatives. For instance, in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), the court liberalized the conflict of laws rules respecting enforcement of judgments as between provinces on the basis that they should be shaped to conform to the federal structure of the Constitution, and should reflect the obvious intention of the Canadian Constitution to create one country. In that case, the court also found that the traditional rules which established jurisdiction over an out-of-jurisdiction defendant simply by effecting service *ex juris* in accordance with Rules of Court raised constitutional concerns regarding territorial over-reaching. The court responded to this concern by modifying the conflicts rules to provide that jurisdiction could only be asserted in circumstances involving a defendant outside of the court's territorial jurisdiction who does not consent to jurisdiction if there is a "real and substantial connection" between the matter and the forum. In the court's subsequent decision of *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), the court was called upon to consider whether a Quebec statute which prohibited the removal from the province of documents of businesses in Quebec that were required pursuant to judicial processes outside of the province was *ultra vires* or constitutionally inapplicable to a judicial proceeding in another province. In deciding the case, the court reiterated that traditional conflict of laws rules respecting enforcement of judgments as between provinces must be adapted in order to comply with constitutional mandates. The court in that case also held that the finding of a real and substantial connection between the forum and the subject matter of the litigation was an absolute constitutional limit on the exercise of jurisdiction by provincial superior courts in a case involving such inter-provincial matters. In *Tolofson v. Jensen*, [1994] S.C.J. No. 110, [1994] 3 S.C.R. 1022 (S.C.C.), and *Van Breda*, the court again discussed how the real and substantial connection test evolved into a constitutionally mandated limit on the exercise of jurisdiction in response to constitutional concerns regarding territorial over-reaching. Lebel J. emphasized at paragraph 21 of *Van Breda* that conflict of laws principles must be adapted to fit within Canada's constitutional structure, which limits the external reach of provincial laws and of a province's courts beyond the province's territorial boundaries.

55 The case-law regarding the adaptability of conflict of laws principles in the face of constitutional challenges supports my conclusion that the appropriate framework for determining jurisdiction in this case is one that incorporates important common law principles, while at the same time providing appropriate safeguards for the constitutional rights of Canada's indigenous peoples. This type of approach respects the needs and interests of all parties involved. It is also supported by the general case-law respecting the purpose of s. 35(1) and the need for aboriginal rights principles to integrate harmoniously with the broader Canadian legal and constitutional framework. In *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (S.C.C.), Lamer J. addressed the purposes underlying s. 35(1), and the articulated general principles for defining the scope of aboriginal rights. He explained that aboriginal rights are recognized and affirmed by s. 35(1) "in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory" (at para. 31). Subsequently, in *R. v. Sappier*, [2006] 2 S.C.R. 686 (S.C.C.), Bastarache J. stated that section 35(1) "seeks to provide a constitutional framework for the protection of the

distinctive cultures of aboriginal peoples, so that their prior occupation of North America can be recognized and reconciled with the sovereignty of the Crown" (at para. 23). Lebel J. held in *Van der Peet* that the test for determining the substantive rights which fall within the purview of s. 35(1) must correspond with this purpose. In determining the proper approach to assessing aboriginal rights claims, the court also emphasized that aboriginal rights exist within the reality of a broader legal and constitutional framework, and a country that consists of both indigenous and non-indigenous peoples. Lamer J. accepted the notion advanced by Mark Walters in his comment on *Delgamuukw v. British Columbia* ("British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992), 17 *Queen's L.J.* 350, at pp. 412-13) that aboriginal rights principles derive from the meeting of aboriginal and non-aboriginal legal cultures, and are intended to bridge these vastly different cultures. As Mark Walters highlighted, the corollary of these features of aboriginal rights is that "there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined." In addressing this question, the court accepted Mark Walters' conclusion, at p. 413 of his comment on *Delgamuukw*, that the only morally and politically defensible conception of aboriginal rights is one that incorporates both aboriginal and non-aboriginal legal perspectives (at para 49). Accordingly, the court concluded that the task of reconciling the prior occupation of Canada by aboriginal peoples with the assertion of Crown sovereignty can only be carried out in a truly fair and just manner by giving equal weight and consideration to the aboriginal perspective and the perspective of the common law. As Lamer J. said, at paras. 49 and 50:

> In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. In *Sparrow, supra* Dickson C.J. and La Forest J. held at p. 1112 that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.
>
> It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. *However, the only fair and*

> *just reconciliation is, as Walters suggests, one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each* [emphasis added].

C. The General Conflict of Laws Principles Respecting Jurisdiction

56 Having concluded that general conflict of laws principles are the starting point for the jurisdiction analysis, I turn now to an overview of those principles. The question of jurisdiction concerns the court's power to deal with a case and render a decision that will be binding on the parties. In order for a decision to be binding, the court must have jurisdiction over the parties to the litigation as well as the subject matter of the dispute. (Pitel and Rafferty, *Supra.*, p. 1).

57 Conflict of laws jurisprudence establishes that the inquiry into the court's jurisdiction involves two stages. First, the court must decide whether it has jurisdiction *simpliciter*, which involves a determination of whether it has or can assume jurisdiction. If jurisdiction *simpliciter* is established, the court must at the second stage of the analysis decide whether it should nonetheless decline to take jurisdiction (*Van Breda*, at paras. 101-103; *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722 (Ont. C.A.); aff'd on other grounds [2012] 1 S.C.R. 359 (S.C.C.)). With respect to the jurisdiction *simpliciter* stage of the analysis, the following principles apply:

> 1. The court has jurisdiction if there is a statutory provision that grants it jurisdiction.
>
> 2. If there is no applicable statutory provision, the court must turn to common law principles to determine the question of jurisdiction *simpliciter*. At common law, the traditional grounds for jurisdiction *simpliciter* are:
>
> > a. The Respondent was present in Ontario and was served within Ontario;
> >
> > b. The Respondent consents to the jurisdiction of the court, even if they are not present in Ontario; or
> >
> > c. A Respondent attorns to the court's jurisdiction, even if they are not present in Ontario.
>
> 3. In addition, at common law, a court *can assume* jurisdiction in a case involving a Respondent who has no presence in the territorial jurisdiction of the court and does not consent or attorn to the court's jurisdiction if the Respondent has been properly served *ex juris* and there is a real and substantial connection between the forum and the subject matter of the litigation.

(*Momentous.ca Corp.*, at para. 35; *Jasen v. Karassik*, 2009 CarswellOnt 1507 (Ont. C.A.); leave to appeal to S.C.C. refused (2009), 400 N.R. 398 (note) (S.C.C.); *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 (S.C.C.)).

58 As discussed earlier in these reasons, the real and substantial connection test for establishing jurisdiction *simpliciter* evolved due to constitutional concerns about the exercise of jurisdiction across territorial boundaries where there is no statutory basis for jurisdiction, the Respondent has no presence in the province and there is no consent or attornment to the court's jurisdiction. Given that this case does not involve a Respondent located outside of Ontario, I conclude that the real and substantial connection test is not relevant to the jurisdiction analysis.

59 The real and substantial connection test for establishing jurisdiction *simpliciter* has not subsumed or overtaken the other statutory or common law grounds for taking jurisdiction. Accordingly, if the test for jurisdiction *simpliciter* is satisfied based on a statutory test, or because the Respondent was served while in the jurisdiction or attorned to the court's jurisdiction, there is no need to engage in the real and substantial connection inquiry (*Inc. Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (Ont. C.A.); *Shekhdar v. K&M Engineering & Consulting Corp.*, [2006] O.J. No. 2120 (Ont. C.A.); *Ward v. Canada (Attorney General)* (2007), 220 Man. R. (2d) 224 (Man. C.A.); *Van Breda*; *Chevron Corp.*). In addition, the cases have established that if there is a statutory test for jurisdiction *simpliciter* and it is not satisfied, a party cannot resort to a common-law test to ground jurisdiction (*Rothgiesser v. Rothgiesser* (2000), 46 O.R. (3d) 577 (Ont. C.A.); *Dovigi v. Razi*, 2012 ONCA 361 (Ont. C.A.), leave to appeal ref'd 34945 (November 22, 2012), 2012 CarswellOnt 14546 (S.C.C.); *Wang v. Lin*, 2013 ONCA 33 (Ont. C.A.); *Nafie v. Badawy*, 2015 ABCA 36 (Alta. C.A.), leave to appeal ref'd, [2015] S.C.C.A. No. 128 (S.C.C.); *Trylinski-Branson v. Branson*, 2010 ABCA 322 (Alta. C.A.) at paras 25-34, leave to appeal refused 2004 CarswellAlta 366 (S.C.C.); *Knowles v. Lindstrom*, 2013 ONSC 2818 (Ont. S.C.J.), aff'd 2014 ONCA 116 (Ont. C.A.)).

60 Consent and attornment are often grouped together as a ground for establishing jurisdiction *simpliciter*. However, they are distinct concepts. Consent entails voluntary submission to the court's jurisdiction. By contrast, the concept of attornment at common law is not necessarily consensual in nature. Attornment occurs where a litigant takes actions that are inconsistent with a denial of the court's jurisdiction. In such circumstances, the party will be deemed to have accepted and acknowledged the court's jurisdiction to hear and resolve the dispute (*Trylinski-Branson*, at para. 26). Any step taken in a proceeding beyond merely challenging the court's jurisdiction can constitute attornment (*Van Damme v. Gelber*, 2013 ONCA 388 (Ont. C.A.) at paras. 22-24; *Fraser v. 4358376 Canada Inc.*, 2014 ONCA 553 (Ont. C.A.)). Examples of conduct that may result in a finding that a party has attorned include the following:

1. Entering an unconditional appearance or a Notice of Intent to Defend (*Trylinski-Branson*; *Kinch v. Pyle*, [2004] O.J. No. 5232 (Ont. S.C.J.) at paras. 10-15);

2. Delivering a defence which responds to the merits of the claim (*Clinton v. Ford* (1982), 37 O.R. (2d) 448 (Ont. C.A.); *Momentous.ca Corp.*; *Singh v. Kaur*, 2015 ONSC 1279 (Ont. S.C.J.));
3. Seeking any type of relief from the court (*Trylinski-Branson*);
4. Taking advantage of the procedures and protections of the court (*Trylinski-Branson*);
5. Bringing a motion to challenge jurisdiction in which the party also seeks substantive relief (*Krisko v. Krisko*, 2000 CarswellOnt 3774 (Ont. C.A.)).

61 The second stage of the jurisdiction analysis occurs only if the court determines that jurisdiction *simpliciter* has been proven. This second step requires the court determine whether it should take or decline to take jurisdiction. The decision on whether the court should take jurisdiction is ultimately a matter of judicial discretion, which flows from the court's residual equitable authority to control its process to assure fairness to the parties and the efficient resolution of the dispute. The authority to decline jurisdiction should only be exercised in limited circumstances (*Van Breda*, at para. 101; *Momentous.ca Corp.*, at para. 36). The case-law to date recognizes two bases upon which the court can decline jurisdiction. The first ground, referred to as the doctrine of *forum non conveniens*, allows the court to refuse jurisdiction if the Respondent establishes that there is another more convenient forum in which to try to claim (*Van Breda*, at para. 101). The second basis for declining jurisdiction is if the parties have previously agreed to another forum for the resolution of their disputes (*Momentous.ca Corp.*, at para. 37).

62 Once jurisdiction *simpliciter* has been established, the litigation should proceed before the court of the forum unless the Respondent advances a case that the court should decline to take jurisdiction. The onus is on the Respondent to raise this issue, and not with the court that is seized with the claim (*Van Breda*, at para. 102). If the Respondent relies on the doctrine of *forum non conveniens*, they have the onus of proving that the proposed alternative forum is clearly more appropriate than the forum which the Applicant has chosen (*Van Breda*, at para. 103; *Knowles*, at para. 47).

63 There are conflicting authorities on the issue of whether the court's discretion to decline jurisdiction extends to cases where jurisdiction *simpliciter* is based on the Respondent's consent or attornment to the court's jurisdiction. In some cases, the courts have viewed attornment as an absolute bar to further consideration of the jurisdiction issue (see *Bedard v. Bedard*, 2004 SKCA 101 (Sask. C.A.); *Han v. Cho*, 2006 BCSC 1623 (B.C. S.C.)). However, Ontario case-law has gone in the opposite direction. In a series of cases leading up to the *Momentous.ca Corp.* decision in 2010, the courts held that there is a discretion in a stay motion brought pursuant to s. 106 of the *Courts of Justice Act* to decline jurisdiction on the basis of the doctrine of *forum non conveniens*, notwithstanding that the responding party attorned to the court's jurisdiction (see for example *ABB Power Generation Inc. v. CSX Transportation* (1996), 47 C.P.C. (3d) 381 (Ont. Gen. Div.); *Occidental Chemical Corp. v. Sovereign General Insurance Co.* (1997), 32 O.R. (3d) 277 (Ont. Gen. Div.); *Kinch v. Pyle* (2004), 8 C.P.C. (6th) 66 (Ont. S.C.J.)). In 2010, the

Ontario Court of Appeal weighed in on this issue in *Momentous.ca Corp.* In that case, the court concluded that there is a discretion to decline jurisdiction even in cases where the Respondent has attorned to the court's jurisdiction. The court concluded on the facts of the case before it that it was appropriate to decline jurisdiction because the parties had contractually agreed to have disputes between them resolved through a different forum. On appeal to the Supreme Court of Canada, the court upheld the court's decision, but did so on the basis that there had been no attornment. The Supreme Court did not comment on the Court of Appeal's decision that the court has a residual discretion to decline jurisdiction notwithstanding a finding of attornment by the Respondent.

D. The Modified Analytical Framework for Determining Jurisdiction in This Case

1. The Approach to the Jurisdiction Analysis if the Respondent Has Not Attorned

64 I turn now to how the general conflict of laws principles respecting jurisdiction need to be modified in the circumstances of this case, where both parties are resident in Ontario and the Respondent challenges the court's jurisdiction on the basis of an alleged aboriginal right to have the case governed by aboriginal adjudicative processes.

65 In the absence of the constitutional challenge based on s. 35(1), the jurisdiction of an Ontario court to deal with this case would be relatively straightforward. The court would rely on statutory provisions relating to jurisdiction or, in the absence of such provisions, the Respondent's presence in Ontario and valid service on him as grounds upon which to take jurisdiction. The court would also consider the applicable Rules of court to determine the appropriate municipality in which the application should be commenced. This case involves the issues of custody, access, child support and spousal support. The Ontario legislation that governs custody and access issues is the *Children's Law Reform Act.* Section 22 of that Act provides that the court may exercise jurisdiction to make an order for custody or access to a child if the child was habitually resident in Ontario at the commencement of the application for the order. Rule 5(1) of the *Family Law Rules* provides that in cases involving custody of or access to a child, the case shall be started in the municipality where the child ordinarily resides, except for cases described in section 22 of the *Children's Law Reform Act* and sections 48(2) and 150(1) of the *Child and Family Services Act*, R.S.O. 1990, c. C-11, as amended. In usual circumstances, the court would clearly have jurisdiction to deal with the custody and access issues on the facts of this case, since the child is ordinarily resident in Waterloo, Ontario. The issues of child support and spousal support as between parties who reside in Ontario and who have not been married are governed by the *Family Law Act.* Unlike the *Children's Law Reform Act*, the *Family Law Act* does not set out a test for jurisdiction in child support and spousal support cases. Accordingly, the court could in the usual course assume jurisdiction based on the Respondent's presence in Ontario.

66 In this case, it is important to note that the Respondent is challenging the issue of jurisdiction at the jurisdiction *simpliciter* stage of the analysis. His position is that his aboriginal right pursuant to s. 35(1) to be governed by Haudenosaunee adjudicative processes would be violated by any attempt by this court to take or assume jurisdiction, and that this breach is not justified pursuant to the test for proving justification of an aboriginal right. I conclude that where such a claim is advanced and the Respondent has not consented or attorned to the court's jurisdiction, the court cannot simply rely on a statutory provision or the Respondent's presence in the province to take jurisdiction. To do so would essentially shut down the constitutional argument based on jurisdiction principles that were not designed with an aboriginal rights challenge to jurisdiction in mind. Such an approach would be inconsistent with the goal which the Supreme Court of Canada has clearly supported in the aboriginal rights jurisprudence of achieving reconciliation between Canada's indigenous and non-indigenous peoples. Furthermore, the court cannot take jurisdiction on the basis of the real and substantial connection test. As I have already noted, that test was developed in response to constitutional concerns regarding territorial over-reaching, and has no application where the responding party in the litigation is present in Ontario. The constitutional protection afforded to aboriginal rights pursuant to section 35(1) mandates that in the face of a challenge to jurisdiction based on s. 35(1) by a Respondent who has not consented or attorned, the jurisdiction analysis must be conducted on the basis of the s. 35(1) jurisprudence relating to the determination of aboriginal rights and the justification test that must be satisfied to limit those rights. Based on this framework, the court would only be able to take jurisdiction if the Respondent did not prove the existence of the alleged aboriginal right, or if the right was established but the justification test was satisfied. However, as I discuss in further detail below, before embarking upon a full hearing to address these issues, the court is entitled to entertain preliminary motions by the other party to dispose of the constitutional challenge to jurisdiction on a summary basis. If any such motion is successful, then the challenge to jurisdiction disappears, and the court can proceed to take jurisdiction based on the standard statutory and common law jurisdictional rules. Alternatively, if any such motion fails, the court would have to proceed to a full hearing of the constitutional challenge to jurisdiction.

2. The Approach to the Jurisdiction Analysis if the Respondent has Consented or Attorned to the Court's Jurisdiction

[the balance of this lengthy judgment is omitted]

2014 BCSC 752
British Columbia Supreme Court

Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Inc.

2014 CarswellBC 1191, 2014 BCSC 752, [2014] 11 W.W.R. 827, [2014] B.C.W.L.D. 4602, [2014] B.C.W.L.D. 4619, 240 A.C.W.S. (3d) 373, 57 C.P.C. (7th) 24, 64 B.C.L.R. (5th) 369

Colonial Countertops Ltd., Plaintiff and Maple Terrazzo Marble & Tile Incorporated d.b.a. International Logistics & Stone Distribution and also d.b.a. Stoneworx, Defendant

R. Punnett J., In Chambers

Heard: January 22, 2014
Judgment: May 1, 2014
Docket: Victoria VI 12-3489

APPLICATION by defendant to stay or dismiss proceeding on grounds of lack of jurisdiction or forum non conveniens.

***R. Punnett J., In Chambers*:**

1 The defendant applies to stay or dismiss this proceeding on the basis that the British Columbia Supreme Court lacks jurisdiction over this matter or, alternatively, on the basis that the principle of *forum non* conveniens favours continuation of ongoing parallel proceedings in Ontario.

Background

2 The plaintiff, Colonial Countertops Ltd. ("Colonial Countertops"), is a British Columbia corporation doing business in BC as a fabricator and installer of countertops.

3 The defendant, Maple Terrazzo Marble & Tile Incorporated ("Maple Terrazzo"), is a company incorporated and doing business in Ontario. It is not registered as an extra provincial company in BC. The defendant is a fabricator and distributor of marble, granite and quartz for

use in both commercial and residential markets.

4 On December 1, 2008, the defendant entered into a supply and distribution agreement with Home Depot of Canada Inc. ("Home Depot"). Under the agreement, the defendant agreed to supply, distribute and install its granite countertop products for Home Depot customers in Ontario. In 2011, the agreement was expanded to grant Maple Terrazzo an exclusive right to supply and install its products for Home Depot customers in Western Canada. As the defendant did not operate outside of Ontario, it decided to subcontract out the fabrication and installation work to other companies in the Western Canadian provinces. In the summer of 2011 the defendant began negotiations with the plaintiff for this purpose.

5 Representatives for the parties first met in Victoria, British Columbia on August 4, 2011 regarding the proposed agreement. After a second meeting on the same day, also in Victoria, the defendant hand-delivered a draft contract to the plaintiff. The plaintiff signed the contract in Victoria on or about August 9, 2011, and faxed it to the defendant's offices in Ontario. On August 15, 2011, the defendant delivered an executed copy of the agreement to the plaintiff by return fax. In the contract Colonial Countertops agreed to purchase the granite products from Maple Terrazzo and then to fabricate, install and service the resulting granite countertops for Home Depot customers in British Columbia.

6 Under the contract, the plaintiff became involved whenever a Home Depot customer in BC ordered the defendant's granite products from a Home Depot location. At that point, the following procedure took place:

a) Home Depot would issue a measure purchase order to the defendant in Ontario;

b) the defendant would forward the measure purchase order to the plaintiff in BC;

c) the plaintiff would contact the Home Depot customer to schedule an appointment to measure the countertop;

d) if the Home Depot customer elected to proceed with the installation, Home Depot would issue an install purchase order to the defendant and the defendant would send an install purchase order to the plaintiff;

e) the plaintiff would fabricate and install the countertop, then invoice the defendant for payment;

f) the defendant would provide the invoice to Home Depot;

g) Home Depot would pay the defendant; and finally,

h) the defendant would pay the plaintiff.

7 The plaintiff was never a party to the agreement between the defendant and Home Depot.

8 Between September 2011 and February 2012 the plaintiff fabricated and installed countertops in households throughout BC. On February 10, 2012, Home Depot advised Maple Terrazzo that it was terminating the installer agreement as it related to the Western Canadian provinces, effective immediately.

9 On February 13, 2012 the defendant terminated its contract with the plaintiff, with thirty days' written notice.

10 On June 19, 2012 the defendant received a written demand from counsel for the plaintiff seeking payment of the plaintiff's outstanding invoices under the contract and demanding that the defendant accept the return of certain granite products the plaintiff had ordered and received during the term of the contract but not yet paid for.

11 On August 1, 2012 Maple Terrazzo filed an action against Colonial Countertops in the Ontario Superior Court of Justice, claiming damages of $115,349.68 for the plaintiff's failure to pay for the granite products and some administration fees allegedly owing under the contract. On October 16, 2012 Colonial Countertops filed a statement of defence on the merits.

12 On August 27, 2013 Maple Terrazzo obtained a consent order in Ontario setting a schedule for the production of documents and examinations for discovery. Colonial Countertops was ordered to pay $1,250.00 in costs.

13 In the meantime, on October 12, 2012, prior to filing its statement of defence in the Ontario proceedings, the plaintiff had filed a notice of civil claim against the defendant in the British Columbia Supreme Court, alleging a breach of the contract with the defendant as well as other causes of action.

14 The defendant filed a jurisdictional response to the notice of civil claim on February 25, 2013 and its response to civil claim on March 27, 2013. The response was filed pursuant to Rule 21-8(1), which provides that a party may, after filing a jurisdictional response, apply to strike the pleading or seek a stay of the proceeding on the ground that the court lacks jurisdiction. This application was filed October 1, 2013.

Issues

15 There are two issues for resolution on this application:

1. Does this Court have territorial competence with respect to this proceeding?

2. If the answer is yes, should this Court decline to exercise territorial competence because there is a more appropriate forum to adjudicate this dispute?

Discussion and Analysis

Overview

16 The issues in this application are issues of private international law — sometimes referred to as "conflicts of law" — and in BC are governed by the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], which came into force in this province in 2006. At common law those same issues were referred to as "jurisdiction *simpliciter*" — a yes/no question as to whether the court has jurisdiction — and "*forum non conveniens*" — a discretionary decision about whether the court should decline jurisdiction. The *CJPTA* replaced these terms: jurisdiction *simpliciter* became territorial competence, and *forum non conveniens* the discretion as to the exercise of territorial competence, but their role in the analysis remains the same.

Territorial Competence

17 Territorial competence is determined by reference to Part 2 of the *CJPTA*. According to s. 3 of the *CJPTA*, a court has territorial competence in a proceeding against a person only if:

> **3** . . .
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction,
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
>
> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
>
> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

18 Subsections (a)-(d) do not apply in this case. That leaves subsection (e), a "real and substantial connection" between the province and the facts of the proceeding, as the only

possible basis for territorial competence. Section 10 of the *CJPTA* provides a list of situations, which presumptively establish a real and substantial connection. The relevant portions of the provision read as follows:

> **10** Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
>
> . . .
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
>
> . . .
>
> . . .
>
> (g) concerns a tort committed in British Columbia,
>
> (h) concerns a business carried on in British Columbia,
>
> (i) is a claim for an injunction ordering a party to do or refrain from doing anything
>
> (i) in British Columbia, or
>
> (ii) in relation to property in British Columbia that is immovable or movable property...

19 The plaintiff's notice of civil claim pleads damages for breach of the countertop installation contract and says that s. 10(e) applies as the proceeding concerns a contract that was substantially performed in BC. However the plaintiff also seeks damages for trespass and a mandatory injunction requiring the removal of the trespass. The alleged trespass relates to the granite products that the plaintiff ordered from the defendant prior to the termination of the contract, as those products remain stored on the plaintiffs' property. The plaintiff submits that as the tort of trespass is pleaded with regards to the leftover granite, the claim concerns a tort committed in BC (s. 10(g)). They also say that s. 10(i) applies because they are seeking an injunction requiring that the defendants remove the unusable granite and stone from the plaintiff's property.

20 The defendant concedes that its argument on the issue of territorial competence is not

strong. Essentially, the defendant raised the issue in its application in order to comply with the decision in *O'Brien v. Simard*, 2006 BCCA 410 (B.C. C.A. [In Chambers]), which held that a defendant must first challenge the court's territorial competence pursuant to Rule 21-8 before it can invoke the doctrine of *forum non conveniens*. Although the defendant argued in its application that the circumstances listed under s. 10 did not apply to this case, counsel did not press the point strongly in oral submissions.

21 In my view the court has territorial competence based on a real and substantial connection arising from the performance, to a substantial extent, of the contractual obligations in BC (s. 10(e)). Maple Terrazzo entered into the contract in order to have Colonial Countertops service Home Depot's customers in BC, as it did not operate in the western provinces, and all fabrication, installation and related services took place in BC. As a result I need not address the other possible reasons for jurisdiction, although I will return to some of those matters as they relate to the *forum non conveniens* issue.

Discretion as to the Exercise of Territorial Competence

22 Once a court concludes it has territorial competence that is not the end of the matter. As set out in s. 11(1) of the *CJPTA*, the court may decline to exercise jurisdiction in the proceeding "on the ground that a court of another state is a more appropriate forum in which to hear the proceeding." The decision to stay a proceeding on that basis is governed by s. 11(2):

> **11** (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

23 Section 11 of the *CJPTA* is a complete codification of the common law test for *forum non conveniens*: *Lloyd's Underwriters v. Cominco Ltd.*, 2009 SCC 11 (S.C.C.) [hereinafter Teck Cominco] at para. 22. The purpose of the *forum non conveniens* analysis, and therefore of s. 11,

is "to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties" (*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), at 912). The factors listed in s. 11(2) reflect a "comity-based approach", that is, an attitude of respect for and deference to the courts of other provinces and the principles of order and fairness (*Teck Cominco*, para. 23; *Van Breda v. Village Resorts Ltd.*, 2012 SCC 17 (S.C.C.) [hereinafter Club Resorts Ltd.] at para. 74).

24 The burden is on the defendants to show that Ontario is the more convenient forum: *Club Resorts Ltd.* at para. 103.

25 The test for declining jurisdiction under s. 11 is whether another forum is "more appropriate." At common law, the test was whether another forum was "*clearly* more appropriate." The defendant says that this change in the language is significant as, in its submission, "more appropriate" implies a lower standard than "clearly more appropriate."

26 Courts in BC have continued to use the phrase "clearly more appropriate", even after the enactment of the *CJPTA*: see for example *Ruloff Capital Corp. v. Hula*, 2013 BCSC 322 (B.C. S.C.), aff'd 2013 BCCA 514 (B.C. C.A.); and *Knapp Consulting Inc. v. Continovation Services Inc.*, 2012 BCSC 887 (B.C. S.C.). However, courts have also used the phrase "more appropriate", or stated that the burden is on the applicant to "clearly establish" or "clearly show" that there is a more appropriate forum (see for example *Purple Echo Productions Inc. v. KCTS Television*, 2008 BCCA 85 (B.C. C.A.) at paras. 59-60, and *Original Cakerie Ltd. v. Renaud*, 2013 BCSC 755 (B.C. S.C.) [hereinafter The Original Cakerie Ltd.] at para. 49). All three phrases appear to be used interchangeably in the jurisprudence; they are sometimes used interchangeably even within a single case: see *Wang v. Sun*, 2014 BCSC 87 (B.C. S.C.). This suggests that "clearly more appropriate," "more appropriate" and "clearly established as more appropriate" all refer to a single standard.

27 As noted, the Supreme Court of Canada held in *Teck Cominco* that s. 11 of the *CJPTA* was intended to codify the common law test for *forum non conveniens*. Again, this suggests that "more appropriate" and "clearly more appropriate" are simply different ways of referring to the same test.

28 The Supreme Court of Canada discussed the test for *forum non conveniens*, and the meaning of the word "clearly," in *Club Resorts Ltd.*:

> [108] Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established..... On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere....

> [109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation....
>
> [Emphasis added.]

29 From these comments it appears that the test, no matter the wording, is focused on determining which forum is best able to dispose of the litigation fairly and efficiently. If the two forums are roughly equivalent, the court should dismiss the application for a stay. As a result if the defendant can establish that Ontario is in fact a more appropriate forum than BC, the test is met.

30 I will now address the application of the relevant factors from s. 11(2) to the facts of this case.

Comparative Convenience and Expense

31 The defendant's head office and manufacturing facility are located in Ontario. The defendant does not conduct business in British Columbia. It is incorporated in Ontario and is not extra-provincially registered in British Columbia.

32 The defendant proposes to call eight witnesses at trial, all resident in Ontario. The defendant submits that the costs of transportation and accommodation for eight witnesses would be significant compared to the costs of their attendance in Ontario.

33 The plaintiff submits that the balance of convenience favours the plaintiff given the plaintiff is a British Columbia company, is not extra-provincially registered in Ontario, and has its head office in Victoria and its warehouse in Kelowna, British Columbia. The plaintiff also submits that the number of witnesses to be called by each side will depend on the issues at trial and the results of discovery and that there is no need for the defendant to call any individuals from Home Depot as the plaintiff was not a party to any contract with Home Depot.

34 Without determining the issue, I do not agree that it is clear that there will be "no need" to

call witnesses from Home Depot. It appears that there is some issue between the parties as to when Maple Terrazzo first found out that Home Depot intended to cancel the installation and distribution contracts for western Canada. If this does become a point in issue in the dispute, witnesses from Home Depot could be required.

35 The plaintiff did not state how many witnesses they might call, although it did indicate that they would all be from BC.

36 On this factor I am satisfied that given the costs involved in witnesses attending at trial the balance of convenience favours the defendant.

Applicable Law

Proper Law of the Contract

37 The defendant submits that the contract was made in Ontario and that the applicable law of the contract is that of Ontario. They say that training took place there, their overarching contracts with Home Depot included a choice of law clause for Ontario, and customer complaints were dealt with there. The plaintiff submits that the contract was made in BC and that it's most substantial connection is to BC.

38 The proper law of a contract is that which the parties intended to apply, objectively ascertained: *Schwarzinger v. Bramwell*, 2011 BCSC 283 (B.C. S.C.) at para. 75. In In this case, there is no clause in the contract respecting jurisdiction or applicable law. Where there is no express choice of law, the proper law of a contract is to be determined:

> . . .
>
> ... by considering the contract as a whole in light of all of the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.
>
> . . .

See *Imperial Life Assurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443 (S.C.C.), at 448.

39 In *Imperial Life Assurance* the court provided a list of factors that may be considered in determining the proper law: the domicile or residence of the parties; the location of a party's corporate headquarters; the place where a contract is made and the place where it is to be performed; the economic connection of the contract with some other transaction; the nature of the subject matter of the contract; and any other fact "which serves to localize the contract" (at 448).

40 The first two factors here are offsetting. The plaintiff is resident here and the defendant is resident in Ontario. Their corporate headquarters are similarly located.

41 Turning to the third factor, there is some disagreement about where, in fact, the contract was formed: the defendant presented a written version of the contract to the plaintiff in BC, and the defendant submits the plaintiff accepted the offer by faxing a signed copy of the contract to the defendant in Ontario.

42 The plaintiff on the other hand argues that the plaintiff, in faxing the signed copy to Ontario, made the offer to the defendant and the defendant accepted it by counter-signing and returning the agreement with the result that the contract was made in BC.

43 I am of the view that the defendant made an offer when it presented the written contract to the plaintiff in BC. An offer "means the signification by one person to another of his willingness to enter into a contract with him on certain terms. The language or conduct involved must be capable of being interpreted as revealing an intention to be bound" (G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Thomson Reuters, 2011) at 27).

44 The general rule is that a contract is made at the place where the offeror receives acceptance. In *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.), at para. 27 the court confirmed that this rule applies to acceptances sent by facsimile transmission, so that the contract is made at the place where the fax is received. As a result the defendant received acceptance of the offer in Ontario upon receipt of the facsimile transmission. The contract was therefore made in Ontario. The fact that the defendant counter-signed the contract and returned it does not change the fact that the defendant made the offer and the defendant accepted it.

45 However in *Imperial Life Assurance* the Court was clear that the place where a contract is made "is not by any means decisive" in determining the proper law.

46 The plaintiff argues that substantive performance of the contract (fabrication and installation) took place in BC. While the plaintiff served customers here in BC, I note that some elements of performance took place in or were funneled through Ontario. All purchase orders and similar communications with Home Depot went through the defendant in Ontario, and the granite products were produced in Ontario; the plaintiff had to order materials from the defendant in Ontario before it could fulfill any customer orders.

47 The economic connection of the contract with some other transaction, the fifth factor, favours the defendant. Although the plaintiff did not have a contract with Home Depot, they understood the nature of their agreement and its relationship with the overarching distribution and installation contract between the defendant and Home Depot. The contract refers to Colonial

Countertops as a "subcontractor" and identifies Home Depot Canada as the party holding the main contract with the defendant. That transaction is an Ontario-based transaction and therefore suggests that Ontario law applies.

48 Without deciding the matter, as it need not be resolved on this application, I am of the view that Ontario law is likely the proper law of the contract. I do not think this factor is particularly strong, however. As the parties indicated in oral submissions, the common law of contract is essentially the same in BC and Ontario. There is no particular advantage that arises for either party under the law of either province and there will be no difficulty with proving foreign law, no matter which forum hears the matter.

Trespass

49 The plaintiff also alleges that the defendant is trespassing on the plaintiff's property by failing to remove its unused granite and stone. It says the stone is now interfering with the plaintiff's use and enjoyment of their premises.

50 The plaintiff submits that as a general rule the law to be applied in torts is the law of the *lex loci delicti*, or the place where the tortious activity occurred: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.) at para. 42. They say that in this case the *lex loci delicti* is BC.

51 The defendant responds to this submission by saying that no trespass has occurred because the plaintiff admits that it ordered the impugned materials from the defendant. The contract does not contain a provision allowing the plaintiff to return any granite materials once ordered.

52 The tort of trespass is committed by entry upon, remaining upon or placing or projecting any object upon land in the possession of another without lawful justification (L.N. Klar et al, *Remedies in Tort* (Toronto: Carswell, 1987), at 23-15).

53 While not determining the issue, in my view the trespass claim is of questionable merit given the plaintiff ordered and willingly placed the products on its property. As a result the allegation of trespass, and the potential application of the *lex loci delicti*, is not a factor that weighs in favour of the plaintiff in the analysis of *forum non conveniens*.

Parallel Proceedings

54 Parallel actions in two jurisdictions are to be avoided: *Lloyd's Underwriters v. Cominco Ltd.*, 2007 BCCA 249 (B.C. C.A.) at para. 79. As indicated by ss. 11(2)(c) and (d), where possible the courts should use their discretion to decline jurisdiction to avoid a situation where

the same cause of action or set of facts gives rise to parallel legal proceedings and (potentially) conflicting judgments.

55 The defendant submits that if the BC proceeding is not stayed or dismissed there will be two separate legal proceedings in two jurisdictions that are essentially identical. The defendant also says that the plaintiff has attorned to the jurisdiction of the Ontario court.

56 The plaintiff denies that the proceedings are parallel, noting that the Ontario claim is for unpaid invoices, an issue that would become moot if the claim were litigated in BC. In addition the plaintiff denies attorning to the jurisdiction of the Ontario court.

57 In *Westec Aerospace Inc. v. Raytheon Aircraft Co.*, 1999 BCCA 243 (B.C. C.A.), the Court of Appeal at para. 25 set out the following test to be applied when considering a stay application where one party alleges the existence of a parallel proceeding:

> [25] . . .
>
> (1) Are there parallel proceedings underway in another jurisdiction?
>
> (2) If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
>
> (3) Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?

58 The plaintiff's submission that the Ontario action would become moot if the matter were tried in BC would apply equally to the effect on the BC action if the matter were tried in Ontario. In Ontario the defendant's claim is based in debt, for goods ordered and delivered but never paid for. In their statement of defence to the Ontario claim, the plaintiff raised the issue of the return of products. In BC the plaintiff claims for work performed and not paid for and the return of granite products, those being the products for which the defendant seeks payment.

59 In *Westec*, the court adopted the definition of "parallel proceedings" from *"Abidin Daver" (The)*, [1984] 1 All E.R. 470 (U.K. H.L.), where Lord Diplock described parallel proceedings as "litigation between the same parties about the same subject matter" (para. 27). The court also noted that parallel proceedings are those that "raise the possibility of inconsistent or conflicting judgments being given" (para. 28).

60 In this case both actions arise out of the termination of, and the rights under, the contract between the parties. It is clearly litigation between the same parties about the same subject

matter. Further, if both actions continue, there is the potential for conflicting judgments.

61 While parallel actions dealing with the same subject matter are to be avoided, if the party resisting the application to stay can demonstrate the possible loss of a juridical advantage then that may be a factor permitting parallel actions to avoid an injustice (*472900 B.C. Ltd. v. Thrifty Canada Ltd.* (1998), 168 D.L.R. (4th) 602 (B.C. C.A.)) However the plaintiff here does not say there is any juridical advantage available in BC that will not be available in Ontario.

62 Applying the *Westec* test, there are clearly parallel proceedings underway in Ontario. It has not been shown that Ontario is not an appropriate forum for resolution of the dispute. The connection with Ontario is not "tenuous," as discussed in *Teck Cominco* at para. 36; a number of witnesses and one party reside there, and the subject matter of the dispute is focused on Maple Terrazzo's actions in terminating the contract, which took place in Ontario. While the services covered under the contract were performed in BC, the issue in both the BC and Ontario actions is breach of contract by termination of the contract and non-payment. As such, the subject of the actions does not engage the services in BC as would be the case were the litigation over breaches arising from deficient performance.

63 Finally, the plaintiff has not provided cogent evidence that there is some personal or juridical advantage available in BC such that it would cause the plaintiff to suffer an injustice if deprived of it.

64 With respect to the issue of attornment Maple Terrazzo commenced action against Colonial Countertops in Ontario on August 1, 2012. The plaintiff filed a statement of defence on the merits on October 16, 2012. That statement of defence also requested a stay on the basis of *forum non conveniens*.

65 The issue is: did the plaintiff attorn to the jurisdiction of the Ontario Court by filing the statement of defence? And if so, what effect does that have on their ability to challenge Ontario's jurisdiction or request a stay of proceedings in that forum?

66 In *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722 (Ont. C.A.), aff'd 2012 SCC 9 (S.C.C.), at para. 35, the court said this about attornment:

> [35]... One of the ways that a defendant consents to the jurisdiction of an Ontario court is by attornment — for example, as in this case, by delivering a statement of defence responding to the merits of the plaintiffs' claim:...

67 In this instance I accept that by filing a statement of defence the plaintiff has attorned to the jurisdiction of the Ontario court. As such they have consented to Ontario's jurisdiction and

cannot apply for a stay on the basis that Ontario does not have jurisdiction *simpliciter*. However, that does not resolve the issue of whether that court is the more appropriate forum to exercise that jurisdiction.

68 In BC a party who attorns to the jurisdiction cannot ask the court to decline to exercise that jurisdiction; in other words, attornment is a bar to applying for a stay under s. 11 of the *CJPTA*: *O'Brien*. That does not appear to be the position in Ontario, in *Momentous* the court went on to say that:

> [44]... Attornment, however, is relevant only to the question whether an Ontario court has jurisdiction. It has little or no relevance to the question whether an Ontario court should exercise that jurisdiction.

69 In Ontario a defendant may apply to challenge jurisdiction *simpliciter* or *forum non conveniens* in three ways: under Rule 17.06 or Rule 21.01(3) of the *Ontario Rules of Civil Procedure* or under s. 106 of the *Courts of Justice Act*. R.S.O. 1990, c. 43. Colonial Countertops cannot rely on Rule 17.06 as that rule says that a party may only apply for a stay "before delivering a defence, notice of intent to defend or notice of appearance."

70 Rule 21.01(3) says as follows:

> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> . . .
>
> (a) the court has no jurisdiction over the subject matter of the action;
>
> . . .
>
> (c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter;...
>
> . . .
>
> 21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs.

71 In *Momentous* the court noted that:

> [45]... Nothing in rule 21.01(3)(a) suggests that a defendant is precluded from contesting jurisdiction because its statement of defence responds to the merits of a plaintiff's claim.

> The defendant is required only to bring its motion "quickly after the commencement of the suit":...

72 In this instance the plaintiff (the defendant in the Ontario action) has not brought such an application, quickly or otherwise, although Colonial Countertops did plead in their Ontario statement of defence that British Columbia was the most appropriate forum.

73 It appears that the Ontario courts have discretion to dismiss an application under Rule 21.01(3) where it was not made promptly: *Fleet Street Financial Corp. v. Levinson*, [2003] O.T.C. 94 (Ont. S.C.J.) at para. 16. However, delay is not a complete bar to hearing a motion, and the court may instead simply take the delay into account in awarding costs: *North York Academy of Golf & Practice Range Inc. v. Toronto (City)* (2008), 170 A.C.W.S. (3d) 855 (Ont. S.C.J.) [2008 CarswellOnt 6154 (Ont. S.C.J.)].

74 Further, a party can apply under s. 106 of the *Courts of Justice Act*, which says that the court, "on its own initiative or on motion by any person, may stay any proceeding the court on such terms as are considered just." There are some cases that suggest that a party who attorns cannot challenge jurisdiction *simpliciter* under s. 106 but it appears that a party may still argue for a stay based on *forum non conveniens*, regardless of attornment: *Kinch v. Pyle*, [2004] O.T.C. 1117 (Ont. S.C.J.) at paras. 17-18; *Denis v. Mouvement Desjardins* (2006), 154 A.C.W.S. (3d) 358 (Ont. S.C.J.) [2006 CarswellOnt 8433 (Ont. S.C.J.)].

75 All that being said, while it may be possible for Colonial Countertops to apply for a stay in Ontario, they have not yet done so. Nor does it appear that they have taken any steps to do so over the past year and a half. Further, the fact that Colonial Countertops has attorned to Ontario's jurisdiction emphasizes that Ontario is an appropriate forum for the purposes of the *Westec* test.

76 In my view the lack of any application to challenge the Ontario action and the more advanced state of that action, combined with the lack of any juridical advantage flowing to Colonial Countertops by litigation in BC, strongly favour resolution of the matter in Ontario.

Enforcement of a Judgement

77 The plaintiff seeks an award of damages as well as a mandatory injunction requiring the removal of the trespass. If the plaintiff is successful in the BC action, it would have to register its judgment in Ontario pursuant to the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5, as the defendant has no assets in BC.

78 In addition, the plaintiff would presumably also seek to enforce any injunction obtained.

An injunction is not enforceable under the Ontario *Reciprocal Enforcement of Judgments Act*, as that *Act* restricts enforcement to judgments where a sum of money is payable. Enforcement of a judgment would require further proceedings in Ontario. In addition such an injunction could only be executed in BC and the defendant as an Ontario company without any connection to BC would not be bound by an injunction issued by a BC court.

79 Of course any judgment obtained by the defendant in the Ontario action would face the same requirement of registration under the BC *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, but without the difficulty faced by the plaintiff with respect to its injunctive relief.

80 The plaintiff submits that any judgment for damages obtained in BC can in fact be enforced as readily in Ontario as in BC (which ignores the injunction issue). The plaintiff also submits that if the court accepts that enforcement of a BC judgment would be more difficult in Ontario that such inconvenience would only relate to the plaintiff and since the plaintiff choses to pursue the matter in BC, that is their choice (*The Original Cakerie Ltd.* at para. 58).

81 Both parties face the same requirement to extra-provincially register any judgment obtained in their respective actions. In my view this factor is neutral.

Conclusion

82 As noted earlier, this is a discretionary matter. Taking into account the factors I have referred to I conclude that Ontario is a more appropriate forum in which to resolve the dispute. I therefore exercise my discretion to decline to take jurisdiction in this case. In the result, the defendant's application is granted and the plaintiff's action is stayed.

Application granted.

2008 SCC 9, 2008 CSC 9
Supreme Court of Canada

Dunsmuir v. New Brunswick

2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 2008 CSC 9, [2008] 1 S.C.R. 190, [2008] A.C.S. No. 9, [2008] S.C.J. No. 9, 164 A.C.W.S. (3d) 727, 170 L.A.C. (4th) 1, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, 372 N.R. 1, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 844 A.P.R. 1, 95 L.C.R. 65, J.E. 2008-547, D.T.E. 2008T-223

David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2007
Judgment: March 7, 2008*
Docket: 31459

Bastarache, LeBel JJ. (McLachlin C.J.C., Fish, Abella JJ. concurring):

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel, administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. Facts

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of

Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal".

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice

and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.
>
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> . . . . .
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession...

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made

known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. Decisions of the Adjudicator

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Dr. Everett Chalmers Hospital v. Mills* (1989), 102 N.B.R. (2d) 1 (N.B. C.A.).

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. Judicial History

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270 (N.B. Q.B.)

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed

under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27 (N.B. C.A.)

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the

adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *A.U.P.E. v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 (S.C.C.). However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since

a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's statutory interpretation determination

A. Judicial Review

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

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. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at p. 234; also *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third,

legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (T. A. Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*British Columbia (Minister of Finance) v. Woodward Estate* (1972), [1973] S.C.R. 120 (S.C.C.), at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), [hereinafter *Bibeault*], at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*, at pp. 237-38:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act*, and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. Reconsidering the Standards of Judicial Review

34 The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian

administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E., Local 79*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), paras. 101-103). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like

> "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. M. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness. ...

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.), at paras. 40-41, *per* LeBel J.

C. Two Standards of Review

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the

inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful

attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above,

neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600; *Q.*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E., Local 79*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan* (1974), [1975] 1 S.C.R. 517 (S.C.C.), where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be

decided on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672, 2004 SCC 26 (S.C.C.)). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.). Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.); Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (S.C.C.). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers.

Such was the case in *Toronto (City) v. C.U.P.E., Local 79*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, [2004] 2 S.C.R. 185, 2004 SCC 39 (S.C.C.).

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. Application

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s.

100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *A.U.P.E. v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Dr. Everett Chalmers Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), *by simply stating that cause is not alleged*" (*ibid*, emphasis added). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty

that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

[*the balance of this decision including the minority judgments is omitted*]

2016 SCC 47, 2016 CSC 47
Supreme Court of Canada
Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.

2016 CarswellAlta 2106, 2016 CarswellAlta 2107, 2016 SCC 47, 2016 CSC 47, [2015] S.C.C.A. No. 161, [2016] 12 W.W.R. 215, [2016] 2 S.C.R. 293, [2016] A.W.L.D. 4996, [2016] A.W.L.D. 5048, [2016] A.W.L.D. 5049, [2016] A.W.L.D. 5050, [2016] A.W.L.D. 5051, [2016] S.C.J. No. 47, 271 A.C.W.S. (3d) 419, 402 D.L.R. (4th) 236, 54 M.P.L.R. (5th) 1, 8 Admin. L.R. (6th) 179, J.E. 2016-1878

City of Edmonton (Appellant) v. Edmonton East (Capilano) Shopping Centres Limited (as represented by AEC International Inc.) (Respondent) and Attorney General of British Columbia, Assessment Review Board for the City of Edmonton and British Columbia Assessment Authority (Interveners)

McLachlin C.J.C., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown JJ.

Heard: March 23, 2016
Judgment: November 4, 2016
Docket: 36403

APPEAL by city from judgment reported at *Edmonton East (Capilano) Shopping Centres Ltd. v. Edmonton (City)* (2015), 2015 ABCA 85, 2015 CarswellAlta 324, 382 D.L.R. (4th) 85, 80 Admin. L.R. (5th) 240, [2015] 5 W.W.R. 547, 34 M.P.L.R. (5th) 204, 599 A.R. 210, 643 W.A.C. 210, 12 Alta. L.R. (6th) 236 (Alta. C.A.), upholding decision quashing Assessment Review Board's decision that, on city's request, increased assessment of taxpayer's property.

Karakatsanis J. **(Abella, Cromwell, Wagner and Gascon JJ. concurring):**

I. Introduction

1 Alberta residents may dispute their municipal property assessment before a local assessment review board. When one Edmonton taxpayer did so, the assessment review board decided to *increase* the assessment the taxpayer had disputed. The taxpayer appealed, submitting that when a taxpayer disputes an assessment the Board lacks the statutory power to increase the assessment and may only lower or confirm it. The Alberta Court of Queen's Bench agreed with

the taxpayer, as did the Court of Appeal. The City of Edmonton now appeals to this Court.

2 This appeal raises two issues: (1) What is the appropriate standard of review for the Board's implicit decision that it could increase the assessment? (2) Does the decision withstand scrutiny on that standard?

3 For the following reasons, I conclude that the standard of review for the Board's decision is reasonableness and that it was reasonable for the Board to find it had the power to increase the assessment. Accordingly, I would allow the appeal and reinstate the decision of the Board.

II. Facts

4 Edmonton East (Capilano) Shopping Centres Limited (the "Company") owns the Capilano Shopping Centre in Edmonton, Alberta. For the 2011 taxation year, the City of Edmonton assessed the value of the mall as approximately $31 million.

5 In March 2011, pursuant to s. 460 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 ("*MGA*"), the Company disputed this assessment by filing a complaint with the Assessment Review Board for the City of Edmonton. The Company's position was that the assessed value exceeded the market value of the mall and was inequitable when compared to the assessed value of other properties. It sought a reduction in the assessed value to approximately $22 million.

6 When reviewing the Company's submissions and evidence, the City discovered what it determined was an error in its original assessment. The City originally classified the mall as a "community centre" with the value of the rent from its anchor tenant, Wal-Mart, assessed at $3.50 per square foot. The City now said the mall should have been classified as a "power centre" with the value of the rent from Wal-Mart assessed at $11.50 per square foot. This change in position was based in large part on the City's review of the assessed value of the rents from three other Wal-Marts in Edmonton. In June 2011, the City informed the Company that it would seek an increase from the Board. In its written submissions to the Board, the City requested that the Board increase the assessed value to approximately $45 million.

7 While the Company expressed concern about the City's change in position, it did not dispute the Board's power to increase the assessment in this case.

8 The Board ultimately increased the assessment to approximately $41 million. On appeal to the Alberta Court of Queen's Bench, the chambers judge set aside the Board's decision and remitted the matter to the Board for a hearing *de novo*. This order was affirmed on appeal to the Alberta Court of Appeal.

III. The Statutory Scheme and Provisions

9 Alberta's *MGA* regulates property assessments in the province. The scheme operates on an annual basis, with municipalities preparing assessments each year (s. 285). Property assessors are subject to an overarching duty to prepare assessments "in a fair and equitable manner" (s. 293(1)).

10 The *MGA* permits any "assessed person" or "taxpayer" to contest a municipal property assessment before an assessment review board (s. 460). After hearing a complaint, an assessment review board may "change" the assessment or "decide that no change is required" (s. 467(1)). "An assessment review board must not alter any assessment that is fair and equitable, taking into consideration ... the valuation and other standards set out in the regulations" (s. 467(3)). The valuation standard for most property is its "market value" (*Matters Relating to Assessment and Taxation Regulation*, Alta. Reg. 220/2004, s. 4(1)(a)).

11 A decision of an assessment review board may be appealed to the Court of Queen's Bench, with permission, on "a question of law or jurisdiction of sufficient importance to merit an appeal" (s. 470(1) and (5) *MGA*). Where the appeal is granted, the matter is referred back to the assessment review board "and the board must rehear the matter and deal with it in accordance with the opinion of or any direction given by the Court on the question of law or the question of jurisdiction" (s. 470.1(2)).

12 In some circumstances, assessments may also be changed outside the complaints process. "If it is discovered that there is an error, omission or misdescription in any of the information shown on the assessment roll ... the assessor may correct the assessment roll for the current year only" (s. 305(1) *MGA*). However, if a complaint has been made about a property, "the assessor must not correct or change the assessment roll in respect of that property" until an assessment review board has made a decision or the complaint has been withdrawn (s. 305(5)).

IV. Decisions Below

A. Assessment Review Board, No. 0098 56/11, August 2, 2011

13 The Board noted the Company's position that the City should not be able to effectively submit a new assessment based on a power centre classification. The Board did not address this argument except to say "the Board decided to continue the merit hearing and place appropriate weight on the evidence presented". Implicit in the Board's analysis was a decision that it had the authority to increase the assessment should it so choose.

14 On the merits of the assessment, the Board agreed in part with the City: it found that the mall was "something more" than a community centre, though not quite a power centre. It

assessed the value of the rent from Wal-Mart at $10.50 per square foot, reasoning in part that it would be inequitable for the assessed value to be as low as $3.50 per square foot when other nearby Wal-Marts had been assessed at $10.50 or $11.50 per square foot. The Board increased the overall assessment to approximately $41 million.

B. Court of Queen's Bench, 2013 ABQB 526, 570 A.R. 208 (Alta. Q.B.) — Rooke A.C.J.

15 The Court of Queen's Bench granted permission to appeal, including on the issue of whether the Board "was entitled to proceed on a new assessment" (para. 14, quoting 2012 ABQB 445 (Alta. Q.B.), at para. 60).

16 Rooke A.C.J. stated that the issue on appeal was a true question of jurisdiction of the kind discussed in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), and the standard of review was correctness.

17 Turning to the substantive issue, the chambers judge concluded that when a taxpayer complains about an assessment, the municipality must defend the assessed amount as correct and cannot ask the Board to change the assessment. Noting that, under the *MGA*, only assessed persons and taxpayers may complain about an assessment (s. 460(3)), the chambers judge reasoned that the City had tried to do indirectly what it cannot do directly. He concluded the Board lacked jurisdiction to increase the assessment at the City's request, set aside the Board's decision and remitted the matter to the Board for a hearing *de novo*.

C. Court of Appeal, 2015 ABCA 85, 599 A.R. 210 (Alta. C.A.) — Slatter, Berger and Rowbotham JJ.A.

18 Writing for the court, Slatter J.A. agreed that the standard of review was correctness. While he did not agree that the issue on appeal was a true question of jurisdiction, he concluded that the decisions of a tribunal subject to a statutory right of appeal (or a right to apply for leave to appeal), rather than ordinary judicial review, should be reviewed on the correctness standard.

19 On the substantive issue, the Court of Appeal concluded that s. 467(1) does not empower the Board to increase an assessment at the City's request. The City did not have the right to seek an increase: it was not empowered to make a complaint under s. 460(3). The court agreed with the chambers judge that the City's power to correct errors (s. 305) did not apply here, because there was no error; the City simply changed its mind. The Court of Appeal concluded that the Board erred in increasing the assessment and dismissed the Company's appeal.

V. Analysis

A. Standard of Review

20 In this case, Slatter J.A. said: "The day may come when it is possible to write a judgment like this without a lengthy discussion of the standard of review" (para. 11). That day has not come, but it may be approaching. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 (S.C.C.), my colleague Abella J. expressed an interest in revisiting the standard of review framework. The majority appreciated Justice Abella's efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability. In my view, the principles in *Dunsmuir* should provide the foundation for any future direction. However, any recalibration of our jurisprudence should await full submissions. This appeal was argued on the basis of our current jurisprudence and I proceed accordingly.

21 The *Dunsmuir* framework balances two important competing principles: legislative supremacy, which requires the courts to respect the choice of Parliament or a legislature to assign responsibility for a given decision to an administrative body; and the rule of law, which requires that the courts have the last word on whether an administrative body has acted within the scope of its lawful authority (paras. 27-31).

(1) Presumption of Reasonableness

22 Unless the jurisprudence has already settled the applicable standard of review (*Dunsmuir*, at para. 62), the reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 (S.C.C.), at para. 46). This presumption of deference on judicial review respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts. A presumption of deference on judicial review also fosters access to justice to the extent the legislative choice to delegate a matter to a flexible and expert tribunal provides parties with a speedier and less expensive form of decision making.

23 The *Dunsmuir* framework provides a clear answer in this case. The substantive issue here — whether the Board had the power to increase the assessment — turns on the interpretation of s. 467(1) of the *MGA*, the Board's home statute. The standard of review is presumed to be reasonableness.

(2) Categories That Rebut the Presumption of Reasonableness

24 The four categories of issues identified in *Dunsmuir* which call for correctness are

constitutional questions regarding the division of powers, issues "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise", "true questions of jurisdiction or *vires*", and issues "regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58-61). When the issue falls within a category, the presumption of reasonableness is rebutted, the standard of review is correctness and no further analysis is required (*Canadian Artists' Representation / Le Front des artistes canadiens v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 (S.C.C.), at para. 13; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), at para. 22).

(a) Is the Issue on Appeal a True Question of Jurisdiction?

25 The chambers judge found, and the Company submits, that whether the Board had the power to increase the assessment is a true question of jurisdiction reviewable on correctness. The Court of Appeal did not agree that this issue was a true question of jurisdiction.

26 This category is "narrow" and these questions, assuming they indeed exist, are rare (*Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615 (S.C.C.), at para. 39; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at paras. 33-34). It is clear here that the Board may hear a complaint about a municipal assessment. The issue is simply one of interpreting the Board's home statute in the course of carrying out its mandate of hearing and deciding assessment complaints. No true question of jurisdiction arises.

(b) Is a Statutory Right of Appeal a New Category of Correctness?

27 The Court of Appeal concluded that when the decisions of a tribunal are subject to a statutory right of appeal (or a right to apply for leave to appeal), rather than ordinary judicial review, the standard of review on such appeals is correctness. It determined that a statutory appeal should be recognized as "an addition to or a variation of" the list of correctness categories enumerated in *Dunsmuir* (Court of Appeal reasons, at para. 24). Slatter J.A. reasoned that the existence of a statutory right of appeal is a strong indication that the legislature intended the courts to show less deference than they would in an ordinary judicial review.

28 I disagree. In my view, recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence from this Court.

29 At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (*McLean*; *Alliance Pipeline Ltd. v.*

Smith, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.); *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, 2009 SCC 40, [2009] 2 S.C.R. 764 (S.C.C.); *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.); *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 (S.C.C.); *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219 (S.C.C.)).

30 In *Saguenay*, this Court confirmed that whenever a court reviews a decision of an administrative tribunal, the standard of review "must be determined on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal" (para. 38, per Gascon J.; see also *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.), at paras. 17, 21, 27 and 36; *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20, [2003] 1 S.C.R. 247 (S.C.C.), at paras. 2 and 21).

31 The Court of Appeal relied on this Court's decision in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161 (S.C.C.), where the statutory appeal clause was referred to when finding the standard of review was correctness (para. 36). However, the Court in *Tervita* relied upon the unique statutory language of that particular appeal clause: a decision of the tribunal was appealable "as if it were a judgment of the Federal Court" (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1)). Obviously, judgments of the Federal Court do not benefit from deference on appeal (except on questions of fact, for entirely different reasons). *Tervita* does not stand for the proposition that all issues arising on all statutory appeals are reviewable on the correctness standard.

(3) Contextual Analysis

32 The Court of Appeal also conducted a review of the relevant contextual factors to support the conclusion that the standard of review is correctness. The presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness (*Saguenay*, at para. 46; *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.), at para. 16).

33 The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer: "... in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?"

(2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 25). Expertise may also arise where legislation requires that members of a given tribunal possess certain qualifications. However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: "... at an institutional level, adjudicators ... can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir*, at para. 68). As this Court has often remarked, courts "may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work" (*McLean*, at para. 31, quoting *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.), at p. 1336, per Wilson J.).

34 As discussed, this Court has often applied a reasonableness standard on a statutory appeal from an administrative tribunal, even when the appeal clause contained a leave requirement and limited appeals to questions of law (see, e.g., *Sattva*), or to questions of law or jurisdiction (see, e.g., *McLean*, *Smith*, *Bell Canada*). In light of this strong line of jurisprudence — combined with the absence of unusual statutory language like that at issue in *Tervita* — there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same as in those cases. The presumption of reasonableness is not rebutted.

35 I would add this comment. The contextual approach can generate uncertainty and endless litigation concerning the standard of review. Subject to constitutional constraints, the legislature can specify the applicable standard of review. In British Columbia, for example, the legislature has displaced almost the entire common law on the standard of review (see the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 58 and 59). Unfortunately, clear legislative guidance on the standard of review is not common.

B. Was it Reasonable for the Board to Find It Could Increase the Assessment?

(1) Reasonableness Review in the Absence of Reasons

36 A decision cannot be reasonable unless it "falls within a range of possible, acceptable outcomes" (*Dunsmuir*, at para. 47, per Bastarache and LeBel JJ.). Reasonableness is also concerned with "the existence of justification, transparency and intelligibility within the decision-making process" (*ibid.*). When a tribunal does not give reasons, it makes the task of determining the justification and intelligibility of the decision more challenging.

37 When procedural fairness requires a tribunal to provide some form of reasons, a complete

failure to do so will amount to an error of law (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at paras. 20-22).

38 However, when a tribunal's failure to provide any reasons does not breach procedural fairness, the reviewing court may consider the reasons "which could be offered" in support of the decision (*Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Defence: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286). In appropriate circumstances, this Court has, for example, drawn upon the reasons given by the same tribunal in other decisions (*Alberta Teachers'*, at para. 56) and the submissions of the tribunal in this Court (*McLean*, at para. 72).

39 The City gave the Company notice that it would be seeking to increase the assessment. In its written submissions to the Board, the City ultimately requested that the Board increase the assessment. The Company filed a lengthy response to the City's submissions and evidence. At the hearing, the Company argued that the City's proper role was to "defend the assessment" and "respond to the evidence provided by the complainant". However, in response to a question from the Board, the Company clarified that it was not disputing the Board's power to increase the assessment in this case:

> [Counsel for the City] has suggested that we are taking issue with your jurisdiction to make a change. We're not. The legislation certainly allows the Assessment Review Board to decrease or increase the assessment. You have that power.
>
> (A.R., vol. 2, at p. 85)

40 Therefore, it is hardly surprising the Board did not explain why it was of the view that it could increase the assessment: the Company expressly conceded the point. Parties "cannot gut the deference owed to a tribunal by failing to raise the issue before the tribunal and thereby mislead the tribunal on the necessity of providing reasons" (*Alberta Teachers'*, at para. 54). Accordingly, I shall review the Board's decision in light of the reasons which *could be* offered in support of it.

(2) Was the Board's Decision Reasonable?

41 The Board proceeded on the basis that s. 467(1) allowed it to increase the assessment at the City's request. In my view, this was a reasonable interpretation of the legislation.

42 Section 467(1) reads:

> **467(1)** An assessment review board may, with respect to any matter referred to in section 460(5), make a change to an assessment roll or tax roll or decide that no change is required.

43 Section 460 provides in relevant part:

> **460(1)** A person wishing to make a complaint about any assessment or tax must do so in accordance with this section.
>
> . . . . .
>
> **(3)** A complaint may be made only by an assessed person or a taxpayer.
>
> . . . . .
>
> **(5)** A complaint may be about any of the following matters, as shown on an assessment or tax notice:
>
> (a) the description of a property or business;
>
> . . . . .
>
> (c) an assessment;

44 In a case that raised the same issue (*Edmonton (City) v. Army & Navy Department Store Ltd.*, [2002] A.M.G.B.O. No. 126 (Alta. Mun. Gov. Bd.)), the Alberta Municipal Government Board (which formerly heard appeals from the Board and had similar expertise) discerned the meaning of s. 467(1) by examining the words of the provision in their entire context and in their grammatical and ordinary sense, in harmony with the object and scheme of the *MGA*. This is consistent with this Court's well-established approach to statutory interpretation (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21).

45 On its face, the language of s. 467(1) empowers the Board to "change" an assessment with respect to "any matter referred to in section 460(5)". Section 460(5) references "an assessment" of value. As the Municipal Government Board reasonably observed in *Army & Navy* (at para. 114), as a matter of ordinary language, the word "change" includes "increase".

46 This grammatical and ordinary meaning of s. 467(1) is consistent with the purpose of the *MGA*. The Court of Appeal said that the broad term "change" was used because some of the matters that can be subject to complaint, for example, the "description of a property" (s. 460(5)(a)), are not numerical in nature. However, the Municipal Government Board in *Army & Navy* noted that to interpret "change" to mean only "confirm or lower" would frustrate the overarching intent of the *MGA*, being to ensure that assessments are "current, correct, fair and equitable" (para. 114). This reasoning is compelling. The importance of fairness and equity to the assessment process is repeatedly emphasized throughout the *MGA*: for example, s. 293(1) provides that property assessors are subject to an overarching duty to prepare the assessment "in a fair and equitable manner; s. 467(3) directs the Board to consider fairness and equity when making its decisions; and s. 324(1) provides that the Minister of Municipal Affairs may quash an assessment if the Minister is of the opinion that it is not fair and equitable. As the Board

emphasizes in its submissions, if it cannot increase an assessment that is below market value, other taxpayers would effectively bear more than their fair share of the overall tax burden. It was reasonable for the Board to conclude that such a result would run contrary to — not further — the *MGA*'s objects.

47 The Board is not simply an adjudicator responding only to the parties' record and submissions, as evidenced by its inquisitorial powers (s. 465) and power to refer an assessment to the Minister even when it is not the subject of a complaint (s. 476.1). Within the complaints process, the Board's role is to determine whether the assessment is fair and equitable (s. 467(3)). Outside the complaints process, the Board may refer an assessment it "considers unfair and inequitable" to the Minister, who may investigate or quash the assessment (s. 476.1). Interpreting s. 467(1) in the manner urged by the Board is consistent with its mandate under ss. 467(3) and 476.1 of ensuring assessments are fair and equitable.

48 The Board's view that s. 467(1) allows it to increase an assessment is also consistent with the scheme of the *MGA*.

49 Section 460(3) provides that only assessed persons and taxpayers may make complaints. The courts below concluded that municipalities may not seek increases from the Board, for that would be tantamount to making a complaint. The Court of Appeal quoted with approval from *Canadian Natural Resources Ltd. v. Wood Buffalo (Regional Municipality)*, 2012 ABQB 177, 535 A.R. 281 (Alta. Q.B.): "A complaint belongs to the taxpayer, not the Municipality" (para. 166, per Sulyma J.).

50 But the scheme of the *MGA* does not require that municipalities be empowered to file a "complaint" against an assessment. The *MGA* provides other mechanisms by which municipalities can change or seek changes to an assessment.

51 Section 305 provides in relevant part:

> **305(1)** If it is discovered that there is an error, omission or misdescription in any of the information shown on the assessment roll,
>
> (a) the assessor may correct the assessment roll for the current year only, and
>
> (b) on correcting the roll, an amended assessment notice must be prepared and sent to the assessed person.
>
> . . . . .
>
> **(5)** If a complaint has been made under section 460 or 488 about an assessed property, the assessor must not correct or change the assessment roll in respect of that property until a decision of an assessment review board or the Municipal Government Board, as the case may be, has been rendered or the complaint has been withdrawn.

52 Section 305(1) permits an assessor (i.e., a municipality) to correct the assessment role if there is an "error, omission or misdescription". The Court of Appeal interpreted s. 305(1) as a narrow provision that permits municipalities to correct only minor errors of a typographical or similar nature. This, it said, was consistent with a municipality's inability to make a complaint; the statutory scheme intended that the municipality would have to wait until the following year. However, by its ordinary meaning, "error" is not limited to typographical or similar errors. Consistent with the language of the provision, it is reasonable to conclude that s. 305(1) empowers a municipality to change an assessment it later determines is too low — i.e., was made in error. The Municipal Government Board reached this conclusion in *Army & Navy*: "... the intent of Section 305 is to allow assessment authorities to correct errors discovered on the assessment roll whether they are of an administrative nature or to do with a change in an assessment" (para. 124).

53 Nor is the Court of Appeal's restrictive reading of s. 305(1) required by "Canadian expectations about the imposition of taxes", specifically the expectation that "retroactive taxation is possible, but not presumed" (para. 39). Although changes to an assessment will often produce tax consequences, the municipal taxing bylaw itself remains constant. Changes to an assessment do not amount to retroactive taxation in the sense that term is normally understood. Rather, an error has been corrected in the underlying assessment. Put simply, the taxpayer's tax liability now corresponds to what the law provides it always should have been for that year.

54 Thus, a municipality can directly correct an error in an assessment if no complaint is pending (s. 305(1)) or, if a complaint is pending, the municipality can ask the Board to correct the error and increase the assessment (s. 467(1)). Properly understood, a complaint does not 'belong' to anyone. It is a process through which the Board, with assistance from the taxpayer and municipality (and potentially other persons at the Board's request), determines the correct, fair and equitable value for the assessment.

55 Section 305(5), which provides that an assessor "must not correct or change" an assessment "until a decision of an assessment review board ... has been rendered or the complaint has been withdrawn", is designed to protect the integrity of the complaints process. When a taxpayer files a complaint, s. 305(5) prevents the municipality from altering the assessment unilaterally, rendering the complaint moot and potentially leading to a new complaint about the new assessment. Instead of resolving a dispute about a revised assessment in a separate proceeding, the municipality can simply explain at the hearing of the first complaint its reasons for wanting to revise the assessment, and the Board can change the assessment as it deems necessary. In the context of an annual scheme, this pursuit of administrative efficiency makes sense. After the Board has determined the correct assessed value and rendered its decision, s. 305(5) does not prevent the municipality from correcting an error, omission or misdescription in any of the other information shown on the assessment roll (for example, the name and mailing address of the assessed person).

56 The Company also relies on the *Matters Relating to Assessment Complaints Regulation*, Alta. Reg. 310/2009. The Company notes that a taxpayer has 60 days to review an assessment and file a complaint (s. 309(1)(c) *MGA*), but only 7 days to reply to a municipality's response to a complaint (*Matters Relating to Assessment Complaints Regulation*, s. 8(2)(b) and (c)). Thus, if a municipality discovers an error outside the complaints process and increases an assessment under s. 305(1), the taxpayer will have 60 days to respond; but if a municipality discovers an error within the complaints process and seeks an increase from the Board, the taxpayer will have only 7 days to respond. The Company says it is implausible that the legislature intended to require a taxpayer to respond much more quickly to a change sought within the complaint process than to one made outside the complaint process, so it must be that a municipality cannot seek an increase from the Board when a taxpayer complains.

57 There are two plausible reasons why the legislature would have created a shorter time period for a taxpayer to reply to a municipality's response to its complaint than the time period to file a complaint in the first place. First, the legislature has empowered the Board to grant extensions of time and adjournments: where a municipality does seek an increase in response to a complaint, the Board can ensure the taxpayer has sufficient time to prepare its reply (*Matters Relating to Assessment Complaints Regulation*, ss. 10(2) and 15(1)). Natural justice and fairness require that the taxpayer have enough time to respond, and the statutory scheme accommodates this. Accordingly, any perceived sense of injustice is largely illusory.

58 Second, in the interests of administrative expediency, it makes sense that the legislature would have established a shorter time horizon within the complaint process. In the normal course, the municipality will respond to a complaint by defending its original assessment. A municipality will respond to a complaint by seeking an increase only when it discovers an error, which is not likely to occur often. By establishing a presumptively shorter time period to reply to a municipality's response to a complaint, while allowing the Board to grant extensions of time when appropriate, the twin goals of administrative efficiency and fairness are both advanced. A lengthier time period for a reply would simply not be required in the majority of cases.

59 Section 9(4) of the *Matters Relating to Assessment Complaints Regulation* also does not require a restrictive interpretation of "change" in s. 467(1). Section 9(4) of the Regulation relates to ss. 299 and 300 of the *MGA*, which permit an assessed person to ask a municipality for "sufficient information to show how the assessor prepared the assessment" (s. 299) of their property or any other property. Section 9(4) of the Regulation provides that the Board "must not hear any evidence from a municipality relating to information that was requested by a complainant under section 299 or 300 of the Act but was not provided to the complainant".

60 As the heading of s. 9 of the Regulation — "Failure to disclose" — makes clear, s. 9(4) simply provides a remedy for non-disclosure. For example, if the municipality has information

relating to an assessment and does not, upon request, disclose it under s. 299 or s. 300, then the municipality cannot rely on that information before the Board. This is a traditional remedy for non-disclosure of evidence. Properly understood, s. 9(4) does not preclude a municipality from changing its mind about an assessment and leading evidence to support its position, as long as it discloses the evidence within the prescribed time limit. Section 8(2)(b) of the Regulation establishes that time limit: it requires the municipality to disclose its evidence at least 14 days before the hearing. This paragraph would serve little purpose if the municipality's entire case already had to be disclosed to a complainant under s. 299 or s. 300. It is therefore unsurprising that s. 299 and s. 300 were not raised by the parties or addressed in the decisions below.

61 To conclude, it was reasonable for the Board to interpret s. 467(1) to permit it to increase the assessment at the City's request. As the Municipal Government Board concluded in *Army & Navy*, this interpretation is consistent with the ordinary meaning of "change" and the overarching policy goal of the *MGA*, to ensure assessments are correct, fair and equitable. The alternative would permit taxpayers to use the complaints process to prevent assessments made in error from being corrected, thereby frustrating the *MGA*'s purpose.

VI. Conclusion

62 The standard of review is reasonableness and the Board's decision was reasonable. Accordingly, I would allow the appeal, set aside the decision of the Court of Appeal and reinstate the Board's decision. I would award the City its costs in this Court and the courts below, payable by the Company only. I would not award costs to or against the Board.

***Côté, Brown JJ.* (McLachlin C.J.C. and Moldaver J. concurring):**

I. Introduction

63 We are of the view that the appropriate standard of review of the City of Edmonton Assessment Review Board's decision is correctness. The legislature of Alberta created a municipal assessment complaints regime that allows certain questions squarely within the expertise of an assessment review board to be reviewed on a deferential standard through the ordinary mechanism of judicial review. The legislature, however, also designated certain questions of law and jurisdiction — for which standardized answers are necessary across the province — to be the subject of an appeal to the Court of Queen's Bench. Where the court quashes a decision, its answers to these questions are binding on the Board. This leads to the unavoidable conclusion that the legislature intended correctness review to be applied to these questions.

64 As to the merits, we are of the view that the Board's decision in this case should be

quashed. Assessment review boards have jurisdiction only to adjudicate the issues that are raised in the assessed person's complaint form. The Board in this case erred by hearing and partially accepting the City of Edmonton's new and revised assessment based on an entirely new classification, one which was not the subject of Edmonton East (Capilano) Shopping Centres Limited's (the "Company") complaint.

II. Standard of Review

65 The "overall aim" of the standard of review analysis has always been "to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law": *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19, [2003] 1 S.C.R. 226 (S.C.C.) [hereinafter *Dr. Q*], at para. 26. As Binnie J. once remarked, the standard of review analysis "is necessarily flexible" as it seeks "the polar star of legislative intent": *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 (S.C.C.), at para. 149.

66 In our view, taken together, the statutory scheme and the Board's lack of relative expertise in interpreting the law lead to the conclusion that the legislature intended that the Board's decisions on questions of law and jurisdiction appealed to the Court of Queen's Bench be reviewed on a correctness standard. As a result, even were the Board's interpretation presumptively owed deference on the basis that the Board is interpreting its home statute, this presumption of deference has been rebutted by clear signals of legislative intent.

A. Contextual Analysis of the Statutory Scheme and Signals of Legislative Intent

67 As we will explain, the nature of the relevant statutory scheme demonstrates that the legislature intended correctness review be applied to decisions on questions of law and jurisdiction for which leave to appeal is granted to the Court of Queen's Bench. Any expertise of the Board does not overcome this clear indication of legislative intent. Indeed, we are of the view that the legislature has indicated that the Board lacks relative expertise to decide those questions.

68 Before addressing this legislative context, however, we wish to make some preliminary comments on the statutory right of appeal in s. 470 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 ("Act").

(1) A Statutory Right of Appeal Is Not a Category of Correctness Review

69 In response to the reasons of Slatter J.A. in the Court of Appeal (2015 ABCA 85, 599 A.R. 210 (Alta. C.A.)), the majority questions whether a statutory right of appeal is a new

"category" of correctness review. Relying on recent decisions of this Court, it concludes that no such category of correctness review exists because the reasonableness standard has been applied in other cases where statutory rights of appeal are present.

70 We agree that a statutory right of appeal is not a new "category" of correctness review. However, the ostensibly contextual standard of review analysis should not be confined to deciding whether new categories have been established. An approach to the standard of review analysis that relies exclusively on categories and eschews any role for context risks introducing the vice of formalism into the law of judicial review, as it seeks to "secure a measure of certainty or predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant": H. L. A. Hart, *The Concept of Law* (3rd ed. 2012), at pp. 129-30.

71 In every case, a court must determine what the appropriate standard of review is for *this* question decided by *this* decision maker. This is not to say that a full contextual standard of review analysis must be conducted in every single case. The applicable standard of review is a question of law: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.), at para. 6. Questions of law forming part of the *ratio decidendi* of a decision are binding on lower courts as a matter of *stare decisis*: *Osborne v. Rowlett* (1880), 13 Ch. D. 774 (Eng. Ch. Div.), at p. 785. Where a standard of review analysis is performed and the proper standard of review is determined for a particular question decided by a particular decision maker, that standard of review should apply in the future to similar questions decided by that decision maker.

72 In *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), this Court made room for the simple operation of the doctrine of precedent in this manner. It recognized that a full contextual standard of review analysis need not be performed in every case, since the appropriate standard of review has often been settled in the jurisprudence. But "[t]his simply means that the analysis required is already deemed to have been performed and need not be repeated" (para. 57). It does not mean that the contextual analysis itself should be curtailed in favour of categories that are themselves "both over- and under-inclusive": P. Daly, "The Unfortunate Triumph of Form over Substance in Canadian Administrative Law" (2012), 50 *Osgoode Hall L.J.* 317, at p. 342. Despite the "attractive simplicity" of the category-based approach, eschewing context in favour of categories is "seriously overbroad": S. Breyer, "Judicial Review of Questions of Law and Policy" (1986), 38 *Admin. L. Rev.* 363, at p. 373. Disregard for the contextual analysis would represent a significant departure from *Dunsmuir* and from this Court's post-*Dunsmuir* jurisprudence.

(2) The Statutory Scheme

73 Because context always matters, we do not agree that the existence of a statutory right of

appeal cannot, in combination with other factors, lead to a conclusion that the proper standard of review is correctness. A statutory right of appeal, like a privative clause, "is an important indicator of legislative intent" and, depending on its wording, it "may be at ease with [judicial intervention]": *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.), at para. 55, per Binnie J. In our view, the wording of this statutory appeal clause, in combination with the legislative scheme, points to the conclusion that the legislature intended that a more exacting standard of review be applied to questions appealed to the Court of Queen's Bench.

74 The majority says, however, that a contextual analysis is unnecessary here in light of this Court's recent decisions of *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.), and *Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, 2009 SCC 40, [2009] 2 S.C.R. 764 (S.C.C.). With respect, we do not read those decisions as supportive of our colleagues' position, because none of them states or even implies that a right of appeal is not a relevant factor in the contextual analysis.

75 Section 470 of the Act grants a statutory right of appeal with leave to the Court of Queen's Bench on a "question of law or jurisdiction" (s. 470(1)) where a judge "is of the opinion that the appeal involves a question of law or jurisdiction of sufficient importance to merit an appeal and has a reasonable chance of success" (s. 470(5)). If a question of law or jurisdiction is appealed to the Court of Queen's Bench and the Court of Queen's Bench decides the question and refers the matter back to the Board, "the board must rehear the matter and deal with it in accordance with the opinion of or any direction given by the Court on the question of law or the question of jurisdiction" (s. 470.1(2)).

76 It is only questions of law and jurisdiction that are "of sufficient importance to merit an appeal" that may be appealed pursuant to s. 470 of the Act. All other questions may still be the subject of judicial review: *Edmonton (City) v. Edmonton (City) Assessment Review Board*, 2010 ABQB 634, 503 A.R. 144 (Alta. Q.B.), at paras. 10-12; *Associated Developers Ltd. v. Edmonton (City)*, 2011 ABQB 592, 527 A.R. 287 (Alta. Q.B.), at paras. 17-24; *Edmonton (City) v. Edmonton (City) Composite Assessment Review Board*, 2012 ABQB 118, 534 A.R. 110 (Alta. Q.B.), at para. 78.

77 In our view, the legislature's decision to enact a limited right of appeal rather than a full right of appeal indicates that the legislature intended these questions to be reviewed by the Court of Queen's Bench for correctness.

78 The legislature must have known that judicial review is available for any question not covered by a limited right of appeal (*Habtenkiel v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180, [2015] 3 F.C.R. 327 (F.C.A.), at para. 35; see also D. J. M.

Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at p. 3-9), given that the legislature is presumed to know the law: *R. v. W. (D.L.)*, 2016 SCC 22, [2016] 1 S.C.R. 402 (S.C.C.), at para. 21, per Cromwell J.; *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 S.C.R. 315 (S.C.C.), at para. 9. The legislature only designated some questions to be the subject of this right of appeal, thereby signalling its intention that these important questions of law and jurisdiction be treated differently from all other questions which are subject to ordinary judicial review. These issues, after all, transcend the particular context of a disputed assessment and have broader implications for the municipal assessment regime. Had the legislature merely intended to provide for a different procedure than judicial review to enhance administrative efficiency within the yearly cycle created by the legislature, it would have enacted a full statutory right of appeal with a shorter limitation period than ordinary judicial review. After all, questions of fact and mixed fact and law would also benefit from a shorter limitation period to enhance administrative efficiency within the yearly cycle. We note, in this regard, the similarity between the wording of s. 470(5) and the statutory right of appeal that was considered in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), in respect of which Bastarache J., for this Court, said:

> First, s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance". ... The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal — and inferentially, the Federal Court, Trial Division — is permitted to substitute its own opinion for that of the Board in respect of questions of general importance.
>
> [Emphasis added; para. 43.]

79 That correctness review was legislatively intended is supported by other aspects of the statutory scheme. Section 470.1(2) of the Act provides that, where the Court of Queen's Bench "cancels a decision", it must refer the matter back to the Board and the Board must "rehear the matter and deal with it in accordance with the opinion of or any direction given by the Court on the question of law or the question of jurisdiction". This strongly suggests that correctness review is the standard that the legislature intended to be applied to these questions, because giving "direction" on a pure and distilled question of law and jurisdiction would be inconsistent with reasonableness review. The fundamental premise of reasonableness review is that "certain questions that come before administrative tribunals do not lend themselves to one specific,

particular result": *Dunsmuir*, at para. 47. However, the fundamental premise of s. 470.1(2) is that pure questions of law and jurisdiction appealed to the Court of Queen's Bench do lend themselves to one specific, particular result because the Court of Queen's Bench is bound to provide *direction* on these pure questions of law and jurisdiction and the Board is prohibited from reaching a different result on those questions when the matter is remitted to it.

80 Further, as Slatter J.A. noted at the Court of Appeal, the municipal assessment regime set out in the Act is applied by local and composite assessment review boards in municipalities across the province. Each assessment review board is a unique entity established by the local municipal council (s. 454). Because each assessment review board is a distinct entity, there is no overarching institutional body capable of promoting consistency in the interpretation and application of the Act between them. We echo the concern of Slatter J.A. that "it is undesirable for the *Municipal Government Act* to mean different things in different parts of the province" (para. 30). Consistency in the understanding and application of these legal questions is necessary, and only courts can provide such consistency. And, to reiterate, the legislature of Alberta has done so here by providing assessed persons a right to appeal certain questions to the courts, which are, in turn, tasked with providing *binding rulings* on those questions: s. 470.1(2) of the Act.

B. Expertise

81 In our view the question at issue is not one which falls within the Board's expertise. Indeed, the Board's lack of expertise in statutory interpretation suggests that the legislature would have wanted courts to review Board answers on questions of law on a more exacting standard.

82 We acknowledge that the notion of "expertise" has become a catch-all trigger for deferential review in this Court's jurisprudence, since an administrative decision maker is simply presumed to be an expert in matters regarding the application of its home statute. We wish, therefore, to be clear: our point of departure from the majority is whether the presumption has been rebutted. And we add this: in strengthening the presumption by ignoring or explaining away any factors that might rebut it, the majority risks making this presumption irrebuttable.

83 Despite its prevalence, this presumption of expertise has rarely been given much explanation or content in our jurisprudence: L. Sossin, "Empty Ritual, Mechanical Exercise or the Discipline of Deference? Revisiting the Standard of Review in Administrative Law" (2003), 27 *Adv. Q.* 478, at pp. 490-91; B. Bilson, "The Expertise of Labour Arbitrators" (2005), 12 *C.L.E.L.J.* 33, at p. 41. As McLachlin C.J. explained in *Dr. Q*, expertise "can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone" (para. 29). Some administrative decision makers are required to possess expert qualifications or experience in a particular area as a condition of appointment: *Canada (Director of Investigation*

& Research) v. Southam Inc., [1997] 1 S.C.R. 748 (S.C.C.), at paras. 50-53. Other administrative decision makers may accumulate "a measure of relative institutional expertise" by habitually making findings of fact in a particular specialized legislative context: *Dr. Q*, at para. 29; *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.), at p. 1336, per Wilson J. This specific or institutional expertise may command deference, though the question of expertise is "closely interrelated" to the nature of the question that forms the basis of the application for judicial review: *Deputy Minister of National Revenue v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100 (S.C.C.), at para. 32. In other words, an administrative decision maker is not entitled to blanket deference in all matters simply because it is an expert in some matters. An administrative decision maker is entitled to deference on the basis of expertise only if the question before it falls within the scope of its expertise, whether specific or institutional.

84 A constant in this Court's jurisprudence both pre- and post-*Dunsmuir* is that expertise is a relative concept. It is not absolute: *Pushpanathan*, at para. 33; *Dr. Q*, at para. 28; *Moreau-Bérubé c. Nouveau-Brunswick*, 2002 SCC 11, [2002] 1 S.C.R. 249 (S.C.C.), at para. 50; *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.) [hereinafter *Rogers Communications*], at para. 15, per Rothstein J. As Sopinka J. explained in *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), "a lack of relative expertise on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference" (p. 335). An administrative decision maker often possesses greater relative expertise in interpreting and applying its constituting statute in the context of administering a specialized regime: *Pushpanathan*, at para. 36; *Dunsmuir*, at para. 54; *Smith*, at para. 80, per Deschamps J., dissenting on this point. But this is not an absolute rule, as a legislature may always indicate that the expertise of an administrative decision maker in interpreting and administering its home statute is not greater relative to the courts: see, e.g., *Rogers Communications*, at para. 16.

85 The legislature therefore has a role to play in designating and delimiting the presumed expertise of an administrative decision maker. The majority's view that "expertise is something that inheres in a tribunal itself as an institution" (para. 33) risks transforming the presumption of deference into an irrebuttable rule. Courts must not infer from the mere creation of an administrative tribunal that it necessarily possesses greater relative expertise in all matters it decides, especially on questions of law. After all, "some administrative decision makers have considerable legal expertise. ... Others have little or none": *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 84, per Binnie J., concurring. Respect for legislative supremacy must leave open to the legislature the possibility of creating a non-expert administrative decision maker, or creating an administrative decision maker with expertise in some areas but not others. Rothstein J. gave effect to this possibility in *Rogers Communications*, holding that the concurrent jurisdiction shared by the courts and the Copyright Board under the *Copyright Act*, R.S.C. 1985, c. C-42, led to the inference "that the legislative intent was not to recognize superior expertise of the Board relative to the court with

respect to such legal questions" (para. 15). We must therefore examine the legislative scheme to determine whether the legislative intent was to recognize the superior expertise of the Board or the courts on matters forming the subject of an appeal pursuant to s. 470.

86 The Act is a broad statute that covers a vast array of municipal government issues. The Board at issue here is a composite assessment review board, created pursuant to s. 454 of the Act with jurisdiction to only hear complaints about certain assessments by taxpayers and assessed persons, and to deal only with the issues listed in s. 460(5) of the Act. The Alberta legislature delegated to other boards and administrative decision makers the simultaneous task of interpreting and applying provisions of the Act, such as the Municipal Government Board (s. 486); growth management boards (s. 708.02); the Minister of Municipal Affairs (in the context of the assessment provisions of the Act, see ss. 317 to 325, 370, 381, 390, 409.3, 425.1, 436.23, 452, 453 to 457, 476.1, 484.1, 514 to 517, 527.1 and 570 to 580); the chief administrative officer of each municipal council (ss. 205, 207 and 208); the Land Compensation Board (ss. 15, 23, 26 and 534); and the Alberta Utilities Commission (ss. 30, 31, 43 to 45, 47 and 47.1), among others. It is therefore incorrect to characterize a specific composite assessment review board as an expert tribunal tasked with administering the Act. We cannot presume greater relative expertise without first examining the statutory scheme that creates the administrative decision maker.

87 The question, then, is whether the Alberta legislature intended to recognize superior expertise in assessment review boards or in the courts with respect to the specific questions appealed pursuant to s. 470 of the Act. As the majority acknowledges, this case is, in part, about the interpretation of s. 467 of the Act. Statutory interpretation does not fall within the specialized expertise of the Board, since its day-to-day work focuses on complex matters of valuation of property. We note that the majority relies on this Court's jurisprudence for the proposition that a court may not be as qualified as a board to interpret the board's home statute given "the broad policy context within which" the board must work (para. 33). That may be true in the application of one's governing statute. However, it is not so in these circumstances, where the matter is one of legal interpretation going to jurisdiction, not practical application. While the Board may have familiarity with the application of the assessment provisions of the Act, the legislature has recognized that the Board's specialized expertise does not necessarily extend to general questions of law and jurisdiction. The Board's decisions may, instead, be appealed on these questions of law and jurisdiction.

88 In light of this lack of relative expertise on questions of law and jurisdiction, it cannot be maintained that a presumption applies that the legislature intended that the review board's determinations on questions of law and jurisdiction be owed deference. The legislature created a tribunal with expertise in matters of valuation and assessment. But the legislature placed that tribunal within a statutory scheme that would allow municipalities and assessed persons to appeal questions of law and jurisdiction, while still implicitly permitting judicial review on all other questions. This, in our view, is a clear signal by the legislature that the tribunal it created is

not entitled to deference from the courts on questions of law and jurisdiction appealed pursuant to s. 470, while it must be afforded deference on other matters. Such clearly expressed legislative intent should be respected, by applying correctness review in this case.

89 We note the concern that a contextual analysis can generate uncertainty and prolonged litigation concerning the applicable standard of review. But the lode star of legislative supremacy and the rule of law remains. The contextual standard of review analysis ensures that legislative intent is respected and the rule of law is protected when courts review decisions of administrative actors. And context does not cease to be relevant once the standard of review is selected. Even if the applicable standard of review were reasonableness, it is a contextual analysis — guided by the principles of legislative supremacy and the rule of law — that defines the range of reasonable outcomes in any given case: P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (forthcoming, *McGill L.J.*), at p. 21. In short, "context simply cannot be eliminated from judicial review" (*ibid.*, at p. 16).

90 We note the chambers judge's conclusion that the issue in this case is a true question of jurisdiction: 2013 ABQB 526, 570 A.R. 208 (Alta. Q.B.). As the majority explained in *Dunsmuir*, a true question of jurisdiction asks "whether or not the tribunal had the authority to make the inquiry", and added that "[a]dministrative bodies must ... be correct in [these] determinations": at para. 59; *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at para. 18. In light of our conclusion above, however, it is not necessary to also consider whether the question at issue falls within that category.

III. Merits

91 The majority characterizes the issue in this case as whether s. 467 of the Act allowed the Board to "increase the assessment at the City's request" (para. 41). We agree that the word "change" in s. 467(1) should be given its ordinary and grammatical meaning, and that the Board is not precluded from ever increasing an assessment. However, in our view, the Board's decision-making authority in this case was limited to the specific matters that were raised in the Company's complaint. The Board had no authority to inquire into the fairness and equity of the assessment generally and to consider or accept elements of the new assessment proposed by the City in increasing the assessment.

92 In our view, this conclusion is supported by five considerations. First, this conclusion respects the assessment complaints procedure set out in the Act and in various regulations. These limit the jurisdiction of the review board to precisely those matters identified on the complaint form and, where applicable, to the information provided by the municipality in response to an access to information request pursuant to ss. 299 and 300 of the Act. There is no space under the Act for municipalities to act as a *de facto* appellant of its own assessment.

Second, to hold otherwise, as the majority does, would allow municipalities to circumvent s. 305 of the Act, which only permits municipalities to correct errors, omissions, or misdescriptions in an assessment when a complaint is not pending. Third, a contrary interpretation would undermine taxpayers' reliance on the information provided by the municipality in its notice of assessment and in any document disclosed pursuant to an access to information request under ss. 299 and 300 of the Act. Fourth, to hold otherwise would also allow municipalities to circumvent certain prescribed notice periods intended to benefit assessed persons. Fifth, the Act does not place an obligation on the Board to ensure that all assessments are "fair" and "equitable".

A. Overview of the Board's Jurisdiction

93 In general terms, the complaints procedure before the Board is a vehicle *for taxpayers* to contest the fairness, correctness and equity of yearly municipal tax assessments. It is in this sense that the complaint belongs to the taxpayer: *Canadian Natural Resources Ltd. v. Wood Buffalo (Regional Municipality)*, 2012 ABQB 177, 535 A.R. 281 (Alta. Q.B.), at para. 166. The Board's narrow jurisdiction reflects the complaint procedure's limited function, and confines the Board's decision-making authority to only those specific matters that were outlined in the City's original assessment, and which were subsequently raised by the taxpayer in his or her complaint.

94 This understanding of the assessment complaints process flows from the following provisions of the Act. A complaint regarding an assessment may be about any of the matters listed in s. 460(5) of the Act shown on the assessment notice. However, a "complaint may be made *only* by an assessed person or a taxpayer" (s. 460(3)). This restricted scope on who may bring a complaint distinguishes the complaints process outlined in the Act from legislation in a number of other jurisdictions where municipalities are explicitly provided with a right to appeal an assessment and, as a result, where review boards have the power to raise an assessment in response to a municipality's appeal: see *Assessment Act*, R.S.B.C. 1996, c. 20, s. 32; *Assessment Act*, R.S.O. 1990, c. A.31, s. 40; *Assessment Act*, R.S.N.S. 1989, c. 23, s. 62(2); *The Cities Act*, S.S. 2002, c. C-11.1, s. 197(3); *The Municipal Assessment* Act, C.C.S.M., c. M226, ss. 42 and 43; *Prince Albert (City) v. Loblaw Properties West Inc.*, 2009 SKCA 59, 324 Sask. R. 313 (Sask. C.A.); *79912 Manitoba Ltd. v. Winnipeg (City) Assessor* (1998), 131 Man. R. (2d) 264 (Man. C.A.), at para. 4; *Orange Properties Ltd. v. Winnipeg (City) Assessor* (1996), 107 Man. R. (2d) 278 (Man. C.A.).

95 This feature of the Act's complaint process resembles appeals from assessments under the federal *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Minister of National Revenue has no right to appeal assessments under that Act, and it has long been settled that a taxpayer's appeal cannot, in light of this, result in an increased assessment: *Harris v. Minister of National Revenue* (1964), [1965] 2 Ex. C.R. 653 (Can. Ex. Ct.), aff'd on other grounds, [1966] S.C.R. 489 (S.C.C.). In *Last v. R.*, 2014 FCA 129, [2015] 3 F.C.R. 246 (F.C.A.), Dawson J.A. observed that

> *Harris* is authority for the proposition that on appeal from an assessment, the question to be answered is whether the Minister's assessment is higher than it should be. However, *Harris* is also authority for the proposition that a taxpayer's appeal cannot result in an increased assessment. This is because the Act does not give any right of appeal to the Minister and any increase to an assessment would in effect allow the Minister to appeal from her own assessment. This principle is to be applied to each source of income. [para. 23]

96 Nowhere does the Act authorize the assessment review board to inquire generally into the fairness and equity of the challenged assessment. Instead, the assessment review board has jurisdiction only "to hear complaints about any matter referred to in section 460(5) that is shown on an assessment notice for property other than property described in subsection (1)(a)"(s. 460.1(2)). A plain reading of this provision reveals two restrictions on the assessment review board's jurisdiction. The review board is limited to hearing "complaints", and these complaints must be "about" a matter "shown on an assessment notice". Section 9(1) of the *Matters Relating to Assessment Complaints Regulation*, Alta. Reg. 310/2009 ("*MRAC*"), reinforces these restrictions by adding that the review board "must not hear any matter in support of an issue that is not identified on the complaint form". Giving this provision full effect, composite assessment review boards have refused to hear issues raised by assessed persons that were not identified in the assessed person's complaint form: see, e.g., Edmonton ARB, Decision No. 0098 139/11, August 24, 2011, at pp. 2-3; Edmonton ARB, Decision No. 0098 174/10, August 4, 2010.

97 Section 9(4) of the *MRAC* restricts this jurisdiction further where a request for information is made by an assessed person or taxpayer. Sections 299 and 300 of the Act provide the assessed person with the right to ask the municipality for access to the assessment record, as well as a summary of the assessment. These "let the assessed person see or receive sufficient information to show how the assessor prepared the assessment of that person's property" (s. 299(1)) and "let the assessed person see or receive a summary of the assessment of any assessed property in the municipality" (s. 300(1)). Section 9(4) of the *MRAC* provides that the review board "must not hear any evidence from a municipality relating to information that was requested by a complainant under section 299 or 300 of the Act but was not provided to the complainant".

98 In our view, these provisions confine the Board to considering only matters arising from the City's original assessment notice that were the subject of complaint by an assessed person or taxpayer on the prescribed complaint form. As a result, once a complaint has been filed, the onus lies on the complainant to identify errors in the City's assessment, and the City can do nothing more than defend its own assessment. To read s. 9(4) as not precluding a municipality from changing its mind about an assessment and leading evidence to support its position would fail to account for s. 9(1) of the *MRAC* which expressly precludes the Board from hearing "any matter in support of an issue that is not identified on the complaint form". The review board's jurisdiction leaves no space for the City to act as a *de facto* appellant of its own assessment. This

would explain why the complainant must disclose to the City and to the review board its documentary evidence, a summary of its testimonial evidence, and any written argument in support of its complaint *42 days* before the hearing date (s. 8(2)(a) *MRAC*), while the City is only bound to provide such disclosure to the complainant *14 days* before the hearing date (s. 8(2)(b) *MRAC*).

99 This interpretation also reflects the fact that the complaints process is pleading-driven, a feature reflected in assessment review boards' persistent refusal to consider issues that were not initially included in the complaint form. If respected, a pleading-driven process usually has the effect of streamlining and simplifying proceedings, enhancing the efficiency of this administrative regime.

100 While it is true that the Board has the power to "change" an assessment roll with respect to any matter referred to in s. 460(5), this power must be interpreted in light of the Board's jurisdiction, as set out in s. 460.1(2) of the Act and in ss. 9(1) and 9(2) of the *MRAC*. To hold otherwise would fail to read these provisions as forming a consistent whole, since it would mean that the Board has the power to make decisions on matters it has no authority to hear.

101 For these reasons, we would adopt the conclusion of Sulyma J. who concluded in *Wood Buffalo*, at para. 166, that

> [A] complaint belongs to the taxpayer, not the Municipality. It gives the taxpayer an opportunity to demonstrate what the correct number should be ... The Municipality cannot then come in and ask the [Review Board] to change the assessment to an altogether different number; it can only defend the assessed amount as correct.

102 This conclusion is also consistent with the Minister's description of the purpose of amendments to the complaints process in 2009, being to "provide *taxpayers* with the understandable, objective, and fair complaint and appeal system they deserve": *Alberta Hansard*, 2nd Sess., 27th Leg., April 21, 2009, at p. 735 (emphasis added). The complaint and appeal system were clearly intended to belong to "taxpayers". The Act must be interpreted in a manner consistent with this overarching purpose. An interpretation that would allow the City to hijack the complaint process by (1) using a new classification that was not identified on the complaint form or disclosed pursuant to the ss. 299 and 300 request (since it did not exist at the time of the request), (2) disclosing that new classification to the complainant a mere 14 days before the hearing, and (3) asking the Board to increase the taxpayer's assessment based on that new classification irrespective of the subject matter or merits of the actual complaint, is, in our respectful view, an interpretation that does not provide taxpayers with an understandable, objective, or fair complaint system. Nor does it respect the clear policy choice of the Alberta legislature.

103 As already noted (at para. 91), we do not mean to suggest that the assessment review boards can never increase an assessment. It is worth remembering that both an assessed person and any other taxpayer may file a complaint (s. 460(3) of the Act). It is conceivable that a taxpayer may file a complaint to have the assessed value on *another* property increased, so that the overall tax burden is more equitably distributed. In our view, assessment review boards could raise an assessment in these circumstances, where it is in response to a taxpayer's complaint and where the assessment review board's intervention is limited to matters raised in that complaint.

B. Section 305 of the Act

104 Our view on the merits of this appeal is affirmed by s. 305 of the Act. It allows a municipality to correct an "error, omission or misdescription" on the assessment roll and send the taxpayer a revised notice of assessment:

> **305(1)** If it is discovered that there is an error, omission or misdescription in any of the information shown on the assessment roll,
>
> (a) the assessor may correct the assessment roll for the current year only, and
>
> (b) on correcting the roll, an amended assessment notice must be prepared and sent to the assessed person.
>
> (2) If it is discovered that no assessment has been prepared for a property and the property is not listed in section 298, an assessment for the current year only must be prepared and an assessment notice must be prepared and sent to the assessed person.
>
> (3) If exempt property becomes taxable or taxable property becomes exempt under section 368, the assessment roll must be corrected and an amended assessment notice must be prepared and sent to the assessed person.
>
> (4) The date of every entry made on the assessment roll under this section or section 477 or 517 must be shown on the roll.
>
> (5) If a complaint has been made under section 460 or 488 about an assessed property, the assessor must not correct or change the assessment roll in respect of that property until a decision of an assessment review board or the Municipal Government Board, as the case may be, has been rendered or the complaint has been withdrawn.
>
> (6) Despite subsection (5), subsection (1)(b) does not apply if the assessment roll is
>
> (a) corrected as a result of a complaint being withdrawn by agreement between the complainant and the assessor, or

(b) changed under section 477 or 517.

105 The assessor is entitled to correct errors on the assessment roll at any time within 120 days of the end of the tax year for which the assessment was prepared, or 90 days following the final expiry date to appeal a decision on an assessment that is made by the Board or a court ("2015 Alberta Assessment Quality Minister's Guidelines" (online), s. 2.4, adopted pursuant to *Matters Relating to Assessment and Taxation Regulation*, Alta. Reg. 220/2004, s. 15). However, the assessor's ability to correct those errors is suspended while a complaint about the property is pending (s. 305(5)). It resumes once a decision is rendered or the complaint is withdrawn, though subject to the time limits set out above (s. 305(5)). Any correction to the assessment roll must be reported to the Minister (s. 305.1).

106 The Act does not grant an assessor the right to complain about its own assessment — that right belongs only to "an assessed person or a taxpayer" (s. 460(3)). Instead, it grants the assessor the right to correct errors on the assessment roll before a complaint is submitted by an assessed person or taxpayer, or after a decision is rendered by the Board (or the complaint is withdrawn). The Act therefore prohibits the assessor from "correcting" errors on the assessment roll while a complaint is pending before the Board, and it denies the assessor the right to complain about its own assessment before the Board.

107 The City nevertheless submits that a municipality is entitled to ask the Board to correct an error and increase the assessment if a complaint is pending. It suggests the prohibition on corrections to the assessment roll in s. 305(5) is designed to avoid complaints about unilaterally corrected assessments being piled on to an underlying complaint. Instead, the hearing is confined: "... the municipality can simply explain at the hearing of the first complaint its reasons for wanting to revise the assessment, and the Board can change the assessment as it deems necessary" (majority reasons, para. 55). With respect, this rationale does not account for the complaint procedure set out in the Act. If the assessed person requests access to the assessment record and to a summary of the assessment under ss. 299 and 300 of the Act, and then makes a complaint about the assessment to the Board, the municipality is prohibited from raising or relying on any information at the hearing that was not provided to the assessed person pursuant to the s. 299 or s. 300 request: s. 9(4) *MRAC*. The Board is also prohibited from hearing any matter in support of an issue not identified on the assessed person or taxpayer's complaint form (s. 9(1)), or any evidence that was not properly disclosed (s. 9(2)).

108 Far from being entitled to raise any error on the assessment roll before the Board and have that error corrected, the City is quite limited in the issues it can raise and rely on before the Board. Even if the municipality could ask the Board to correct errors for it, it could not ask the Board to correct *any* error it might discover in the assessment — the Board may correct only those errors that happen to be related to the issues identified on the taxpayer's complaint form. It

also cannot rely on any information relating to the assessment — even information that shows an error on the assessment roll that could be corrected but for the complaint — that it may have discovered after any s. 299 and s. 300 requests were fulfilled.

109 To interpret the Act as permitting the City to ask the Board to correct any errors it may discover while the complaint is pending makes portions of s. 305 and the associated regulations redundant. If the municipality could ask the Board to correct any error, and if the Board were to have an overarching obligation to ensure that all assessments are fair, equitable, and correct — a point which we will return to below — then there would be no reason why the legislature would grant the municipality under s. 305(5) the ability to correct an error after a decision of an assessment review board has been rendered: the error would already have been corrected by the Board. As s. 305(5) states:

> **(5)** If a complaint has been made under section 460 or 488 about an assessed property, the assessor must not correct or change the assessment roll in respect of that property until a decision of an assessment review board or the Municipal Government Board, as the case may be, has been rendered or the complaint has been withdrawn.

In other words, if the Board does indeed have an obligation to ensure all assessments are correct, then any decision rendered by the Board affirming or altering an assessment must result in a correct assessment. A correct assessment does not, by definition, admit of any subsisting errors.

110 To conclude otherwise risks leaving meaningless the power of an assessor to correct errors on the assessment roll following a decision of the Board — which is expressly granted by s. 305(5).

C. Reliance and a Chilling Effect on Complaints

111 Were the review board's jurisdiction to extend beyond the parameters of the Company's complaint, municipalities would by implication be allowed to tax on one basis, and then later defend their assessments on another. This would have the effect of undermining a taxpayer's reliance on the City's assessment notice, as well as on any information the taxpayer might obtain through a request for access to the City's assessment record under s. 299 of the Act. As the Court of Appeal of Alberta noted in *Canadian Natural Resources Ltd. v. Wood Buffalo (Regional Municipality)*, 2014 ABCA 195, 575 A.R. 362 (Alta. C.A.):

> The central purpose of taxpayer information rights is to provide taxpayers with information about the preparation of their tax assessments. In deciding whether to make a complaint and, if so, on what grounds, the taxpayer must know what it can rely upon. Reliance is defeated if the Municipality is permitted to defend a tax assessment on a basis different from that disclosed before the complaint was brought. Indeed, if a Municipality can defend an assessment on a basis different to that disclosed in a s. 299 response, a taxpayer will be

prevented by s. 9(1) of *MRAC* from contesting the new basis for assessment (because the taxpayer's complaint form will have stated the issues in reliance on the information disclosed in the s. 299 response).

[Emphasis added; para. 20.]

112 Not only is reliance undermined, taxpayers going forward face the real, unexpected and legislatively unintended risk that a review board may *increase* an assessment in response to their complaint. In *Immeubles B.P. Ltée v. Anjou (Ville)*, [1978] C.S. 422 (C.S. Que.), Rothman J., then of the Quebec Superior Court, worried with regard to a similar complaint process that "ratepayers could find themselves penalized for having exercised their rights", and that this "would almost certainly discourage some ratepayers from exercising" these rights (p. 425). A similar concern was voiced by Robertson J.A. in *New Brunswick (Executive Director of Assessment) v. Ganong Bros. Ltd.*, 2004 NBCA 46, 271 N.B.R. (2d) 43 (N.B. C.A.), who observed that the purpose of the taxpayer's appeal was to "provide property owners with a meaningful right of appeal from an assessment that the Director is prepared to defend", and not to "provide the Director with a weapon to discourage otherwise potentially valid appeals to the Appeal Board" (para. 129). We agree, and would add that to decide otherwise would make fewer potentially unfair and inequitable assessments subject to the scrutiny of assessment review boards. Again, this chilling effect undermines the policy choice of the Alberta legislature.

D. Notice Periods Intended to Benefit Assessed Persons

113 Allowing the City to respond to a complaint by effectively submitting to the Board an entirely new assessment would undermine certain notice periods intended to benefit taxpayers. Each municipality must annually prepare assessment notices for all assessed property and send them to the assessed persons: s. 308 of the Act. Under normal circumstances, once an assessment notice has been prepared and sent to the assessed person, a complaint may be made within 60 days after that notice (or an amended assessment notice) is sent: s. 309(1)(c). The assessed person may make use of this period to request copies of the assessment record: s. 299(1) and (1.1).

114 In this case, the City did not amend its assessment roll, nor did it send the Company an amended notice of assessment. It would have been barred from doing so by s. 305(5) of the Act. Instead, the City simply presented its new assessment in the course of its submissions on the Company's complaint. As a result, the Company was denied its 60-day period to consider whether and how to contest the City's proposed assessment. The City was only bound by its disclosure requirements under the *MRAC*. These disclosure requirements only required the City to reveal its documentary evidence, a summary of its testimonial evidence, and its written argument 14 days before the hearing date: s. 8(2) *MRAC*.

115 By allowing the City to present a virtually new assessment to the Company only 14 days before the hearing, the Board denied the Company adequate time to prepare arguments that could respond to this new assessment. The Company's ability to seek an adjournment if it needed more time to respond is beside the point: the legislature prescribed these notice periods to ensure fairness and objectivity in the complaints process, not to avoid adjournments. The Court must take care not to undermine the intended effect of these notice periods, thereby frustrating the clear and simple complaints procedure the Alberta legislature chose to enact. A taxpayer would never know whether his or her complaint would be heard based on the original assessment which the taxpayer chose to complain about, or a new assessment sprung on him or her 14 days before the hearing — a new assessment which, in turn, may necessitate an adjournment, delay, and increased costs as the taxpayer works to determine how he or she wishes to respond to it.

E. Fair and Equitable Assessment

116 While fairness and equity are, of course, features of the legislative scheme, the Board itself does not have a free-standing obligation or right to ensure all assessments are fair and equitable. The Board is simply an adjudicator that is limited to responding to the matters raised in the taxpayer's or assessed person's complaint. Its jurisdiction is limited only to hearing and adjudicating complaints of taxpayers. It is true that the Board is prohibited from *altering* an assessment that it deems to be fair and equitable (s. 467(3) of the Act), but this does not mean that it must in every case determine the correct, fair and equitable value for the assessment. Its jurisdiction is limited to reviewing the matters indicated on the complaint form, not determining the fairness and correctness of each assessment *de novo*.

117 Fairness and equity in municipal assessments are achieved in the Act through the operation of the Act as a whole, not through the jurisdiction of review boards. The assessor itself has a duty to ensure that the assessment is fair and equitable (s. 293(1) of the Act). The municipality qua assessor has no right to complain about an assessment because, in exercising its yearly responsibility to assess property, it already has a statutory duty to produce a fair and equitable assessment. Instead, the municipality was given the ability to correct errors on the assessment roll (s. 305) and taxpayers and assessed persons were given a right to complain about assessments (s. 460).

118 Nor is, the Board responsible for ensuring that assessments are prepared according to the statutorily prescribed criteria. This responsibility lies with the Minister. The Alberta legislature did not create a scheme that would require the Board to allow unfair or inequitable assessments to remain on the assessment roll. If the Board's jurisdiction precludes it from considering certain matters that go to the fairness or equity of an assessment, the Board may use its power to refer any assessment it deems to be unfair or inequitable to the Minister:

> **476.1** An assessment review board may refer any assessment that it considers unfair and inequitable to the Minister and the Minister may deal with it under sections 324 and 571.

119 If the Board chooses to refer an inequitable or unfair assessment to the Minister, the Minister is empowered to inquire into the preparation of the assessment (s. 571 of the Act). If the Minister concludes that the assessment is not fair or equitable, the Minister may order that the assessment be quashed and a new assessment prepared:

> **324(1)** If, after an inspection under section 571 or an audit under the regulations is completed, the Minister is of the opinion that an assessment
>
> (a) has not been prepared in accordance with the rules and procedures set out in this Part and the regulations,
>
> (b) is not fair and equitable, taking into consideration assessments of similar property, or
>
> (c) does not meet the standards required by the regulations,
>
> the Minister may quash the assessment and direct that a new assessment be prepared.
>
> (2) On quashing an assessment, the Minister must provide directions as to the manner and times in which
>
> (a) the new assessment is to be prepared,
>
> (b) the new assessment is to be placed on the assessment roll, and
>
> (c) amended assessment notices are to be sent to the assessed persons.
>
> (3) The Minister must specify the effective date of a new assessment prepared under this section.

120 It is therefore the Minister who has a freestanding obligation to ensure that all assessments are fair and equitable and that they conform to the statutory criteria. The Board has no such authority.

F. Application

121 In this case, the Company identified the "issues of complaint" on the prescribed complaint form as follows: "The assessed value of this property is greater than its actual market

value." It requested information pursuant to ss. 299 and 300 relating to the preparation of the original assessment, and indicated on its complaint form that this information was provided. The Company therefore prepared its complaint according to the original assessment and the information disclosed to it about that assessment.

122 In response to the complaint, the City indicated to the Company that it intended to alter the classification maintained in the original assessment and seek an increase in the assessed value from the Board. This was disclosed to the Company 14 days before the date set for hearing, well after the Company received information relating to the preparation of the original assessment, and well after the Company prepared its complaint based on that original assessment.

123 The original classification of the property formed the basis of the Company's complaint. The Company characterized the mall as a "lower-tier community shopping centre", located in "one of the lowest purchasing power neighbourhoods in greater Edmonton". Vacancy rates in the mall were high, causing a decline in the value of the mall. The ultimate basis of the Company's complaint was that the mall was "assessed at value comparable to that applied to better property", based on the original classification of the property.

124 Further, given that the basis of the complaint was that the assessed value of the mall exceeded its market value given its classification as a "lower-tier community shopping centre", the Board was limited to considering the matter as framed on the complaint form: s. 9(1) *MRAC*. Because the Board considered information that it was statutorily prohibited from considering, the Board's decision to increase the assessed value based on the City's submissions must be quashed.

IV. Conclusion

125 The appropriate standard of review is correctness. Applying that standard, we conclude that the Board erred in increasing the assessment in this case. We would therefore dismiss the appeal and affirm the decisions of the Court of Queen's Bench and Court of Appeal. The matter should be remitted to the Board for a hearing *de novo*. We would award costs to the Company in this Court and the courts below, payable by the City only. Costs should be awarded against the Board in the courts below only.

Appeal allowed.
Pourvoi accueilli.

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2016 BCCA 122
British Columbia Court of Appeal

Kriegman v. Wilson

2016 CarswellBC 681, 2016 BCCA 122, [2016] B.C.W.L.D. 3307, 265 A.C.W.S. (3d) 897, 385 B.C.A.C. 111, 665 W.A.C. 111, 86 B.C.L.R. (5th) 1

Bruce P. Kriegman, solely in his capacity as court-appointed Chapter 11 Trustee for LLS America LLC, Respondent (Plaintiff) and Ana Wilson, Appellant (Defendant)

Bennett, Stromberg-Stein, Savage JJ.A.

Heard: February 18, 2016
Judgment: March 16, 2016
Docket: Vancouver CA42710

APPEAL by defendant investor from judgment reported at *LLS America LLC (Trustee of) v. Wilson* (2015), 2015 BCSC 441, 2015 CarswellBC 749 (B.C. S.C.), dismissing investor's application to set aside registration order of foreign judgment.

Savage J.A.:

I. Introduction

1 Ana Wilson (the "Appellant") appeals from the order of Mr. Justice Affleck pronounced March 23, 2015 in which he dismissed the Appellant's application to set aside registration of a foreign judgment based on a bankruptcy proceeding. The Respondent is the bankruptcy trustee (the "Trustee") of LLS America LLC ("LLS America"), a company involved in United States bankruptcy proceedings commenced in Nevada in July 2009 and continued in the United States Bankruptcy Court for the Eastern District of Washington (the "Washington Court").

2 The bankruptcy proceeding involves an October 31, 2012 judgment of the Washington Court granting final default judgment in an adversary complaint filed by the Trustee against Larry Wilson and Ana Wilson (the "Wilsons") in the amount of $347,044.92 (the "Foreign Judgment"). The Foreign Judgment subordinated the claims made by the Wilsons against LLS America in their Proof of Claim to the Trustee's claims against the Wilsons. The Foreign

Judgment was registered in British Columbia in *ex parte* proceedings which culminated in a registration order (the "Registration Order").

3 LLS America was involved in a Ponzi scheme operating as the "Little Loan Shoppe". Little Loan Shoppe was established by Doris Nelson in British Columbia in 1997. It was relocated to Spokane, Washington in 2001. Over time LLS America went from a storefront model to become a largely Internet based enterprise. Although LLS America operated as a payday loan business it was in fact a Ponzi scheme. The scheme involved issuance of promissory notes to lenders who were promised high rates of return (40 - 60%). Early lenders, such as the Wilsons, were paid, not from operations of the payday loan business, but from funds taken from later lenders. On $220,000 in loans the Appellant says they were paid $252,720, but on learning of the bankruptcy they submitted their Proof of Claim for $355,666.69 which included the interest they claimed under the promissory notes.

4 The issues in the appeal are (1) whether the court below was correct in deciding that it could not extend the time limit in s. 34(1)(b) of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 (the "*COEA*") to allow the Appellant to challenge registration of the Foreign Judgment; (2) whether the time limit in the *COEA* is inapplicable because registration of the Foreign Judgment is in any event a nullity; and (3) whether the court below was correct in finding that it lacked jurisdiction to either extend the time for the appellant to set aside the Registration Order or otherwise challenge registration of the Foreign Judgment because of its inherent jurisdiction.

II. Background Facts

5 The background facts are described in the court below at length in paragraphs 2-44. I summarize the essential facts as follows.

6 The Wilsons met and invested $220,000 with Ms. Nelson in 2005, in what they thought was a payday loan business. The Appellant had no investment experience. She believed she could receive annual rates of return as high as 40 - 60% from the investment. There is no evidence that the Wilsons knowingly participated in the Ponzi scheme.

7 All of the Appellant's dealings with Ms. Nelson took place in Canada. Her investment was in Canadian dollars and deposited into a Canadian bank account belonging to one of the British Columbian numbered companies operated by Ms. Nelson. The promissory notes she received were undersigned by Ms. Nelson's two British Columbian companies. The notes stated that they were to be governed by the law of British Columbia. Although Ms. Nelson's signatures were witnessed and a seal applied by a Washington State notary public, there was no evidence the seal was applied at the time the notes were signed by her, nor was there evidence about where she signed them.

8 In total the Appellant received $252,720 from her $220,000 investment, which she deposed resulted in a net after-tax profit of $13,460.

9 In 2009 the Appellant learned from other LLS America investors of the bankruptcy. The Appellant was contacted by U.S. lawyers acting for creditors in the U.S. who ultimately declined to act for her. The Appellant received a "proof of claim" from the U.S. Bankruptcy Court District of Nevada which she completed, signed on November 17, 2009, and returned claiming $355,666.69. The basis for the claim was listed as "money loaned to LLS plus interest". The Proof of Claim lists "Wilson, Larry or Ana" as "Name of Creditor (the person or other entity to whom the debtor owes money or property)". It makes no reference to attornment, nor does it warn that it may be used as the basis for attornment of a claim against the creditor at a future time.

10 Mr. Wilson died in November 2010. The Appellant travelled to Argentina in August 10, 2011 and returned on December 10, 2011. On July 15, 2011 an "adversary complaint" was filed in the Washington Court naming her as a defendant. An unsworn certificate signed by a Washington Court clerk claims the Adversary Complaint, and a summons, were sent by registered mail to the Appellant on July 29, 2011. Two delivery receipts, dated August 22 and 26, 2011, were later filed in the Washington Court as proof of service of these documents. Notably only the Appellant's son signed the delivery receipts, and the receipts do not list the documents sent. The Appellant deposed that her son did not advise her of the delivery of these materials while she was in Argentina.

11 On August 19, 2011, the trustee in bankruptcy for LLS America, Witherspoon Kelley, a Washington State law firm, sent the Appellant a letter. The letter outlined that the Appellant was a defendant in adversary proceedings in which the bankruptcy estate of LLS America sought to "claw back" any payments made to her and her husband:

> ... under applicable bankruptcy and state law, LLS America and its related companies were involved in a "Ponzi scheme". This means that money received by LLS America from investors was generally used to pay back loans to previous investors in the companies. Under Bankruptcy Code terminology, these payments made by LLS America to prior investors using funds of subsequent investors constituted "fraudulent conveyances." Under applicable law, the bankruptcy estate of LLS America may be entitled to "claw back" any payments made, regardless of whether an investor received back from LLS America all of the money the investor may have invested.

12 The letter further stated that the Appellant had until October 15, 2011 to file an answer to the Adversary Complaint. The Appellant deposed that she read the letter after returning from Argentina in December 2011 but did not understand it. Because the deadline had passed, she

chose not to respond.

13 In 2012 the Appellant continued to receive letters from Witherspoon Kelley, but did not answer them "because [she] was consumed with caring for" her son who was in hospital for all of the year. In September 2012 she wrote to Witherspoon Kelley explaining her family circumstances and stating she hadn't read or understood the letters she had received. She asked to be kept informed as to what was going on.

14 The Washington Court issued the Foreign Judgment against the Appellant on October 31, 2012 in the amount of $347,044.92. On April 10, 2013 a master of the British Columbia Supreme Court granted the Registration Order. The parties agree the Appellant was personally served with the Registration Order in April 2013. The Appellant deposed that it was not until spring of 2013 that she realized she was being sued in the Washington Court. She did not file a notice of application to set aside the Registration Order until September 9, 2014.

15 The effect of the Foreign Judgment was to claw back any payments made to the Appellant to put her on the same footing as the other creditors. The Appellant stands to collect a portion of her investment through her claim against LLS America in the bankruptcy proceedings. I note that the amount of the Foreign Judgment, $347,044.92, far exceeded the total payments that Justice Affleck found the Appellant received of $252,720, although the discrepancy is that in the Washington Court proceeding transfers of $332,044.92 and $15,000 were alleged and ordered repaid.

16 Justice Affleck found that he was inclined to set aside the Registration Order because the Appellant was not "duly served" with the process of the Washington Court, nor did she appear or defend or attorn to the jurisdiction of that Court. However, he held that he did not have jurisdiction to do so in the face of s. 34(1)(b) of the *COEA*, which required the Appellant to apply to set aside the Registration Order within one month of receiving notice of it.

III. Legislation

17 The definitions applicable to Part 2 of the *COEA* are set out in s. 28:

> 28 (1) In this Part:
>
> "judgment" means a judgment or order of a court in a civil proceeding if money is made payable and includes an award in an arbitration proceeding if the award, under the law in force in the state where it was made, has become enforceable in the same manner as a judgment given by a court in that state, but does not include an order for the periodical payment of money as support, alimony or maintenance for a spouse, a former spouse, a reputed spouse, a child or any other dependant of

the person against whom the order was made;

"judgment creditor" means the person who obtained the judgment, and includes the person's executors, administrators, successors and assigns;

"judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the state in which it was given;

"original court" in relation to a judgment means the court that gave the judgment;

"registering court", in relation to a judgment, means the court in which the judgment is registered under this Part.

(2) All references in this Part to personal service mean actual delivery of the process, notice or other document to be served, to the person to be served with it personally, and service must not be held not to be personal service merely because the service is effected outside the state of the original court.

18 Section 29 of the *COEA* provides for the registration of judgments given in reciprocating states:

29 (1) If a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to have the judgment registered in the Supreme Court unless

(a) the time for enforcement has expired in the reciprocating state, or

(b) 10 years have expired after the date the judgment became enforceable in the reciprocating state.

(1.1) On application under subsection (1), the Supreme Court may order that the judgment be registered.
(2) An order for registration under this Part may be made without notice to any person in any case in which
(a) the judgment debtor

(i) was personally served with process in the original action, or

(ii) although not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court, and

(b) under the law in force in the state where the judgment was made,

(i) the time in which an appeal may be made against the judgment has expired and no appeal is pending, or

(ii) an appeal has been made and has been disposed of.

(3) In a case to which subsection (2) applies, the application must be accompanied by a certificate issued from the original court and under its seal and signed by a judge or the clerk of that court.

(4) The certificate must be in the form set out in Schedule 2, or to the same effect, and must set out the particulars as to the matters mentioned in it.

(5) In a case to which subsection (2) does not apply, notice of the application for the order as is required by the rules or as the judge considers sufficient must be given to the judgment debtor.

(6) An order for registration must not be made if the court to which the application for registration is made is satisfied that

(a) the original court acted either

(i) without jurisdiction under the conflict of laws rules of the court to which application is made, or

(ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor,

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, even though he or she was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court,

(d) the judgment was obtained by fraud,

(e) an appeal is pending or the time in which an appeal may be taken has not expired,

(f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court, or

> (g) the judgment debtor would have a good defence if an action were brought on the judgment.
>
> (7) Registration may be effected by filing the order and an exemplification or certified copy of the judgment with the registrar of the court in which the order was made, and the judgment must be entered as a judgment of that court.
>
> (8) If a judgment provides for the payment of money and also contains provisions for other matters, the judgment may only be registered under this Part for the payment of money.

[Emphasis Added.]

19 The effect of registration of a judgment is set out in s. 33:

> **33** If a judgment is registered under this Part,
>
> (a) the judgment, from the date of the registration, is of the same effect as if it had been a judgment given originally in the registering court on the date of the registration, and proceedings may be taken on it accordingly, except that if the registration is made under an order made without notice to any person, a sale or other disposition of any property of the judgment debtor must not be made under the judgment before the expiration of one month after the judgment debtor has had notice of the registration or a further period as the registering court may order,
>
> (b) the registering court has the same control and jurisdiction over the judgment as it has over judgments given by itself, and
>
> (c) the reasonable costs of and incidental to the registration of the judgment, including the costs of obtaining an exemplification or certified copy from the original court and of the application for registration, are recoverable in the same manner as if they were sums payable under the judgment if the costs are taxed by the proper officer of the registering court and the officer's certificate is endorsed on the order for registration.

[Emphasis Added.]

20 In the event that a foreign judgment is registered *ex parte*, s. 34 applies:

> 34 (1) If a judgment is registered under an order made without notice to any person
>
> (a) within one month after the registration or within a further period as the registering court may at any time order, notice of the registration must be served on the judgment debtor in the same manner as a notice of civil claim is required

to be served, and

(b) the judgment debtor, within one month after he or she has had notice of the registration, may apply to the registering court to have the registration set aside.

(2) On an application under subsection (1) (b), the court may set aside the registration on any of the grounds referred to in section 29 (6) and on terms the court thinks fit.

[Emphasis Added.]

21 Section 39 of the *COEA* provides that:

This Part must be interpreted so as to effect its general purpose of making uniform the law of the provinces that enact it.

22 Section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 reads as follows:

24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

IV. Can Registration of the Foreign Judgment be set aside?

23 This case concerns challenges to the registration of a foreign judgment which on its face was duly registered under the *COEA* and not challenged in a timely way under the statutory scheme.

24 The statutory provisions at issue are based on a uniform model law enacted in similar terms in all common law provinces: see Uniform Law Conference of Canada, *Reciprocal Enforcement of Judgments* Act, 1994 (re adoption of the uniform model law). The statutory provisions with which we are concerned must be interpreted so as to effect its general purpose of making uniform the law of the provinces that enact it.

25 A significant part of the Appellant's argument involved what she said were substantial issues in the proceedings both in respect of the obtaining of the Registration Order and the Washington Court assuming jurisdiction.

26 For example, the Appellant argues that the "real and substantial connection" (with the foreign jurisdiction) test was not met, as found by Justice Affleck, because of the limited connection between the Wilsons' promissory notes and Washington State, the fact the transactions were in Canadian dollars, and the fact the promissory notes said they were subject to British Columbia law.

27 The Respondent does not concede there were any such defects in the proceedings. For example, the Respondent argues that the "real and substantial connection" test was met, because jurisdiction exists where the foreign court has either a real and substantial connection with the subject matter of the action or the defendant.

28 A real and substantial connection with the subject matter of the action will satisfy the real and substantial connection test, even in the absence of such a connection with the defendant: *Beals v. Saldanha*, 2003 SCC 72 (S.C.C.), at para. 23, citing *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.). On facts materially the same as those in the case before us, and in a related proceeding, Grauer J., seemed of the view that the real and substantial connection test had been met: *LLS America LLC (Trustee of) v. Grande*, 2013 BCSC 1745 (B.C. S.C.) at para. 24 [*Grande*]. Bankruptcy proceedings have to take place somewhere, and it is normal practice in this jurisdiction, as well as in the District Courts in the US, to bring them all "under one roof".

29 The Appellant refers to the judge below finding that there was no attornment to the jurisdiction. Attornment is a stand-alone basis for the assumption of jurisdiction. Even if there is no connection to a foreign state, the courts of that state obtain jurisdiction if the defendant attorns.

30 The Respondent says that the appellant clearly attorned to the jurisdiction of the Washington Court by filing the Proof of Claim. Both Canadian and American courts have taken the view that by voluntarily availing oneself of the jurisdiction of a bankruptcy court, by filing a proof of claim, a party cannot deny the courts personal jurisdiction in a proceeding directly related to that case: *Grande* at para. 23-25, *LLS America, LLC et al*, U.S. Bankr. No. 09-06194-POW11.

31 The Appellant also raised issues with respect to "due service", "natural justice", and "full and frank disclosure". The Respondent controverts those submissions.

32 With respect to "due service" the Appellant says, as the judge below found, that she was not duly served with notice of the foreign proceeding because the method of service employed was insufficient to put her on notice of the proceedings. Thus she was denied natural justice in the adversary proceedings and the Foreign Judgment should not be enforced in Canada. The Respondent says there was no breach of natural justice. There was a return receipt showing delivery to the Appellant's address on the Proof of Claim. The Appellant does not deny

receiving the Adversary Complaint and receiving many pieces of mail from the Trustee at the address on the Proof of Claim which, on any objective basis, could leave no doubt that adversary proceedings had been commenced against her.

33 The Appellant says that the Trustee failed to make full and frank disclosure at the *ex parte* application for the Registration Order, and that the Registration Order should be set aside on that basis.

34 The Appellant's position is based on two matters (1) that the fact the Proof of Claim was from the Nevada Court, and (2) the erroneous statement that the Appellant had attorned to the jurisdiction of the Washington Court.

35 The Respondent says that this is a new issue on appeal that is a serious allegation and, if asserted in the court below, could have required evidence from the Trustee or counsel. In any event, the Respondent says there is no merit to this position. With respect to the first point, the Respondent says that although the header on the Proof of Claim refers to the Nevada Court, the Proof of Claim, on its face, says that it was filed in the Washington Court to which the proceedings had been lawfully transferred. On the second point, the Respondent says there was attornment, by filing the Proof of Claim, which provided for attornment to legal proceedings as confirmed by the decision in *Grande*.

36 I am not persuaded that it is necessary to resolve any of these issues unless it can be shown that the court below erred in concluding that it had no jurisdiction to extend the time period under s. 34(1)(b) of the *COEA*, or for any of the other reasons argued with respect to the validity of the Registration Order, the Registration Order is of no effect.

37 The Appellant had an opportunity to set aside the Registration Order by an application made within one month of receiving notice of it. In my view, if any of those arguments had merit she would have been entitled to succeed in setting the Registration Order aside as provided for in s. 34(2), based on the defects enumerated in s. 29(6). The question is, having failed to make application in a timely manner can she now argue the merits of those positions and avoid the prescription contained in s. 34(1)(b) of the *COEA*?

A. Extending the Time Limits of the COEA

38 In this case the judgment was registered *ex parte*. Accordingly, s. 34(1)(b) of the *COEA* gives the judgment debtor one month after notice of the registration to have the registration set aside. The judgment was registered on April 10, 2013 in British Columbia. It is agreed that the Registration Order was personally served on the Appellant in April, 2013, within the one month specified in s. 34(1)(a) of the *COEA*.

39 In March 2014 the Registration Order was registered on title to the Appellant's home in Surrey, British Columbia. On September 9, 2014 the Appellant filed an application to set aside the Registration Order. Thus the application to set aside the Registration Order was made 16 months after the time prescribed under s. 34(1)(b) of the *COEA*.

40 Justice Affleck in the court below dismissed the Appellant's application to set aside the Registration Order. As s. 34(1)(b) requires that an application to set aside registration of a foreign judgment filed without notice under Part 2 of the *COEA* be brought within one month of notice of the registration, he held that failing to bring the application within the prescribed period was fatal to the application.

41 Justice Affleck held that s. 24 of the *Law and Equity Act* does not allow a court to relieve against the statutory limitation period in s. 34(1)(b) of the *COEA*. In support of that proposition, the judge below relied on two decisions of this Court: *Martin Mine Ltd. v. British Columbia* (1985), 62 B.C.L.R. 107 (C.A.) at 116 and *Ganitano v. Metro Vancouver Housing Corp.*, 2014 BCCA 10 (B.C. C.A.) at para. 34.

42 In *Martin Mine*, this Court applied the reasoning of the Supreme Court of Canada and Privy Council in *R. v. Canadian Northern Railway*, [1923] A.C. 714 (P.C.), aff'g (1922), 64 S.C.R. 264 (S.C.C.), aff'g (1921), 58 D.L.R. 624 (Alta. C.A.) [*Canadian Northern Railway*]. In *Canadian Northern Railway*, a provision in Alberta legislation gave the court the power to relieve "against all penalties and forfeitures" similar to s. 24 of the *Law and Equity Act*. The main issue was whether the court had the power to relieve against financial penalties imposed upon the railway companies under the terms of provincial legislation.

43 In *Martin Mine*, Craig J.A. writing for the Court said:

> ... The main issue in the case was whether the Court had power to relieve against financial penalties imposed upon the railway companies under the terms of provincial legislation. The Appellate Division of the Supreme Court of Alberta unanimously held that the power to relieve against penalties in forfeitures did not authorize relief against statutory penalties (1921) 1 W.W.R. 178. The Supreme Court of Canada unanimously agreed with this view, including Idington J. and Anglin J. who dissented. At p. 269 Idington J. said:
>
> > The contention founded upon the power of the court to relieve from such penalties ... seems to me to be applicable only to such contractual penalties and forfeitures as the Court of Chancery had exercised jurisdiction in regard to.
>
> Duff J. said at p. 272:
>
> > I am unable to accept the contention that the authority to relieve from forfeitures expressed in general terms and conferred upon the Supreme Court by the statute of

> 1907 extends to penalties and forfeitures declared by a public enactment and thereby made exigible upon the non-performance of a general duty created by such enactment, such as a duty to pay taxes or to make a return under a taxing statute.

The Privy Council agreed with this view. In giving the judgment of the Privy Council, Lord Parmoor said at p. 722:

> The Chief Justice (Chief Justice Harvey of the Appellate Division) expresses the opinion that if the power given to the Court to relieve against penalties applied to statutory penalties, this would, in effect, be giving an authority to enable the Court to repeal statutes. This decision was unanimously confirmed in the Supreme Court of Canada. Idington J. says in his judgment "that the power in the Court to relieve from penalties seemed to him to be applicable only to such contractual penalties, and forfeitures as those to which the Court of Chancery had exercised jurisdiction".

I think that these views are determinative of this issue and that a court cannot relieve against penalties or forfeitures which are statutory in origin.

[Emphasis Added.]

44 In the result the Court in *Martin Mine* held that it had no power to relieve against the statutory forfeiture of a mineral claim upon a free miner failing to perform his obligations under the terms of a mining lease.

45 In *Ganitano*, a five member division of this Court applied the reasoning in *Canadian Northern Railway* to the issue of whether s. 24 of the *Law and Equity Act* empowered a court to grant equitable relief against forfeiture of a residential tenancy for failure to make timely payment of rent, as provided for under ss. 46 and 47 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78. Frankel J.A. speaking for the Court said:

> [44] In my view, the Legislative Assembly has clearly and expressly stated that a tenant's failure to respond within the statutory time limits to a notice given in accordance with either s. 46(4) or s. 47(4) will, by operation of law, bring a tenancy to an end and entitle the landlord to regain possession of the rental unit. Such a termination is a statutory forfeiture (i.e., a taking back of the remainder of the term of the tenancy) and is beyond the reach of s. 24 of the *Law and Equity Act*. Indeed, it would be anomalous to allow a tenant to call in aid the equitable jurisdiction of the courts to reinstate a tenancy he or she is "conclusively presumed to have accepted" is at an end.
>
> [Emphasis in original]

46 The one-month limitation on setting aside foreign judgments in s. 34(1)(b) of the *COEA* is a statutory prescription. I agree with the judge below that s. 24 of the *Law and Equity Act* does not empower the court to relieve a party from the limitation prescribed by s. 34(1)(b) of the *COEA*.

B. Nullity

47 The Appellant argues that the judge below erred in law by failing to find that the Registration Order was a nullity on the basis of it being *void ab initio* and should be set aside regardless of the expiry of the one month time limit in s. 34 of the *COEA*.

48 The Appellant says that the Registration Order was *void ab initio* for various reasons: (1) the conditions for an *ex parte* registration order were not met; (2) the Respondent failed to make full and frank disclosure of all material facts that could be reasonably expected to have a bearing on the outcome of the *ex parte* application; (3) s. 34 of the *COEA* has no application to an order that is void; (4) there was no real and substantial connection between the Appellant and the foreign jurisdiction; (5) the Appellant was not "duly served" in the adversary proceedings; and (6) the Respondent's non-compliance with the *COEA* allows the court below to grant relief against the statutory prescription contained in the *COEA*. The Respondent takes issue with most of the premises of these arguments, and says the judge below erred in several of his findings (although not in his conclusion).

49 Each of these arguments is premised on there being substantial defects in the proceedings leading up to and culminating in registration of the Foreign Judgment. The Appellant says that, in effect, these defects go to the jurisdiction of making the Registration Order, and make the Registration Order a nullity. Thus she says there is no limitation provision which applies to setting aside such an order.

50 One of the difficulties in these arguments, says the Respondent, is that the provisions of the *COEA* contemplate there being substantial defects in the making of registration orders, and specifically make provision for setting aside a registration order in a timely way based on such concerns. The Respondent says that Part 2 of the *COEA* is a complete code. Fraud, natural justice and public policy are all relevant factors under Part 2 of the *COEA* as they fall within the grounds listed in s. 29(6) for setting aside registration of a foreign judgment, on a timely application, under s. 34(2). Were these matters raised as a ground to set aside registration, they would still be subject to the time limitation set out in s. 34 of the *COEA*.

51 The grounds upon which one can oppose registration of a foreign judgment are varied, extremely broad and, in my opinion, encompass the appellant's arguments here. For convenience, I will repeat those grounds which are set out in s. 29(6) which provides:

(6) An order for registration must not be made if the court to which the application for registration is made is satisfied that

(a) the original court acted either

(i) without jurisdiction under the conflict of laws rules of the court to which application is made, or

(ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor,

(b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court,

(c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, even though he or she was ordinarily resident or was carrying on business in the state of that court or had agreed to submit to the jurisdiction of that court,

(d) the judgment was obtained by fraud,

(e) an appeal is pending or the time in which an appeal may be taken has not expired,

(f) the judgment was for a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court, or

(g) the judgment debtor would have a good defence if an action were brought on the judgment.

[Emphasis Added.]

52 It was available to the Appellant to raise any of these grounds with a timely application under s. 34 of the *COEA*. She did not do so. I do not think characterizing a defect (in the process leading up to obtaining a superior court order) as creating a 'nullity' escapes the application of s. 34 as a matter of statutory interpretation.

53 In support of her position the Appellant cites a number of decisions including *South Pacific Import Inc. v. Ho*, 2009 BCCA 163 (B.C. C.A.). She says that *South Pacific* supports the proposition that the court is not bound by s. 34 of the *COEA* where there is a common law basis to set aside the registration of a foreign judgment. I am unable to interpret *South Pacific* in the manner argued by the Appellant.

54 The decision in *South Pacific* concerned an application to set aside registration of a foreign judgment. The limitation provision in s. 34 of the *COEA* does not appear to be at issue and was not referred to by this Court or the court below. The appeal concerned two orders of Blair J. with reasons indexed as 2007 BCSC 211 (B.C. S.C.) and 2007 BCSC 213 (B.C. S.C.). Neither of those decisions referenced the limitation found in s. 34 of the *COEA*. The matter appears to have proceeded simply on the basis that it was a timely application to set aside a registration order, and whether any of the grounds for setting aside such an order, enumerated in s. 29(6), had application. For that reason I do not find the case of assistance to the Appellant.

55 The Appellant refers to a number of cases which she says support the proposition that the order is a nullity, including *TMR Energy Ltd. v. State Property Fund of Ukraine*, 2005 FCA 28 (F.C.A.); *Bekar v. TD Evergreen*, 2006 BCCA 266 (B.C. C.A.); *McLean v. Retail Solutions Inc.* (1989), 37 B.C.L.R. (2d) 131 (S.C.); and *Lornal Construction Ltd. v. Lawrence* (1984), 47 C.P.C. 99 (B.C.S.C.). These decisions draw a distinction between irregularities, which a court may be prepared to countenance, and substantial defects which do not meet the conditions requisite to being treated as irregularities subject to the available curative provisions of the court rules.

56 The Respondent says that the Appellant's argument that the order is a nullity is misconceived. An order of a superior court is never a nullity no matter how wrong it might be, and is binding and conclusive on all the world until it is set aside or varied on appeal: *V. (L.R.) v. V. (A.A.)*, 2006 BCCA 63 (B.C. C.A.) at para 37; *Canadian Transport Co. v. Alsbury* (1953), 1 D.L.R. 385 (B.C.C.A.), aff'd *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 S.C.R. 516 (S.C.C.).

57 *TMR Energy* concerned a prothonotary acting beyond his jurisdiction under the *Federal Court Act* and *Federal Court Rules* granting registration of a foreign judgment. The rules allowed the court to set aside or vary an order that was made *ex parte*. The rule at issue set no time limit on the filing of such a motion. The Court noted that the authorities held that a motion to set aside or vary the order "must be brought with reasonable diligence". Although the Court drew a distinction between nullities and irregularities, in the case before it, there was no time limit as exists under the *COEA*. The motion was heard and dealt with. Tardiness could be addressed by costs (para. 33).

58 In *Bekar*, this Court was dealing with the enforcement of an arbitral award by a certificate of judgment which was obtained *ex parte* by requisition from a registrar in BC Supreme Court. The filing of a certificate, and the ability to use the machinery of the courts to enforce it, required leave of the court by an originating application and notice to the respondent (para. 25) none of which was done. The Court found that the execution proceedings were flawed from the inception as a result of the failure to comply with s. 29 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, and there was no basis in the record for it to make an order *nunc pro tunc*

(para. 51).

59 In *McLean*, the defendants applied to set aside a writ of summons which had been served in the province of Alberta. No leave to serve the originating process outside of British Columbia had been obtained and a copy of the writ had not been endorsed with a notice in the required form. The defendants applied for a declaration that such service was invalid and the plaintiffs responded with an application for leave to serve the writ in Alberta *nunc pro tunc*. The Court set aside the service on the basis that failing to apply for leave was not an irregularity that could be cured.

60 The *Lornal Construction* case was an application to set aside registration of a foreign judgment. Mr. Justice Gibbs, as he then was, set aside the registration on the basis that the affidavit in support of the application did not meet the requirements of Rule 54 (now Rule 19-3 of the *Supreme Court Civil Rules*), and was not merely an irregularity. There is no suggestion in the decision that the Court was relieving against a statutory limitation period.

61 In *Virani*, this Court in brief reasons in a family claim addressed an attack on court orders which raised jurisdictional concerns:

> [37] At present before this Court are two substantive issues:
>
> 1. Does the *Divorce Act*, by its terms, empower a superior court in Canada to make a support order in favour of a child habitually resident in this jurisdiction whose parents were divorced by the order of a foreign court?
>
> 2. Does the **Family Relations Act** empower a court in British Columbia to make an original order for support against a non-resident parent who has never been a resident of this or any Canadian jurisdiction?
>
> It is convenient to note at this point that the notice of motion of the appellant seeking to have the order of the court declared a "nullity" was misconceived. An order of a court of superior jurisdiction is never a "nullity", no matter how wrong it may be.
>
> [Emphasis Added.]

62 In *Mazepa v. Embree*, 2014 ABCA 438 (Alta. C.A.), the Court said:

> [10] In any event, there is an overriding principle that the orders of a superior court of record are never nullities. They perhaps should not have been granted, they may be based on procedural irregularities, and they may be undermined by reviewable error. They are, nevertheless, valid orders of the court until they are set aside. As the Court noted in *Virani v Virani*, 2006 BCCA 63 at para. 37, 52 BCLR (4th) 112:

> It is convenient to note at this point that the notice of motion of the appellant seeking to have the order of the court declared a "nullity" was misconceived. An order of a court of superior jurisdiction is never a "nullity", no matter how wrong it may be.

There are numerous other authorities to the same effect: *Preston v Preston*, 2014 ABCA 247 at para. 2; *Fiebich v Ortlieb*, 2004 ABCA 256 at para. 19, 31 Alta LR (4th) 1; *Isaacs v Robertson*, [1985] AC 97 at pp. 101-3 (PC (St V)); *Canadian Transport (U.K.) v Alsbury* (1952), 105 CCC 20, 7 WWR (N.S.) 49 (BCCA) affirmed sub nom *Tony Poje v Attorney General of British Columbia*, [1953] 1 SCR 516; *Harrison v Harrison*, 2007 BCCA 120 at para. 27, 64 BCLR (4th) 318; *Regina (City) v Cunningham*, [1994] 8 WWR 457, 123 Sask R 233 (CA).

63 A thorough discussion of the point occurs in the *Canadian Transport* decision. In that case one picketer was committed to jail for three months for contempt for failing to abide an *ex parte* injunction restraining the picketing of a ship in Nanaimo harbour. It was argued that the injunction was a nullity that could be ignored with impunity because of various failings in the procedure for obtaining it and arguments that it was made without jurisdiction. Sidney Smith J.A. said:

> [59] The appellants attacked the chief justice's order on many grounds, of which I shall examine the foremost:
>
> [60] First it was said that the injunction order of Clyne, J. was a nullity that could be ignored with impunity, and could form no basis for contempt proceedings. Many objections were levelled at this learned judge's order, chief among them being: (1) That it was based on improper and inadmissible evidence; (2) That the injunction was in conflict with the *Trade-unions Act* and the *Laws Declaratory Act*, RSBC, 1948, ch. 179; (3) That the injunction was in permanent form and no court could grant a permanent injunction *ex parte*. To this the general answer is made that the order of a superior court is *never* a nullity; but, however wrong or irregular, still binds, cannot be questioned collaterally, and has full force until reversed on appeal. This seems to be established by the authorities cited by counsel for the Attorney-General, viz., *Scott v. Bennett* (1871) LR 5 HL 234, at 245; *Revell v. Blake* (1873) LR 8 CP 533, at 544, 42 LJCP 165; *Scotia Construction Co. v. Halifax (City)*, [1935] S.C.R. 124; and to these I might add *In re Padstow Assur. Assn.; Ex parte Bryant* (1882) 20 Ch D 137, at 145, 51 LJ Ch 344, and *Hughes v. Nor. Elec. & Mfg. Co.* (1913) 50 SCR 626, at 652-3. To these general authorities may be added the more specific line of cases holding that an injunction, however wrong, must be obeyed until it is set aside, as shown by the authorities cited in *Kerr on Injunctions*, 6th ed., p. 688, and 7 *Halsbury*, p. 32, which include the authoritative decision in *Eastern Trust Co. v. Mackenzie, Mann & Co.*, 31 W.L.R. 248, [1915] A.C. 750, at 761, 84 LJPC 152, where a party was held to be rightly committed for disobeying an injunction, later set aside. Other

authorities for holding that an injunction, though wrong, must be obeyed till set aside, are *Leberry v. Braden* (1900) 7 BCR 403, and *Bassell's Lunch v. Kick*, [1936] OR 445, at 456. The cases cited by appellants for their proposition largely dealt with inferior courts and so were not in point. I may mention however that I venture to doubt whether *Lumley v. Osborne*, [1901] 1 K.B. 532, 70 L.J.K.B. 416, is a good decision, even as applied to an inferior court. It seems clearly contrary to later authority.

. . .

[62] But to return to the objection that the injunction order was a nullity (which means made without jurisdiction) because founded on inadequate and inadmissible evidence: The idea that the sufficiency of evidence has any relation to jurisdiction is entirely novel and against principle. That would be so even if we were dealing with an inferior court. It should be sufficient to refer to *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 W.W.R. 30, [1922] 2 A.C. 128, particularly at 151-2, 91 LJPC 146; but I might add *Haggard v. Pélicier Frères* [1892] AC 61, 61 LJPC 19, and *Hooper v. Hill*, [1894] 1 Q.B. 659, 63 LJQB 598, among many other cases in point.

[63] Next the appellant said that the injunction was a nullity because it went further than the *Trade-unions Act* permitted, and because it did not comply with the *Laws Declaratory Act* regulating *ex-parte* injunctions. This argument that a court, particularly a superior court, acts without jurisdiction when it errs in matters of statute law seems to be clearly against both authority and principle. Direct authority on the point is found in *Scott v. Bennett*, *supra*; *Bevell v. Blake*, *supra*; and *Leeds Corpn. v. Ryder*, [1907] A.C. 420, at 423, 76 LJKB 1032. On principle it seems clear that a court's mistakes as to statute law are errors just like their mistakes in common law. Otherwise impossible situations would arise. There is always room for doubt as to what statutes mean and as to whether the facts of a particular case bring it within a statute. Parties resort to courts to find out what their legal rights are. But if a judgment was void whenever the judge made a mistake in statute law, resort to the courts would be useless. Every one would then become his own lawyer, and his own judge as well. The submission cannot be sound.

[64] The argument that the injunction was void because it took an unjustifiable form was based partly on the *Laws Declaratory Act*. I have already dealt with that. But many decisions were also cited to show that permanent injunctions could properly be issued in certain circumstances, but not in others. These were all authorities to show that Clyne, J. erred and that he could perhaps have been reversed if appeal had been taken from his injunction; but they are not authorities for his order being treated as a nullity and ignored. Far from it.

[Emphasis Added.]

64 Bird J.A. concurred, saying:

[96] The order under review is that of a superior court of record, and is binding and conclusive on all the world until it is set aside or varied on appeal. No such order may be treated as a nullity.

[97] In *Scott v. Bennett* (1871) LR 5 HL 234, the House of Lords approved and adopted the unanimous opinion of the judges, who had been summoned by the House of Lords, as expressed by Baron Martin at p. 245:

> It was said by the learned counsel that there was no jurisdiction to make this rule. That is entirely a mistake. The Court of Common Pleas is one of the superior courts of record. It may be that the Act of Parliament did not justify it, but nevertheless the judges had perfect jurisdiction to make it, and the rule being made by them, it is binding and conclusive on all the world, unless it can be altered by appeal or error.

[98] In *Revell v. Blake* (1873) LR 8 CP 533, 42 LJCP 165, the judges of the Exchequer Chamber expressed a like opinion. At p. 544, Blackburn J. said:

> Reading these sections together I can come to no other conclusion than that the local courts are branches of this principal court of record, and so must be treated as courts of general jurisdiction, and we cannot treat a judgment of one of them as a nullity, but must leave it to the matter of appeal.

[99] In *Eastern Trust Co. v. Mackenzie, Mann & Co.*, 31 W.L.R. 248, [1915] A.C. 750, 84 L.J.P.C. 152, Sir George Farwell, speaking for their Lordships of the Judicial Committee, said at pp. 255-6:

> It [the injunction] was, of course, interlocutory, not final, but it is binding on all parties to the order so long as it remains undischarged — .

[100] Duff, C.J. approved the same principle in *Scotia Construction Co. v. Halifax (City)*, [1935] S.C.R. 124, and expressed the principle in these terms:

> In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a court of general jurisdiction, possessing — authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction.

[101] In my opinion these submissions must be rejected.

65 Speaking for the majority of the Supreme Court of Canada in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), McIntyre J. at 599 said:

In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

Authority for these propositions is to be found in many cases. A particularly clear statement of the law, together with reference to many of the authorities, is to be found in *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 D.L.R. 385, a judgment of the British Columbia Court of Appeal.

66 Justice McIntyre then went on to cite and review other cases that confirm "the well-established and fundamentally important rule ... that an order of a court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms" (at 604). Reference may also be made to the Saskatchewan Court of Appeal decisions in *Bank of Montreal v. Coopers & Lybrand Inc.* (1996), 137 D.L.R. (4th) 441 (Sask. C.A.) (per Lane J.A.) and *Chaban (Trustee of) v. Chaban* (1999), 172 D.L.R. (4th) 312 (Sask. C.A.).

67 In my view the Appellant's cases are of no assistance to the court. They all involve timely applications to set aside the registration of a judgment, the registration of an arbitration award, or service *ex juris*. The references to matters being a 'nullity' in those cases are made in connection with arguments that the defects are minor enough that curative provisions can be applied *nunc pro tunc* to defeat a timely application to set aside the order.

68 In my view the authorities establish that an order of a superior court of record is binding and conclusive unless set aside on appeal. The Appellant failed to apply to set aside the Registration Order within the limitation period proscribed by s. 34 of the COEA. This conclusion is consistent with the decisions referred to us by the Respondent such as *Alcor Pacific Lumber Sales Ltd. v. Janet Lumber Trading Co.* (1977), 11 A.R. 139 (Alta. T.D.);

Yorkshire Trust Co. v. Mallett (1986), 71 A.R. 23 (Alta. C.A.); and *Concord Mortgage Group Ltd. v. Northern Geophysics Ltd.*, [1994] N.W.T.J. No. 55 (N.W.T. S.C.).

69 In a related argument, the Appellant says the judge below failed to correctly apply the test for enforcement of foreign judgments in *Beals*. The Appellant says that the judge below made two findings relevant to the application of *Beals*, namely, that (1) there was no real and substantial connection between the Appellant and the foreign jurisdiction, and (2) the Appellant was not "duly served" with the process in the foreign court.

70 However, with respect, *Beals* is not a case involving an attempt to set aside a foreign judgment after the expiration of a limitation period. Rather, *Beals* concerns a timely defence to an application to enforce a foreign judgment: *Beals v. Saldanha* (1998), 42 O.R. (3d) 127 (Ont. Gen. Div.). It is of no assistance to the Appellant in her argument that the Registration Order is a nullity and there was no need to comply with the statutory limitation period in order to set it aside.

C. Inherent Jurisdiction

71 In argument it was suggested that there is inherent jurisdiction in the court below to set aside the Registration Order.

72 *R & J Siever Holdings Ltd. v. Sunridge Merritt Motel Inc.*, 2008 BCCA 59 (B.C. C.A.) demonstrates an application of the Court's inherent jurisdiction. In that case the Court of Appeal held at para. 14:

> In addition to the powers conferred by the *Rules of Court*, the Supreme Court of British Columbia, as a superior court of record, has inherent jurisdiction to regulate its practice and procedures so as to prevent abuses of process and miscarriages of justice: see I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Leg. Prob. 23 at 23-25. As the author said, at 25,
>
> The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by the Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of powers are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

73 Thus inherent jurisdiction exists to "prevent abuses of process and miscarriages of justice". While the precise boundaries of the Court's inherent jurisdiction are unclear, that jurisdiction "is a procedural concept and courts must be cautious in exercising the power which

should not be used to effect changes in substantive law": *Goodwin v. Rodgerson*, 2002 NSCA 137 (N.S. C.A.) at para. 17.

74 In this case there is a statutory procedure in the *COEA*. Subsection 34(2) of the *COEA* makes it clear that the court can set aside registration on any of the grounds referred to in s. 29(6) on terms the court finds fit, provided the application is made in a timely way. In my view it is a code for the grounds on which registration of a foreign judgment may be set aside: *LLS America LLC (Trustee of) v. Dill*, 2015 BCSC 1467 (B.C. S.C.). "Inherent jurisdiction" is not a basis upon which the statutory procedure and prescription set out in s. 34 the *COEA* can be avoided.

D. Failure to Comply with the COEA

75 The Appellant argues that because the Respondent failed to comply with the provisions of the *COEA* the authorities establish that the court has jurisdiction to extend the time for setting aside the Registration Order. Thus the judge below erred in failing to recognize that if the plaintiff failed to comply with mandatory terms of the *COEA* then the court can extend the time limit under s. 34(1)(b).

76 To support that proposition the Appellant cites *Auger v. Hume*, [1999] B.C.J. No. 118 (B.C. S.C.) at para 14 and *Walters v. Tolman*, 2005 BCSC 838 (B.C. S.C.) at para. 16. In *Augers*, although the *ex parte* registration order was made it was not served within one month of registration, contrary to s. 34(1)(a) of the *COEA*.

77 The effect of the decision in *Augers* is that the one-month limitation in s. 34(1)(b) of the *COEA* does not commence until service has been effected as required by s. 34(1)(a), although in places the court expresses the principle as one where the court in such circumstances can make orders mutually extending the time periods. The decision in *Walters* follows that in *Auger*. Both decisions are restricted to circumstances in which there has not been timely service of the Registration Order. That is not the situation here.

78 It is clear that s. 34(1)(a) expressly contemplates extending the time under which service of a registration order may take place, by requiring service "within one month after the registration *or within a further period as the registering court may at any time order*". In my view, the one-month limitation in s. 34(1)(b) can only start to run, after the date on which service has been perfected. These decisions, in my view, do not stand for the proposition that there is a general ability of the court to extend the time for compliance with the statutory limitation in s. 34(1)(b). Indeed, the language allowing the court to extend time under s. 34(1)(a) does not appear in s. 34(1)(b).

V. Conclusion

79 Counsel for the Appellant has said all that could be said in support of the appeal, but I have concluded that there are no grounds raised on which the Registration Order can be set aside. As there are no grounds raised on which the Registration Order can be set aside it is unnecessary to determine whether the Registration Order could have been set aside on a timely application under s. 34(1)(b) of the *COEA*. I would dismiss the appeal.

***Bennett J.A.*:**
I AGREE:

***Stromberg-Stein J.A.*:**
I AGREE:

Appeal dismissed.

Most Negative Treatment: Distinguished
Most Recent Distinguished: C.U.P.E., Local 38 v. Calgary (City) | 2001 CarswellAlta 1807, 78 C.L.R.B.R. (2d) 1, 2002 C.L.L.C. 220-050, [2001] Alta. L.R.B.R. 529 | (Alta. L.R.B., Nov 30, 2001)

1975 CarswellBC 136
Supreme Court of Canada

McGavin Toastmaster Ltd. v. Ainscough

1975 CarswellBC 136, 1975 CarswellBC 284, [1975] 5 W.W.R. 444, [1975] S.C.J. No. 51, [1976] 1 S.C.R. 718, 4 N.R. 618, 54 D.L.R. (3d) 1, 75 C.L.L.C. 14,277

McGavin Toastmaster Limited v. Ainscough et al.

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpreé JJ.

Judgment: April 22, 1975

Counsel: *D. McK. Brown, Q.C.*, and *D. L. Page*, for appellant.
G. L. Murray, Q.C., for respondent.

Subject: Labour

Headnote

Labour Law --- Collective agreement — Nature of collective agreement — Effect of individual employment contract

Labour Law --- Collective agreement — Wages — Severance or layoff pay

Trades and trade unions — Closure of plant — Unlawful strike of employees in attempt to avert closure with consequential loss of employment — Whether employer-employee relationship terminated — Severance pay.

Appeal from the judgment of the British Columbia Court of Appeal, [1974] 3 W.W.R. 114, dismissing an appeal from the judgment of Kirke Smith J., [1973] 4 W.W.R. 505. Appeal dismissed.

Respondents, employees of appellant, and members of a union which had concluded a collective

agreement with appellant which was in force when the dispute arose, learned that appellant was about to "phase out" its operations at the plant at which they were employed; fearing for their jobs the employees decided to strike and did strike on 1st March 1971. The strike was admittedly illegal. Appellant took no action with regard to the strike but on 5th March 1971, pursuant to a directors' resolution of 4th March, it closed its plant. Respondents, numbering 93, brought an action for severance pay which the company resisted on the ground that the employees had wrongfully terminated their own employment and were disentitled to severance pay. Kirke Smith J. allowed the claims and his judgment was affirmed by the British Columbia Court of Appeal, Robertson J.A. dissenting.

Held (*De Grandpre, Ritchie, Spence and Pigeon JJ.* dissenting), the appeal should be dismissed; in the light of the fact that a collective agreement was in force, binding upon both employer and employees, and in the light of the then existing legislation questions such as repudiation of contracts of employment and fundamental breach were inapplicable and could not be invoked. Appellant could have taken action against the striking employees but did not do so but insisted instead that they had quit their jobs; they had stopped work but far from quitting their jobs they had gone on strike in an effort to retain them. The illegal strike did not per se terminate the employer-employee relationship and the appellant was therefore obliged to meet its severance pay obligations under the terms of the collective agreement: *Syndicate Catholique des Employées de Magasins de Québec v. Paquet Ltée*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346; *Polymer Corpn. v. Oil, Chemical and Atomic Workers International Union, Local 16-14*, [1961] O.R. 176, 26 D.L.R. (2d) 609, affirmed [1961] O.R. 438, 28 D.L.R. (2d) 81, affirmed [1962] S.C.R. 338 (sub nom. *Imbleau c. Laskin*), 33 D.L.R. (2d) 124; *C.P.R. v. Zambri*, [1962] S.C.R. 609, 34 D.L.R. (2d) 654 applied.

Laskin C.J.C. (Martland, Judson, Dickson and Beetz JJ. concurring):

1 This appeal, which is here by leave of this Court, concerns entitlement to severance pay as provided for under the terms of a collective agreement between the appellant company and a trade union representing bakery employees in the appellant's bakery plant in Vancouver. The claim to severance pay was made by 93 persons who were the plaintiffs in an action to recover such pay following the appellant's refusal to recognize their entitlement thereto when it closed its Vancouver plant on or about 5th March 1971. The monetary calculations are not in issue, but the appellant defended the action on the ground that from and after 1st and 2nd March 1971 the plaintiffs were no longer employees of the appellant, that they wrongfully and in breach of individual contracts of employment left the plant and did not report for work, and were therefore disentitled to enforce the severance pay provisions of the collective agreement which were alleged to be part of their respective contracts of employment. The appellant company asserted in its defence that the plaintiffs were not discharged but themselves left the employment of the company.

2 This Court raised, suo motu, the question whether the matter in issue here ought properly to have been submitted to arbitration under the grievance and arbitration provisions of the collective agreement between the appellant and the plaintiffs' trade union. In correspondence exchanged between solicitors the question of arbitration was raised and then dropped, and Court proceedings were instituted on 12th May 1971. There was no contention in defence that the appropriate proceedings should have been by way of arbitration under the collective agreement, and it does not appear that any such position was taken either before the trial Judge [[1975] 4 W.W.R. 505] or in the British Columbia Court of Appeal [[1974] 3 W.W.R. 114]. This Court refrained therefore in this case from taking any position on this question and is content to deal with the legal issue or issues as having been properly submitted to the Courts for adjudication.

3 The bare facts of this case are that employees of the company, including the plaintiffs in this action, went on strike on 1st March 1971 and were still on strike on 5th March 1971 when the company closed its plant pursuant to a decision of its board of directors taken the previous day that the plant, which was shut down by reason of the strike, would not be reopened. The strike was illegal because, inter alia, it occurred during the subsistence of a collective agreement: see The Mediation Services Act, 1968 (B.C.), c. 26 (as entitled by 1972 (B.C.) (2nd Sess.), c. 8, s. 1), s. 23(1) (Act repealed by 1973 (2nd Sess.) (B.C.), c. 122, s. 151(*b*), enacting new Labour Code, effective as to various provisions on proclamation). There is no doubt that the union, party to the collective agree ment, and the employees who were members thereof, were deeply concerned about loss of jobs owing to layoffs over the previous two years and owing to a decision by the company to move a certain operation to another plant in another province. Though this was the explanation for the strike, it could not be a legal justification for it. Extensive submissions were made by counsel for the company as to the economic reasons which compelled it to assess the future of the Vancouver plant, but it is of no relevance to this case whether the situation justified its course of action or not. There was no suggestion that it was not legally entitled to make such assessment and come to a decision to phase out its Vancouver operation or bring it to an immediate end subject, of course, to any obligations that it had under the collective agreement.

4 There was some dispute as to the extent to which the company had or had not had meetings with the union at or following 22nd February 1971, when it decided to discontinue the so-called "bun" operation in Vancouver and to have its Calgary plant serve the Kelowna area with buns as of 1st March 1971. Certainly, no meetings were held after 1st March 1971. Between 22nd February and 1st March 1971, there was communication between company and union, and the record, for what it is worth, is clear that the company's decision was an irrevocable one, leading to union alarm that further attrition of the work force was likely. The work force had been informed by a union official of the "bun" decision and when the communications and discussions up to 1st March 1971 proved unsuccessful to secure a reversal or suspension of the decision, the employees in late mid-morning on 1st March 1971 began an orderly shutdown of the plant preparatory to a general membership meeting in the afternoon. The minutes of the

meetings disclose that it was unanimously agreed "to stay out until the situation is rectified". These words were said by company counsel to mean that the employees had decided to quit their jobs but it is the fact, as Robertson J.A. said in his reasons, that the minutes were not communicated to the company which made its decision to close the plant independently of any knowledge of or reliance on the minutes. The union, as both the trial Judge and Seaton J.A. noted in their reasons, attempted after 1st March 1971 to meet with the company but a meeting was refused. However, a union official was told by telephone to be available on Friday, 5th March 1971, and at that time he was handed a letter announcing the company's decision, taken on 4th March 1971, to close the plant.

5 There was agreement by the trial Judge and by all members of the Court of Appeal that the company had closed the plant within the meaning of art. XX of the collective agreement, reading as follows:

> In the event of amalgamation, closure of the plant or a department thereof, or reduction in work force due to automation or technological advances causing a regular full-time employee to lose his or her employment, the Company hereby agrees to pay such an employee severance pay at his or her regular rate of pay according to the following schedule.

6 From that basis, which appears to me to be incontestible, the issues taken both at trial and on appeal were: (1) whether there was a repudiation by each employee of his contract of employment, by reason of the unlawful strike, entitling the company to terminate it and whether the company did so; (2) whether the concerted refusal to work terminated the employer-employee relationship; and (3) whether the unlawful strike constituted a breach of a fundamental term of the contracts of employment of the respective striking employees so as to disentitle them to call upon the company to perform its obligations, in this case the obligation to give severance pay. The trial Judge, Kirke Smith J., found for the plaintiffs on all issues, concluding his reasons as follows [p. 511]:

> It may well be that in the circumstances here the defendant would have been justified in giving each of the plaintiffs notice of discharge, and that such discharge would be regarded as having been made 'for sufficient cause' within Art. VII s. 1(a) of the collective agreement. The defendant not having done so, the plaintiffs' contracts of employment, in my opinion, continued in force — and the so-called decision of the defendant not to 're-open' the plant constituted the effective 'closure' of that plant, as that term is used in Art. XX. This term, like all others in that Article, involves management action.
>
> It follows, therefore, that there having been no notice of discharge given to the plaintiffs, no allegation that there was in each case sufficient cause for discharge, and a closure of the plant by the defendant effected by termination of the plaintiffs' employment, the plaintiffs are entitled to the relief sought in the action, with the following exceptions.

> The plaintiff William H. Lilly, a jobber, and the plaintiffs Sara Bourne, Arlene Comber, Betty Klassen and Worthy Margaret Nicol, regular part-time employees, are not entitled to benefits under the clauses of the collective agreement invoked. No evidence was led by or on behalf of these plaintiffs, and the dismissal of their claims will be without costs.

7 The British Columbia Court of Appeal was unanimous in affirming the trial Judge on issues (1) and (2), but Robertson J.A. took a different view on the question of the alleged fundamental breach and would have allowed the appeal on that ground. The majority of the Court, McFarlane and Seaton JJ.A., were of the opinion that the holding at trial on this issue in plaintiffs' favour was correct.

8 I am of the same opinion as the majority of the British Columbia Court of Appeal, affirming the decision of the trial Judge, that the plaintiffs should succeed, but I come to this conclusion on different grounds. I do not think that in the face of labour relations legislation such as existed at the material time in British Columbia, in the face of the certification of the union, of which the plaintiffs were members, as bargaining agent of a specified unit of employees of the company and in the face of the collective agreement in force between the union and the appellant company, it is possible to speak of individual contracts of employment and to treat the collective agreement as a mere appendage of individual relationships. The majority of this Court, speaking through Judson J. in *Syndicate Catholique des Employées de Magasins de Québec v. Paquet Ltée*, [1959] S.C.R. 206 at 212, 18 D.L.R. (2d) 246, said this in a situation where a union was certified for collective bargaining under Quebec labour relations legislation:

> There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations.

9 The situation is the same in British Columbia where the legislation in force at the material time stated explicitly that a collective agreement entered into between a union and an employer is binding on the union, the employer and the employees covered thereby: see The Mediation Services Act, s. 6.

10 The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties

thereto. To quote again from the reasons of Judson J. in the *Paquet* case, at p. 214:

> If the relation between employee and union were that of mandator and mandatary, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatary but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

11 The collective agreement in the present case makes the foregoing abundantly clear. Wages and hours of work are of course dealt with, and persons who come into the employ do so on the terms of the collective agreement as to wages and hours. They also come under the terms of the collective agreement as to promotion, layoffs, rehiring and preference of transfers to shifts, all of which are regulated in this case by art. XVI of the collective agreement, headed "Seniority". Article V deals with hiring procedure, and gives the union the prior right to supply staff subject to certain exceptions. Discharge is dealt with both in art. IV and in art. VII. Central to all the benefits and obligations that rest upon the union, the employees and the company under the collective agreement are the grievance and arbitration provisions, about which nothing more need be said here. Standing at the forefront of the substantive terms of the collective agreement is art. I under which the union is recognized by the company as "the sole collective bargaining agency for all employees coming under the jurisdiction of this agreement". There is in this collective agreement ample support for the observations of Judson J. in the *Paquet* case.

12 In my view, therefore, questions such as repudiation and fundamental breach must be addressed to the collective agreement if they are to have any subject matter at all. When so addressed, I find them inapplicable in the face of the legislation which, in British Columbia and elsewhere in Canada, governs labour-management relations, provides for certification of unions, for compulsory collective bargaining, for the negotiation, duration and renewal of collective agreements. The Mediation Services Act, which was in force at the material time in this case, provided in s. 8 for a minimum one-year term for collective agreements unless the responsible Minister gave consent to earlier termination, and provided also for the making of collective agreements for longer terms, subject to certain termination options before the full term had run. Neither this Act nor the companion Labour Relations Act, R.S.B.C. 1960, c. 205 [Act repealed by 1973 (2nd Sess.) (B.C.), c. 122, s. 151(*a*)] could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists.

13 In *Polymer Corpn. v. Oil, Chemical and Atomic Workers International Union, Local 16-14*, [1961] O.R. 176, 26 D.L.R. (2d) 609, affirmed [1961] O.R. 438, 28 D.L.R. (2d) 81,

affirmed [1962] S.C.R. 338 (sub nom. *Imbleau v. Laskin*), 33 D.L.R. (2d) 124, McRuer C.J.H.C. observed at p. 182 that a collective agreement "is not that sort of contract that can be terminated by repudiation by one party merely because the other party has broken one of its terms". In *C.P.R. v. Zambri*, [1962] S.C.R. 609, 34 D.L.R. (2d) 654, this Court recognized that the common law relations of employer and employee had been altered by the labour relations legislation of Ontario that was involved in that case, legislation that was comparable to that in British Columbia to which I have referred. Judson J. speaking for four members of this Court said at p. 624 of the *Zambri* case that:

> When a collective agreement has expired, it is difficult to see how there can be anything left to govern the employer-employee relationship. Conversely, when there is a collective agreement in effect, it is difficult to see how there can be anything left outside, except possibly the act of hiring.

14 The references I have made to the collective agreement in this case, which was in force during the events that gave rise to this litigation, lends substance to the words of Judson J. What is, in truth, left for consideration on the appellant's submissions is whether, notwithstanding the existence and binding effect of the collective agreement, the plaintiffs had ceased to be employees by reason only of their unlawful strike and hence had by their own act excluded themselves from the benefits provided by art. XX of the collective agreement.

15 The applicable legislation, The Mediation Services Act, s. 23, prohibits an employee who is bound by a collective agreement from striking during the term of the agreement. It was open to the company in this case to take disciplinary action against the plaintiffs for participating in an unlawful strike, and it is arguable (although this is not before this Court) that discharge would have been held to be for sufficient cause in the light of all the circumstances, if this issue had gone to arbitration. The company did not, however, take any action against the striking employees and, indeed, insisted in its statement of defence that the employees were not discharged but had, in effect, quit their jobs. No doubt they had quit work, but, far from quitting their jobs, the record shows that they had resorted to strike action as a means of emphasizing their concern for retention of jobs in the plant and as a means of persuading the company to reconsider its decision to curtail available jobs, a decision which was part of an overall plan to phase out the Vancouver operation. Even on the basis of common law concepts, the opinion was unanimous below that the unlawful strike did not per se terminate the employer-employee relationship, and I think this is plainly right, and a fortiori in the light of governing labour-management relations legislation. It was open to the company to act in relation to the unlawful strike by positive action against the strikers; and, whether or not it saw in the strike an opportunity to accelerate its longer term plan to close out its Vancouver operations, its failure to act against the employees save by closure of the plant brought it within the severance pay obligations of art. XX of the collective agreement.

16 I would dismiss the appeal with costs.

***De Grandpré* (dissenting) (Ritchie, Spence and Pigeon JJ. concurring):**

17 Reduced to its bare essentials, the question put to this Court is the following: When all the members of a union engage in an illegal strike and refuse to report to work until management has changed a decision it is admittedly entitled to take, is there such a breach of a fundamental term of the various contracts of employment that the employer cannot be called upon to perform its part of the contract, in this case to pay severance pay and one week's pay in lieu of notice?

18 To that question, the trial Judge and the majority in the Court of Appeal have given a negative answer whereas Robertson J.A. concluded in favour of the employer.

19 The facts are simple and have been detailed at length in the judgments below which have been reported respectively at [1973] 4 W.W.R. 505, and [1974] 3 W.W.R. 114. It is therefore sufficient to recall the following:

(1) The events with which we are here concerned took place in March 1971;

(2) The respondents are all members of the Bakery and Confectionery Workers' International Union of America, Local 468, the certified bargaining agent for a group of the appellant's employees;

(3) At the relevant time there existed between appellant and the Bakery Workers' Union a collective agreement, the relevant provisions of which will be quoted later;

(4) For eight of the ten years preceding that period, the business had suffered a loss;

(5) In an effort to reverse that situation, appellant had taken various steps including the decision to supply the Kelowna market in British Columbia with buns produced in its Calgary plant;

(6) On 22nd February 1971, this decision was communicated to the union;

(7) Prior to that date and in the days that followed, numerous communications by telephone and by interviews were exchanged between the union and the appellant; on each and every occasion the latter reaffirmed that its economic situation was such that it was impossible to modify its decision;

(8) On 1st March in the afternoon, the members of the Bakery Workers' Union met during working hours and took the decision to go on strike and to remain away from work as long as the decision would not have been modified by the employer;

(9) In the days that followed, there was no real communication between the parties;

(10) On 4th March, the directors of the company, in the light of the economic situation and of the fact that in a perishable goods business a clientele is lost rapidly, decided it could do nothing else but close its plant;

(11) This decision was communicated to the striking union and to the other employees on 5th March, the letter to the striking union reading as follows:

> Please be advised that by resolution of its Board of Directors, this Company has determined that it will not re-open its plant at 601 West 10th Avenue, Vancouver, B.C., closed on March 1st, 1971.

20 The plant will be dismantled and sold.

(12) The following day, 6th March, each respondent was forwarded a letter couched in the following terms:

> As you are no longer an employee of this Company your Unemployment Insurance Bulk Contribution Certificate is enclosed herewith.

21 To complete the picture, a word should be said about the question raised in the Courts below whether or not the decision of the union summarized in para. 8 above was communicated to the appellant in some fashion prior to the directors' meeting of 4th March? On this point, the trial Judge had this to say (p. 508):

> The company was duly advised of this decision; and on the three following days no employee who was a member of this union showed up for work.

22 With this finding, Robertson J.A. did not agree. At p. 120, the report of the judgment in appeal reads as follows:

> As I have indicated, there is no evidence to show that the decision arrived at at the meeting on 1st March was communicated to the appellant. As far as appears from the evidence, the employees merely stayed away from work.

23 On this aspect of the case, there was certainly no reason for Robertson J.A. to set aside the finding of the trial Judge, this finding obviously being based on the evidence in general and particularly on that part thereof which indicates that the local press, as well as radio stations, were immediately notified of the decision taken by the meeting of 1st March and that in fact this information was published and broadcasted.

24 As a result of the foregoing, the respondents, members of the striking union, took an action against appellant claiming one week's pay in lieu of notice as well as severance pay under arts. VII and XX of the collective agreement, the material extracts reading as follows:

> ARTICLE VII: NOTICE
>
> Section 1(a) The Company will give regular employees one (1) week's notice or one (1) week's pay in lieu thereof before discharging except that no notice or pay will be given if the discharge is for sufficient cause.
>
> Section 1(b) Employees will give the Company one (1) week's notice when desiring to terminate their employment, except where otherwise mutually agreed.
>
> ARTICLE XX: SEVERANCE PAY
>
> In the event of amalgamation, closure of the plant or a department thereof, or reduction in work force due to automation or technological advances causing a regular full-time employee to lose his or her employment, the Company hereby agrees to pay such an employee severance pay at his or her regular rate of pay according to the following schedule:

Full Time	Severance Pay
Consecutive service	
up to 2 years	one week
over 2 years	one week's pay for every year of full time service to a maximum of twenty (20) weeks.

> The foregoing shall be in addition to the regular week's notice or week's pay in lieu thereof to which such employees may be entitled. This clause does not apply to a temporary lay-off.

25 On the sole question with which I am dealing, and which is stated in the opening paragraph of these reasons, I can only repeat what was said by McFarlane J.A. (p. 116):

> I note that counsel made no distinction in this regard between severance pay and pay in lieu of notice.

26 Are respondents entitled to claim the benefit of these provisions? In my view, the answer

should be in the negative with the result that the action is ill-founded and should have been dismissed.

27 The contract of employment of each of the respondents with the appellant contains clauses derived from two sources: (a) the collective agreement; (b) the general law in all matters not covered by the agreement.

28 Such was the unanimous view of the Judges below and this view is totally in accord with the judgments of this Court in *Syndicate Catholique des Employées de Magasins de Québec v. Paquet Ltée*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346, and in *C.P.R. v. Zambri*, [1962] S.C.R. 609, 34 D.L.R. (2d) 654, when these decisions are read in their entirety.

29 The obligation of the employee to serve his employer is not spelled out in the collective agreement and may be considered as flowing from the general law. In my view, it is also imposed by the collective agreement, the basis of which is that the union will take active steps to ensure that the members of the unit will respect the law, including the obligation not to withdraw their services to the employer through an illegal strike. To me, this is the principle behind *Polymer Corpn. v. Oil, Chemical and Atomic Workers International Union Local 16-14*, [1961] O.R. 176, 26 D.L.R. (2d) 609, as affirmed at [1961] O.R. 438, 28 D.L.R. (2d) 81, and eventually by this Court in [1962] S.C.R. 338 (sub nom. *Imbleau v. Laskin*), 33 D.L.R. (2d) 124. The no strike clause in that case does not create a difference in law with our own situation.

30 It follows, in my opinion, that when the employees in concert refuse illegally, as was the case here, to offer their services, they are in breach of the most fundamental obligation of their contracts. When, as was also the case here, this breach acquires a definitive character by effectively destroying the goodwill of the operation, the employer is justified in considering the employees as having definitely broken their contracts of employment. From that moment on, the employer is no longer bound by any of the terms of those contracts, including in the present case the benefits stipulated in the collective agreement. This was the attitude of the employer as is apparent from the facts recalled above in paras. 10, 11 and 12 of my summary. This attitude was perfectly justified in law.

31 This entire subject matter has been carefully reviewed by Robertson J.A. in his dissenting opinion which, on this point, starts in the middle of p. 132 of the report. I cannot do any better than to adopt his reasons as my own. To these, I would like to add, however, one reference: *Australian Hardwoods Property v. Ry. Commr.*, [1961] 1 W.L.R. 425, [1961] 1 All E.R. 737, a decision of the Privy Council where Lord Radcliffe, at p. 742, writes:

> A plaintiff who asks the court to enforce by mandatory order in his favour some stipulation of an agreement which itself consists of interdependent undertakings between the plaintiff and the defendant cannot succeed in obtaining such relief if he is at the time in breach of his own obligations.

32 I would allow the appeal and dismiss the action with costs throughout.

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2010 SCC 43
Supreme Court of Canada

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council

2010 CarswellBC 2867, 2010 CarswellBC 2868, 2010 SCC 43, [2010] 11 W.W.R. 577, [2010] 2 S.C.R. 650, [2010] 4 C.N.L.R. 250, [2010] B.C.W.L.D. 8040, [2010] B.C.W.L.D. 8184, [2010] B.C.W.L.D. 8185, [2010] A.C.S. No. 43, [2010] S.C.J. No. 43, 11 Admin. L.R. (5th) 246, 194 A.C.W.S. (3d) 691, 225 C.R.R. (2d) 75, 293 B.C.A.C. 175, 325 D.L.R. (4th) 1, 406 N.R. 333, 496 W.A.C. 175, 54 C.E.L.R. (3d) 1, 96 R.P.R. (4th) 1, 9 B.C.L.R. (5th) 205, J.E. 2010-1926

Rio Tinto Alcan Inc. and British Columbia Hydro and Power Authority (Appellants) and Carrier Sekani Tribal Council (Respondent) and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, British Columbia Utilities Commission, Mikisew Cree First Nation, Moosomin First Nation, Nunavut Tunngavik Incorporated, Nlaka'pamux Nation Tribal Council, Okanagan Nation Alliance, Upper Nicola Indian Band, Lakes Division of the Secwepemc Nation, Assembly of First Nations, Standing Buffalo Dakota First Nation, First Nations Summit, Duncan's First Nation, Horse Lake First Nation, Independent Power Producers Association of British Columbia, Enbridge Pipelines Inc. and TransCanada Keystone Pipeline GP Ltd. (Interveners)

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

Heard: May 21, 2010
Judgment: October 28, 2010
Docket: 33132

APPEAL by R Inc. and Crown corporation from judgment reported at *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* (2009), [2009] 2 C.N.L.R. 58, 266 B.C.A.C. 228, 449 W.A.C. 228, 76 R.P.R. (4th) 159, 89 B.C.L.R. (4th) 298, [2009] 4 W.W.R. 381, 2009 CarswellBC 340, 2009 BCCA 67 (B.C. C.A.), allowing appeals by tribal council of First Nations from decisions of provincial Utilities Commission.

McLachlin C.J.C.:

1 In the 1950s, the government of British Columbia authorized the building of the Kenney Dam in Northwest British Columbia for the production of hydro power for the smelting of aluminum. The dam and reservoir altered the water flows to the Nechako River, which the Carrier Sekani Tribal Council ("CSTC") First Nations have since time immemorial used for fishing and sustenance. This was done without consulting with the CSTC First Nations. Now, the government of British Columbia seeks approval of a contract for the sale of excess power from the dam to British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation. The question is whether the British Columbia Utilities Commission ("the Commission") is required to consider the issue of consultation with the CSTC First Nations in determining whether the sale is in the public interest.

2 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), this Court affirmed that governments have a duty to consult with Aboriginal groups when making decisions which may adversely impact lands and resources to which Aboriginal peoples lay claim. In the intervening years, government-Aboriginal consultation has become an important part of the resource development process in British Columbia especially; much of the land and resources there are subject to land claims negotiations. This case raises the issues of what triggers a duty to consult, and the place of government tribunals in consultation and the review of consultation. I would allow the appeal, while affirming the duty of BC Hydro to consult the CSTC First Nations on future developments that may adversely affect their claims and rights.

I. Background

A. The Facts

3 In the 1950s, Alcan (now Rio Tinto Alcan) dammed the Nechako River in northwestern British Columbia for the purposes of power development in connection with aluminum production. The project was one of huge magnitude. It diverted water from the Nechako River into the Nechako Reservoir, where a powerhouse was installed for the production of electricity. After passing through the turbines of the powerhouse, the water flowed to the Kemano River and on to the Pacific Ocean to the west. The dam affected the amount and timing of water flows into the Nechako River to the east, impacting fisheries on lands now claimed by the CSTC First Nations. Alcan effected these water diversions under Final Water Licence No. 102324 which gives Alcan use of the water on a permanent basis.

4 Alcan, the Province of British Columbia, and Canada entered into a Settlement Agreement in 1987 on the release of waters in order to protect fish stocks. Canada was involved because fisheries, whether seacoast-based or inland, fall within federal jurisdiction under s. 91(12) of the

Constitution Act, 1867. The 1987 agreement directs the release of additional flows in July and August to protect migrating salmon. In addition, a protocol has been entered into between the Haisla Nation and Alcan which regulates water flows to protect eulachon spawning grounds.

5 The electricity generated by the project has been used over the years primarily for aluminum smelting. Since 1961, however, Alcan has sold its excess power to BC Hydro, a Crown Corporation, for use in the local area and later for transmission to neighbouring communities. The Energy Purchase Agreement ("EPA") entered into in 2007, which is the subject of this appeal is the latest in a series of power sales from Alcan to BC Hydro. It commits Alcan to supplying and BC Hydro to purchasing excess electricity from the Kemano site until 2034. The 2007 EPA establishes a Joint Operating Committee to advise the parties on the administration of the EPA and the operation of the reservoir.

6 The CSTC First Nations claim the Nechako Valley as their ancestral homeland, and the right to fish in the Nechako River. As was the practice at the time, they were not consulted about the diversion of the river effected by the 1950s dam project. They assert, however, that the 2007 EPA for the power generated by the project should be subject to consultation. This, they say, is their constitutional right under s. 35 of the *Constitution Act, 1982*, as defined in *Haida Nation*.

B. The Commission Proceedings

7 The 2007 EPA was subject to review before the Commission. It was charged with determining whether the sale of electricity was in the public interest under s. 71 of the *Utilities Commission Act*, R.S.B.C. 1996, c. 473. The Commission had the power to declare a contract for the sale of electricity unenforceable if it found that it was not in the public interest having regard to the quantity of energy to be supplied, the availability of supplies, the price and availability of any other form of energy, the price of the energy supplied to a public utility company, and "any other factor that the commission considers relevant to the public interest".

8 The Commission began its work by holding two procedural conferences to determine, among other things, the "scope" of its hearing. "Scoping" is the process by which the Commission determines what "information it considers necessary to determine whether the contract is in the public interest" pursuant to s. 71(1)(b) of the *Utilities Commission Act*. The question of the role of First Nations in the proceedings arose at this stage. The CSTC was not party to the proceedings but the Haisla Nation was. The Haisla people submitted that the Province and BC Hydro "had failed to act on their legal obligation" to them, but "refrained from asking the Commission to assess the adequacy [of consultation] and accommodation afforded ... on the 2007 EPA": *Re: British Columbia Hydro & Power Authority Filing of Electricity Purchase Agreement with Alcan Inc. as an Energy Supply Contract Pursuant to Section 71*, British Columbia Utilities Commission, Oct. 10, 2007 (the "Scoping Order"). The Commission's Scoping Order therefore addressed the consultation issue as follows:

> Evidence relevant to First Nations consultation may be relevant for the same purpose that the Commission often considers evidence of consultation with other stakeholders. Generally, insufficient evidence of consultation, including with First Nations is not determinative of matters before the Commission.

9 On October 29, 2007, the CSTC requested late intervener status on the issue of consultation on the basis that the Commission's decision might negatively impact Aboriginal rights and title which were the subject of its ongoing land claims. At the opening of the oral hearing on November 19, 2007, the CSTC applied for reconsideration of the Scoping Order and, in written submissions of November 20, 2007, it asked the Commission to include in the hearing's scope the issues of whether the duty to consult had been met, whether the proposed power sale under the 2007 EPA could constitute an infringement of Aboriginal rights and title in and of itself, and the related issue of the environmental impact of the 2007 EPA on the rights of the CSTC First Nations.

10 The Commission established a two-stage process to consider the CSTC's application for reconsideration of the Scoping Order: an initial screening phase to determine whether there was a reasonable evidentiary basis for reconsideration, and a second phase to receive arguments on whether the rescoping application should be granted. At the first stage, the CSTC filed evidence, called witnesses and cross-examined the witnesses of BC Hydro and Alcan. The Commission confined the proceedings to the question of whether the 2007 EPA would adversely affect potential CSTC First Nations' interests by causing changes in water flows into the Nechako River or changes in water levels of the Nechako Reservoir.

11 On November 29, 2007, the Commission issued a preliminary decision on the Phase I process called "Impacts on Water Flows". It concluded that the "responsibility for operation of the Nechako Reservoir remains with Alcan under the 2007 EPA", and that the EPA would not affect water levels in the Nechako River stating, "the 2007 EPA sets the priority of generation produced but does not set the priority for water". With or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation".

12 As to fisheries, the Commission stated that "the priority of releases from the Nechako Reservoir [under the 1987 Settlement Agreement] is first to fish flows and second to power service". While the timing of water releases from the Nechako Reservoir for power generation purposes may change as a result of the 2007 EPA, that change "will have no impact on the releases into the Nechako river system". This is because water releases for power generation flow not into the Nechako River system to the east, with which the CSTC First Nations are concerned, but into the Kemano River to the west. Nor, the Commission found, would the 2007 EPA bring about a change in control over water flows and water levels, or alter the management structure of the reservoir.

13 The Commission then embarked on Phase II of the rescoping hearing and invited the parties to make written submissions on the reconsideration application — specifically, on whether it would be a jurisdictional error not to revise the Scoping Order to encompass consultation issues on these facts. The parties did so.

14 On December 17, 2007, the Commission dismissed the CSTC's application for reconsideration of the scoping order on grounds that the 2007 EPA would not introduce new adverse effects to the interests of the First Nations: *British Columbia Hydro & Power Authority, Re*, 2008 CarswellBC 1232 (B.C. Utilities Comm.) (the "Reconsideration Decision"). For the purposes of the motion, the Commission assumed the historic infringement of Aboriginal rights, Aboriginal title, and a failure by the government to consult. Referring to *Haida Nation*, it concluded that "more than just an underlying infringement" was required. The CSTC had to demonstrate that the 2007 EPA would "adversely affect" the Aboriginal interests of its member First Nations. Applying this test to its findings of fact, it stated that "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 [without consultation] would not be a jurisdictional error". The Commission therefore concluded that its decision on the 2007 EPA would have no adverse effects on the CSTC First Nations' interests. The duty to consult was therefore not triggered, and no jurisdictional error was committed in failing to include consultation with the First Nations in the Scoping Order beyond the general consultation extended to all stakeholders.

15 The Commission went on to conclude that the 2007 EPA was in the public interest and should be accepted. It stated:

> In the circumstances of this review, evidence regarding consultation with respect to the historical, continuing infringement can reasonably be expected to be of no assistance for the same reasons there is no jurisdictional error, that is, the limited scope of the section 71 review, and there are no new physical impacts.

16 In essence, the Commission took the view that the 2007 EPA would have no physical impact on the existing water levels in the Nechako River and hence it would not change the current management of its fishery. The Commission further found that its decision would not involve any transfer or change in the project's licences or operations. Consequently, the Commission concluded that its decision would have no adverse impact on the pending claims or rights of the CSTC First Nations such that there was no need to rescope the hearing to permit further argument on the duty to consult.

C. The Judgment of the Court of Appeal, 2009 BCCA 67, 89 B. C.L.R. (4th) 298 (B.C. C.A.) (Donald, Huddart and Bauman JJ.A.)

17 The CSTC appealed the Reconsideration Decision and the approval of the 2007 EPA to the British Columbia Court of Appeal. The Court, *per* Donald J.A., reversed the Commission's orders and remitted the case back to the Commission for "evidence and argument on whether a duty to consult and, if necessary, accommodate the [CSTC First Nations] exists and, if so, whether the duty has been met in respect of the filing of the 2007 EPA" (para. 69).

18 The Court of Appeal found that the Commission had jurisdiction to consider the issue of consultation. The Commission had the power to decide questions of law, and hence constitutional issues relating to the duty to consult.

19 The Court of Appeal went on to hold that the Commission acted prematurely by rejecting the application for reconsideration. Donald J.A., writing for the Court, stated:

> ... 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 [CSTC] would win the point as a precondition for a hearing into the very same point.
>
> 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. [paras. 61-62]

20 The Court of Appeal held that the honour of the Crown obliged the Commission to decide the consultation issue, and that "the tribunal with the power to approve the plan must accept the responsibility to assess the adequacy of consultation" (para. 53). Unlike the Commission, the Court of Appeal did not consider whether the 2007 EPA was capable of having an adverse impact on a pending claim or right of the CSTC First Nations. The Court of Appeal did not criticize the Commission's adverse impacts finding. Rather, it appears to have concluded that despite these findings, the Commission was obliged to consider whether consultation could be "useful". In finding that the Commission should have considered the consultation issue, the Court of Appeal appears to have taken a broader view than did the Commission as to when a duty to consult may arise.

21 The Court of Appeal suggested that a failure to consider consultation risked the approval of a contract in breach of the Crown's constitutional duty. Donald J.A. asked, "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" (para. 42).

22 Alcan and BC Hydro appeal to this Court. They argue that the Court of Appeal took too wide a view of the Crown's duty to consult and of the role of tribunals in deciding consultation

issues. In view of the Commission's task under its constituent statute and the evidence before it, Alcan and BC Hydro submit that the Commission correctly concluded that it had no duty to consider the consultation issue raised by the CSTC, since, however much participation was accorded, there was no possibility of finding a duty to consult with respect to the 2007 EPA.

23 The CSTC argues that the Court of Appeal correctly held that the Commission erred in refusing to rescope its proceeding to allow submissions on the consultation issue. It does not pursue earlier procedural arguments in this Court.

II. The Legislative Framework

A. Legislation Regarding the Public Interest Determination

24 The 2007 EPA was subject to review before the Commission under the authority of s. 71 of the *Utilities Commission Act* to determine whether it was in the public interest. Prior to May 2008, this determination was to be based on the quantity of energy to be supplied; the availability of supplies; the price and availability of any other form of energy; the price of the energy supplied to a public utility company; and "any other factor that the commission considers relevant to the public interest": *Utilities Commission Act*, s. 71(2)(a-e). Effective May 2008, these considerations were expanded to include "the government's energy objectives" and its long-term resource plans: s. 71(2.1)(a-b). The public interest clause, however, was narrowed to considerations of the interests of potential British Columbia public utility customers: s. 71(2.1)(d).

B. Legislation on the Commission's Remedial Powers

25 Based on the above considerations, the Commission may issue an order approving the proposed contract under s. 71(2.4) of the *Utilities Commission Act* if it is found to be in the public interest. If it is not found to be in the public interest, the Commission can issue an order declaring the contract unenforceable, either wholly or in part, or "make any other order it considers advisable in the circumstances": s. 71(2), (3).

C. Legislation on the Commission's Jurisdiction and Appeals

26 Section 79, of the *Utilities Commission Act* states that all findings of fact made by the Commission within its jurisdiction are "binding and conclusive". This is supplemented by s. 105 which grants the Commission "exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on it by this or any other Act". An appeal, however, lies from a decision or order of the Commission to the Court of Appeal with leave: s. 101(1).

27 Together, ss. 79 and 105 of the *Utilities Commission Act* constitute a "privative clause" as defined in s. 1 of the British Columbia *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Under s. 58 of the *Administrative Tribunals Act*, this privative clause attracts a "patently unreasonable" standard of judicial review to "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"; a standard of correctness is to be applied in the review of "all other matters".

28 The jurisdiction of the commission is also arguably affected by s. 44(1) of the *Administrative Tribunals Act* which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*. Section 44(1) of the *Administrative Tribunals Act* states that "[t]he tribunal does not have jurisdiction over constitutional questions". A "constitutional question" is defined in s. 1 of the *Administrative Tribunals Act* by s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Section 8(2) says:

> (2) If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) an application is made for a constitutional remedy,
>
> the law must not be held to be invalid or inapplicable and the remedy must not be granted until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.

A "constitutional remedy" is defined as "a remedy under section 24(1) of the *Canadian Charter of Rights and Freedoms* other than a remedy consisting of the exclusion of evidence or consequential on such exclusion": *Constitutional Question Act*, s. 8(1).

D. Section 35 of the Constitution Act, 1982

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.

III. The Issues

30 The main issues that must be resolved are: (1) whether the Commission had jurisdiction to consider consultation; and (2) if so, whether the Commission's refusal to rescope the inquiry to consider consultation should be set aside. In order to resolve these issues, it is necessary to consider when a duty to consult arises and the role of tribunals in relation to the duty to consult. These reasons will therefore consider:

1. When a duty to consult arises;
2. The role of tribunals in consultation;
3. The Commission's jurisdiction to consider consultation;
4. The Commission's Reconsideration Decision;
5. The Commission's conclusion that approval of the 2007 EPA was in the public interest.

IV. Analysis

A. When Does the Duty to Consult Arise?

31 The Court in *Haida Nation* answered this question as follows: the duty to consult 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" (para. 35). This test can be broken down into three elements: (1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right. I will discuss each of these elements in greater detail. First, some general comments on the source and nature of the duty to consult are in order.

32 The duty to consult is grounded in the honour of the Crown. It is a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process. While the treaty claims process is ongoing, there is an implied duty to consult with the Aboriginal claimants on matters that may adversely affect their treaty and Aboriginal rights, and to accommodate those interests in the spirit of reconciliation: *Haida Nation*, at para. 20. As stated in *Haida Nation*, at para. 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.

33 The duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity. These remedies have proven time-consuming, expensive, and are often ineffective. Moreover, with a few exceptions, many Aboriginal groups have limited success in obtaining injunctions to halt development or activities on the land in order to protect contested Aboriginal or treaty rights.

34 Grounded in the honour of the Crown, the duty has both a legal and a constitutional character: *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.), at para. 6. The duty seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal peoples and the Crown. Rather than pitting Aboriginal peoples against the Crown in the litigation process, the duty recognizes that both must work together to reconcile their interests. It also accommodates the reality that often Aboriginal peoples are involved in exploiting the resource. Shutting down development by court injunction may serve the interest of no one. The honour of the Crown is therefore best reflected by a requirement for consultation with a view to reconciliation.

35 *Haida Nation* sets the framework for dialogue prior to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them: J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-35. The duty *is prospective*, fastening on rights yet to be proven.

36 The nature of the duty varies with the situation. The richness of the required consultation increases with the strength of the *prima facie* Aboriginal claim and the seriousness of the impact on the underlying Aboriginal or treaty right: *Haida Nation*, at paras. 43-45 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.), at para. 32.

37 The remedy for a breach of the duty to consult also varies with the situation. The Crown's failure to consult can lead to a number of remedies ranging from injunctive relief against the

threatening activity altogether, to damages, to an order to carry out the consultation prior to proceeding further with the proposed government conduct: *Haida Nation*, at paras. 13-14.

38 The duty to consult embodies what Brian Slattery has described as a "generative" constitutional order which sees "section 35 as serving a dynamic and not simply static function" ("Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at p. 440). This dynamicism was articulated in *Haida Nation* as follows, at para. 32:

> ... 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*.

As the post-*Haida Nation* case law confirms, consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21.

39 Against this background, I now turn to the three elements that give rise to a duty to consult.

(1) Knowledge by the Crown of a Potential Claim or Right

40 To trigger the duty to consult, the Crown must have real or constructive knowledge of a claim to the resource or land to which it attaches: *Haida Nation*, at para. 35. The threshold, informed by the need to maintain the honour of the Crown, is not high. Actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), para. 34. Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated. While the existence of a potential claim is essential, proof that the claim will succeed is not. What is required is a credible claim. Tenuous claims, for which a strong *prima facie* case is absent, may attract a mere duty of notice. As stated in *Haida Nation*, at para. 37:

> 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.

41 The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed: Newman, at p. 30, citing *Haida Nation*, at paras. 27, 33.

(2) Crown Conduct or Decision

42 Second, for a duty to consult to arise, there must be Crown conduct or a Crown decision that engages a potential Aboriginal right. What is required is conduct that may adversely impact on the claim or right in question.

43 This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 C.N.L.R. 74 (B.C. S.C.), at paras. 94, 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 C.N.L.R. 315 (B.C. S.C.), at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.

44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41, emphasis omitted). Examples include the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110 (B.C. S.C.)); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1 (F.C.), aff'd, 2008 FCA 20, 35 C.E.L.R. (3d) 1 (F.C.A.)); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C. Utilities Comm.)). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*, 2007 ABCA 206, 77 Alta. L.R. (4th) 203 (Alta. C.A.), at paras. 37-40.

(3) Adverse Effect of the Proposed Crown Conduct on an Aboriginal Claim or Right

45 The third element of a duty to consult is the possibility that the Crown conduct may affect the Aboriginal claim or right. The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending

Aboriginal claims or rights. Past wrongs, including previous breaches of the duty to consult, do not suffice.

46 Again, a generous, purposive approach to this element is in order, given that the doctrine' s purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27, 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653 (B.C. C.A.), at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

47 Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

48 An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is designed to prevent damage to Aboriginal claims and rights while claim negotiations are underway: *Haida Nation*, at para. 33. The duty arises when the Crown has *knowledge*, real or constructive, of the potential or actual existence of the Aboriginal right or title "and contemplates conduct that might adversely affect it": *Haida Nation*, at para. 35 (emphasis added). This test was confirmed by the Court in *Mikisew Cree* in the context of treaty rights, at paras. 33-34.

49 The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages. To trigger a fresh duty of consultation — the matter which is here at issue — a contemplated Crown action must put current claims and

rights in jeopardy.

50 Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals. Thus conceived, the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.

(4) An Alternative Theory of Consultation

51 As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.

52 The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.

53 I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.

54 The argument for a broader duty to consult invokes the logic of the fruit of the poisoned tree — an evidentiary doctrine that holds that past wrongs preclude the Crown from subsequently benefiting from them. Thus, it is suggested that the failure to consult with the CSTC First Nations on the initial dam and water diversion project prevents any further

development of that resource without consulting on the entirety of the resource and its management. Yet, as *Haida Nation* pointed out, the failure to consult gives rise to a variety of remedies, including damages. An order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights. Absent this, other remedies may be more appropriate.

B. The Role of Tribunals in Consultation

55 The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.). It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.

56 The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.

57 Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.

58 Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: *Conway*. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

59 The decisions below and the arguments before us at times appear to merge the different duties of consultation and its review. In particular, it is suggested that every tribunal with jurisdiction to consider questions of law has a constitutional duty to consider whether adequate consultation has taken place and, if not, to itself fulfill the requirement regardless of whether its constituent statute so provides. The reasoning seems to be that this power flows automatically from the power of the tribunal to consider legal and hence constitutional questions. Lack of consultation amounts to a constitutional vice that vitiates the tribunal's jurisdiction and, in the case before us, makes it inconsistent with the public interest. In order to perform its duty, it must rectify the vice by itself engaging in the missing consultation.

60 This argument cannot be accepted, in my view. A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent: *Conway*, at para. 82.

61 A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.

62 The fact that administrative tribunals are confined to the powers conferred on them by the legislature, and must confine their analysis and orders to the ambit of the questions before them on a particular application, admittedly raises the concern that governments may effectively avoid their duty to consult by limiting a tribunal's statutory mandate. The fear is that if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult.

63 As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

64 Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

> 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... 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...

65 It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.). It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.

C. The Commission's Jurisdiction to Consider Consultation

66 Having considered the law governing when a duty to consult arises and the role of tribunals in relation to the duty to consult, I return to the questions at issue on appeal.

67 The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.

68 As discussed above, issues of consultation between the Crown and Aboriginal groups arise from s. 35 of the *Constitution Act, 1982*. They therefore have a constitutional dimension. The question is whether the Commission possessed the power to consider such an issue. As discussed, above, tribunals are confined to the powers conferred on them by the legislature: *Conway*. We must therefore ask whether the *Utilities Commission Act* conferred on the Commission the power to consider the issue of consultation, grounded as it is in the constitution.

69 It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest. The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585 (S.C.C.), at para. 39).

"[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.

70 Beyond its general power to consider questions of law, the factors the Commission is required to consider under s. 71 of the *Utilities Commission Act*, while focused mainly on economic issues, are broad enough to include the issue of Crown consultation with Aboriginal groups. At the time, s. 71(2)(e) required the Commission to consider "any other factor that the Commission considers relevant to the public interest". The constitutional dimension of the duty to consult gives rise to a special public interest, surpassing the dominantly economic focus of the consultation under the *Utilities Commission Act*. As Donald J.A. asked, "How can a contract formed by a Crown agent in breach of a constitutional duty be in the public interest?"

71 This conclusion is not altered by the *Administrative Tribunals Act*, which provides that a tribunal does not have jurisdiction over constitutional matters. Section 2(4) of the *Utilities Commission Act makes* certain sections of the *Administrative Tribunals Act* applicable to the Commission. This includes s. 44(1) which provides that "[t]he tribunal does not have jurisdiction over constitutional questions". However, "constitutional question" is defined narrowly in s. 1 of the *Administrative Tribunals Act* as "any question that requires notice to be given under section 8 of the *Constitutional Question Act*". Notice is required only for challenges to the constitutional validity or constitutional applicability of any law, or are application for a constitutional remedy.

72 The application to the Commission by the CSTC for a rescoping order to address consultation issues does not fall within this definition. It is not a challenge to the constitutional validity or applicability of a law, nor a claim for a constitutional remedy under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982*. In broad terms, consultation under s. 35 of the *Constitution Act, 1982* is a constitutional question: *Paul*, para. 38. However, the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests. It follows that, in applying the test articulated in *Paul* and *Conway*, the Commission has the constitutional jurisdiction to consider the adequacy of Crown consultation in relation to matters properly before it.

73 For these reasons, I conclude that the Commission had the power to consider whether adequate consultation with concerned Aboriginal peoples had taken place.

74 While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult

to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

75 As the Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. If the tribunal structure set up by the Legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts: *Haida Nation*, at para. 51.

D. The Commission's Reconsideration Decision

76 The Commission correctly accepted that it had the power to consider the adequacy of consultation with Aboriginal groups. The reason it decided it would not consider this issue was not for want of power, but because it concluded that the consultation issue could not arise, given its finding that the 2007 EPA would not adversely affect any Aboriginal interest.

77 As reviewed earlier in these reasons, the Commission held a hearing into the issue of whether the main hearing should be rescoped to permit exploration of the consultation issue. The evidence at this hearing was directed to the issue of whether approval of the 2007 EPA would have any adverse impact on the interests of the CSTC First Nations. The Commission considered both the impact of the 2007 EPA on river levels (physical impact) and on the management and control of the resource. The Commission concluded that the 2007 EPA would not have any adverse physical impact on the Nechako River and its fishery. It also concluded that the 2007 EPA did not "transfer or change control of licenses or authorizations", negating adverse impacts from management or control changes. The Commission held that an underlying infringement (i.e. failure to consult on the initial project) was not sufficient to trigger a duty to consult. It therefore dismissed the application for reconsideration and declined to rescope the hearing to include consultation issues.

78 The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission's findings of fact are "binding and conclusive", attracting a patently unreasonable standard under the *Administrative*

Tribunals Act. Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of "reasonableness" as set out in *Haida Nation* and *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.).

79 A duty to consult arises, as set out above, when there is: (a) knowledge, actual or constructive, by the Crown of a potential Aboriginal claim or right, (b) contemplated Crown conduct, and (c) the potential that the contemplated conduct may adversely affect the Aboriginal claim or right. If, in applying the test set out in *Haida Nation*, it is arguable that a duty to consult could arise, the Commission would have been wrong to dismiss the rescoping order.

80 The first element of the duty to consult — Crown knowledge of a potential Aboriginal claim or right — need not detain us. The CSTC First Nations' claims were well-known to the Crown; indeed, it was lodged in the Province's formal claims resolution process.

81 Nor need the second element — proposed Crown conduct or decision — detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.

82 The third element — adverse impact on an Aboriginal claim or right caused by the Crown conduct — presents greater difficulty. The Commission, referring to *Haida Nation*, took the view that to meet the adverse impact requirement, "more than just an underlying infringement" was required. In other words, it must be shown that the 2007 EPA could "adversely affect" a current Aboriginal interest. The Court of Appeal rejected, or must be taken to have rejected, the Commission's view of the matter.

83 In my view, the Commission was correct in concluding that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. As discussed above, the constitutional foundation of consultation articulated in *Haida Nation* is the potential for adverse impacts on Aboriginal interests of state-authorized developments. Consultation centres on how the resource is to be developed in a way that prevents irreversible harm to existing Aboriginal interests. Both parties must meet in good faith, in a balanced manner that reflects the honour of the Crown, to discuss development with a view to accommodation of the conflicting interests. Such a conversation is impossible where the resource has long since been altered and the present government conduct or decision does not have any further impact on the resource. The issue then is not consultation about the further development of the resource, but negotiation about compensation for its alteration without having properly consulted in the past. The Commission applied the correct legal test.

84 It was argued that the Crown breached the rights of the CSTC when it allowed the

Kenney Dam and electricity production powerhouse with their attendant impacts on the Nechako River to be built in the 1950s and that this breach is ongoing and shows no sign of ceasing in the foreseeable future. But the issue before the Commission was whether a fresh duty to consult could arise *with respect to the Crown decision before the Commission*. The question was whether the *2007 EPA* could *adversely* impact the claim or rights advanced by the CSTC First Nations in the ongoing claims process. The issue of ongoing and continuing breach was not before the Commission, given its limited mandate, and is therefore not before this Court.

85 What then is the potential impact of the 2007 EPA on the claims of the CSTC First Nations? The Commission held there could be none. The question is whether this conclusion was reasonable based on the evidence before the Commission on the rescoping inquiry.

86 The Commission considered two types of potential impacts. The first type of impact was the physical impact of the 2007 EPA on the Nechako River and thus on the fishery. The Commission conducted a detailed review of the evidence on the impact the 2007 EPA could have on the river's water levels and concluded it would have none. This was because the levels of water on the river were entirely governed by the water licence and the 1987 agreement between the Province, Canada, and Alcan. The Commission rejected the argument that not approving the 2007 EPA could potentially raise water levels in the Nechako River, to the benefit of the fishery, on the basis of uncontradicted evidence that if Alcan could not sell its excess electricity to BC Hydro it would sell it elsewhere. The Commission concluded that with or without the 2007 EPA, "Alcan operates the Nechako Reservoir to optimize power generation". Finally, the Commission concluded that changes in the timing of water releases for power generation have no effect on water levels in the Nechako River because water releases for power generation flow into the Kemano River to the west, rather than the Nechako River to the east.

87 The Commission also considered whether the 2007 EPA might bring about organizational, policy, or managerial changes that might adversely affect the claims or rights of the CSTC First Nations. As discussed above, a duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants. It noted that a "section 71 review does not approve, transfer or change control of licenses or authorization". Approval of the 2007 EPA would not effect management changes, ruling out any attendant adverse impact. This, plus the absence of physical impact, led the Commission to conclude that the 2007 EPA had no potential to adversely impact on Aboriginal interests.

88 It is necessary, however, to delve further. The 2007 EPA calls for the creation of a Joint Operating Committee, with representatives of Alcan and BC Hydro (s. 4.13). The duties of the committee are to provide advice to the parties regarding the administration of the 2007 EPA and to perform other functions that may be specified or that the parties may direct (s. 4.14). The 2007 EPA also provides that the parties will jointly develop, maintain, and update a reservoir operating model based on Alcan's existing operating model and "using input data acceptable to

both Parties, acting reasonably" (s. 4.17).

89 The question is whether these clauses amount to an authorization of organizational changes that have the potential to adversely impact on Aboriginal interests. Clearly the Commission did not think so. But our task is to examine that conclusion and ask whether this view of the Commission was reasonable, bearing in mind the generous approach that should be taken to the duty to consult, grounded in the honour of the Crown.

90 Assuming that the creation of the Joint Operating Committee and the ongoing reservoir operation plan can be viewed as organizational changes effected by the 2007 EPA, the question is whether they have the potential to adversely impact the claims or rights of the CSTC First Nations. In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.

91 By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.

92 This ongoing right to consultation on future changes capable of adversely impacting Aboriginal rights does not undermine the validity of the Commission's decision on the narrow issue before it: whether approval of the 2007 EPA could have an adverse impact on claims or rights of the CSTC First Nations. The Commission correctly answered that question in the negative. The uncontradicted evidence established that Alcan would continue to produce electricity at the same rates *regardless of whether the 2007 EPA is approved or not*, and that Alcan will sell its power elsewhere if BC Hydro does not buy it, as is their entitlement under Final Water Licence No. 102324 and the 1987 Agreement on waterflows. Moreover, although the Commission did not advert to it, BC Hydro, as a participant on the Joint Operating Committee and the resevoir management team, must in the future consult with the CSTC First

Nations on any decisions that may adversely impact their claims or rights. On this evidence, it was not unreasonable for the Commission to conclude that the 2007 EPA will not adversely affect the claims and rights currently under negotiation of the CSTC First Nations.

93 I conclude that the Commission took a correct view of the law on the duty to consult and hence on the question before it on the application for reconsideration. It correctly identified the main issue before it as whether the 2007 EPA had the potential to adversely affect the claims and rights of the CSTC First Nations. It then examined the evidence on this question. It looked at the organizational implications of the 2007 EPA and at the physical changes it might bring about. It concluded that these did not have the potential to adversely impact the claims or rights of the CSTC First Nations. It has not been established that the Commission acted unreasonably in arriving at these conclusions.

E. The Commission's Decision that Approval of the 2007 EPA was in the Public Interest

94 The attack on the Commission's decision to approve the 2007 EPA was confined to the Commission's failure to consider the issue of adequate consultation over the affected interests of the CSTC First Nations. The conclusion that the Commission did not err in rejecting the application to consider this matter removes this objection. It follows that the argument that the Commission acted unreasonably in approving the 2007 EPA fails.

V. Disposition

95 I would allow the appeal and confirm the decision of the British Columbia Utilities Commission approving the 2007 EPA. Each party will bear their costs.

Appeal allowed.

